IN THE COURT OF APPEALS OF MARYLAND

No. 79

September Term, 2015

MICHELLE L. CONOVER

Petitioner,

v.

BRITTANY D. CONOVER

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS

Brief of *Amici Curiae* American Civil Liberties Union of Maryland Foundation, and American Civil Liberties Union

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IDENTITY AND INTEREST OF *AMICI*

The American Civil Liberties Union ("ACLU") is a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 500,000 members nationwide. The American Civil Liberties Union of Maryland is the state affiliate of the ACLU, with over 10,000 members.

The ACLU is committed to protecting the constitutional right of parental autonomy and has submitted *amicus* briefs in support of parents who objected to court-ordered visitation with non-parents in *Troxel v. Granville*, 530 U.S. 57 (2000), and *Koshko v. Haining*, 398 Md. 404 (2007). The ACLU also seeks to ensure that relationships between children and the adults who function as their parents, whether or not related by blood, adoption or marriage, are also protected and, thus, has filed *amicus* briefs in a number of cases addressing this issue, including in this Court. *See Janice M. v. Margaret K.*, 404 Md. 661 (2008); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005); and *Clifford K.v. Paul S. ex rel Z.B.S.*, 619 S.E.2d 138 (W. Va. 2005). These cases, along with the ACLU's representation of the plaintiffs in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Conaway v. Deane,* 401 Md. 219 (2007), abrogated by *Obergefell*, 135 S. Ct. 2584; and *North v. North*, 102 Md. App. 1 (1994) (invalidating denial of overnight visitation to gay father based on his sexual orientation), also further the ACLU's goal of

ensuring that the full range of family protections are available for lesbian and gay parents and their children.

STATEMENT OF THE CASE

Amici adopt Appellant's statement of the case.

STATEMENT OF QUESTIONS PRESENTED

Amici adopt Appellant's statement of the questions presented.

STATEMENT OF FACTS

Amici adopt Appellant's statement of facts.

ARGUMENT

Amici strongly agree that Appellant Michelle Conover[1] should be recognized as a parent based on the statutory presumptions of parentage, which must, as a matter of statutory construction as well as constitutional principles, be applied regardless of gender. *Amici* also fully support Michelle's position that this Court should overrule its decision in

[1] *Amici* use Appellant's former name and gender pronouns prior to his gender transition to be consistent with the record and Appellant's brief.

Janice M. v. Margaret K., 404 Md. 661 (2008), and recognize *de facto* parents under equitable principles. *Amici* submit this brief to explain that, however this Court resolves those questions, Constitutional principles require that Michelle and Jaxon's parent-child relationship be afforded the protections available under state law to other parent-child relationships. Michelle and Jaxon have a liberty interest in their relationship that developed as a result of living as parent and child for the first 2 ½ years of Jaxon's life. The Supreme Court has long recognized that this liberty interest arises as a result of shared family life rather than mere biological ties, and that it belongs to both parent and child. Thus, denying Michelle access to any of the means available under Maryland law to recognize parent-child relationships and to the mechanism to protect such relationships when families break up—court-ordered custody or visitation if deemed to be in the best interest of the child—would violate both Michelle and Jaxon's due process and equal protection rights. Such a cruel result is neither required nor permitted by Supreme Court precedent.

I. The Constitution Recognizes and Affords Protection to the Relationships Between Children and their Parents Regardless of Whether they have Biological or Otherwise Legally-Recognized Ties.

All people have the right, protected by the state and federal constitutions, to join together and form families. The parent-child relationships that result are constitutionally protected. The relationship between parent and child, which is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court, *Troxel v. Granville*, 530

U.S. 57, 65 (2000), is "far more precious than any property right." *M.L.B. v. S.L.J.*, 519 U.S. 102, 102 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982)). A parent's right to "the companionship, care, custody, and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The Constitution protects "the integrity of the family unit." *Id.* at 649; *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) ("the Constitution protects the sanctity of the family."). Thus, the Constitution places significant substantive and procedural limits on state interference with the relationship. *See, e.g.*, *Santosky*, 455 U.S. 745; *Stanley*, 405 U.S. 645.

The constitutional rights that protect families safeguard the interests of the child as well as the parent. *See, e.g.*, *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Santosky*, 455 U.S. at 760 ("the child and his parents share a vital interest in preventing erroneous termination of their natural relationship"); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (the "right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the 'companionship, care, custody and management of his or her children,' and of the children in not being dislocated from the 'emotional attachments that

derive from the intimacy of daily association,' with the parent.") (internal citations omitted).

This constitutional protection extends beyond the traditional nuclear family, *Moore*, 431 U.S. 494 (grandmother who was raising her grandsons had constitutionally protected relationship with them); beyond families headed by married couples, *Stanley*, 405 U.S. at 649 (unwed father's right to seek custody of child protected); and beyond biological parent-child relationships, *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) (certain foster parent-child relationships could be protected by Constitution). Since at least *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Supreme Court has recognized that it is not biological parents alone whose interest in their relationships with their children is entitled to constitutional protection. The Court treated the relationship between Sarah Prince and Betty Simmons (Sarah's "custodian" and aunt) as a constitutionally protected parent-child relationship. *Prince*, 321 U.S. at 159, 169; *Smith*, 431 U.S. at 843, n. 49 (citing *Prince* as example of parental due process rights extending beyond biological parents).

The core of the family interest protected by the due process clause, according to the Supreme Court, derives not from biology, but from the emotional bonds that develop between family members as a result of shared daily life. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983). As the Court explained in *Smith*, 431 U.S. at 844,

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of

> daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship.

(internal citations omitted). *See also Moore*, 431 U.S. at 504-506 (recognizing that the constitutional right to parental autonomy extends to relatives who take on the responsibility of child rearing).

Thus, there are circumstances in which relationships between children and adults who, although not their biological or otherwise legally-recognized parents, function as their parents in every way ("*de facto* parents[2]"), fall within the shelter the Constitution provides for parent-child relationships. *Smith*, 431 U.S. at 844; *see, e.g.*, *In re Parentage of L.B.*, 122 P.3d 161, 178 (Wash. 2005) (explaining that *de facto* parents "have a 'fundamental liberty interest[]' in the 'care, custody, and control'" of the child); *V.C. v. M.J.B.*, 748 A.2d 539, 550 (N.J. 2000) (explaining that the "strong interest" both the child and a *de facto* parent have in their parent-child relationship "for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life.").

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[2] "*De facto* parent" is one of several terms courts have used to refer to such individuals. Others are "psychological parent," *see, e.g.*, *V.C.*, 748 A.3d 539, and "in loco parentis" parent, *Bethany v. Jones*, 378 S.W.3d 731 (Ark. 2011). Because all of these terms convey the same idea, for simplicity *amici* will use the term "*de facto* parent" regardless of the terms used in the case law cited.

In this case, the record shows that Michelle and Jaxon have a parent-child relationship that merits constitutional protection.[3] Indeed, based on the evidence presented, the circuit court concluded that Michelle was Jaxon's "*de facto* parent." E19. Michelle was not merely someone who lived in Jaxon's house and helped take care of her from time to time, but rather she and Jaxon had a fully developed parent-child relationship. *See, e.g.*, *V.C.*, 748 A.2d 539 (woman who cared for children with her partner for 2 ½ years deemed a *de facto* parent); *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa. Super. Ct. 1996) (woman who functioned as parent of child for 3 years deemed a *de facto* parent).

Nothing in *Troxel*, 530 U.S. 57, limits the constitutional principle that the Due Process Clause protects the rights of parents and children even in the absence of a biological or other legally-recognized relationship. *Troxel* reiterates that families should be protected from interference from outsiders. It does not restrict the determination of who a family—or a parent—is. In *Troxel* there was no factual or legal question about parentage. Ms. Granville was the biological mother of the children, her husband was their adoptive father, and the Troxels were their paternal grandparents. *Troxel*, 530 U.S.

[3] The evidence showed that from Jaxon's birth in April 2010 until he was nearly a year and a half, he lived with Brittany and Michelle in the home they shared. They were a family; indeed the couple married a few months after his birth. Michelle was a stay-at-home parent and Jaxon's primary caregiver until the couple separated. Even after that, Jaxon called Michelle "da-da" or "daddy" and Brittany recognized Michelle as one of Jaxon's parents until he was about 2 1/2. E14-15, 56-60, 81-82, 84, 87-88. To the extent this Court believes the record is insufficient to establish a bonded parent-child relationship that warrants constitutional protection, it should remand for expedited fact-finding.

at 60-62. The Troxels never claimed to have a parental or daily caregiver role with respect to the children. *Id.* *Troxel* correctly subordinated the visitation interest of non-parents to the family autonomy rights of parents, but it did not purport to establish any similar hierarchy of rights among people who claim parental relationships with children.

Numerous state courts that have considered the implications of *Troxel* in cases involving *de facto* parents have agreed that ordering custody or visitation to maintain children's relationships with their *de facto* parents does not violate the biological parent's autonomy rights. *See, e.g.*, *Bethany*, 378 S.W. 3d at 736 ("the finding of an *in loco parentis* relationship is different from the grandparent relationships found in *Troxel* . . . because it concerns a person who, in all practical respects, was a parent."); *Rubano v. Dicenzo*, 759 A.2d 959, 967 (R.I. 2000) (distinguishing non-biological parent's petition for visitation from *Troxel* on the basis of the existence of a parent-like relationship); *see also Eldredge v. Taylor*, 339 P.3d 888, 894-95 (Okla. 2014); *L.B.*, 122 P.3d at 177-179; *T.B. v. L.R.M.*, 786 A.2d 913, 919-20 (Pa. 2001); *Interest of E.L.M.C.*, 100 P.3d 546, 548-49 (Colo. App. 2004); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 832 (Mass. 1999).[4] These

[4] This Court has held that under "Maryland jurisprudence," the right to parental autonomy of a biological or adoptive parent means that a *de facto* parent, like any "third party," must demonstrate parental unfitness or "exceptional circumstances" to pursue child custody or visitation, and that the existence of a parental bond, by itself, does not establish exceptional circumstances. *Janice M.,* 404 Md. at 685; *id.* at n. 7. *Amici* agree with Michelle that this Court should overrule *Janice M.* It failed to account for the constitutionally protected relationship that can exist between parents and children despite the absence of biological or adoptive ties. And it has caused children like Jaxon to be subjected to the painful loss of their important relationships with people they know as parents.

courts have explained that it is no intrusion on parental autonomy to recognize *de facto* parent-child relationships that the biological parent herself chose to create. As one court put it:

> Th[e] parent has the absolute ability to maintain a zone of autonomous privacy for herself and her child. However, if she wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child.

V.C., 748 A.2d at 552. *See also Rubano*, 759 A.2d at 976 (when a parent "agree[s] to and foster[s]" a *de facto* parent child relationship and allows that person to "assume an equal role as one of the child's two parents," she renders her own parental rights "less exclusive and less exclusory."); *Middleton v. Johnson*, 633 S.E.2d 162, 169 (S.C. Ct. App. 2006) ("The legal parent's active fostering of the psychological parent-child relationship is significant because the legal parent has control over whether or not to invite anyone into the private sphere between parent and child."); *Mason v. Dwinnell*, 660 S.E.2d 58, 73 (N.C. Ct. App. 2008) ("Courts do not violate a parent's constitutionally-protected interest by respecting the parent-child relationships that the legal parent—in accordance with her constitutional rights—voluntarily chose to create.").

Here, the record shows that Brittany made a decision to create a two-parent family for Jaxon; indeed, she handwrote and signed a document identifying herself and Michelle as "Parental Guardian[s]" of Jaxon and agreeing that they would share "joint custody" of the child. E61-62, 66-68. The record further shows that Michelle assumed the duties and

responsibilities of a parent to Jaxon and, as a result, as the circuit court found, a *de facto* parent-child relationship developed. It is no intrusion on Brittany's parental autonomy rights to prohibit her from "erasing a relationship . . . she voluntarily created and actively fostered simply because after the party's separation she regretted having done so." *V.C.*, 748 A.2d at 552. *De facto* parent-child relationships are no less profound or important to children's well-being than other parent-child relationships. *See, e.g.*, *Chatterjee v. King*, 280 P.3d 283, 292 (N.M. 2012) ("The attachment bonds that form between a child and parent are formed regardless of a biological or legal connection."); *V.C.*, 748 A.2d at 550 ("[C]hildren have a strong interest in maintaining the ties that connect them to adults who love and provide for them.").

II. Denying Michelle Access to the Mechanism for Protecting Parent-Child Relationships Would Violate Michelle and Jaxon's Due Process and Equal Protection Rights.

In keeping with constitutional mandates, Maryland law provides parents with significant protection of their relationships with their children when families break up. It gives them the right to spend time with their children through custody or regular visitation, and where necessary, access to the courts for assistance in securing that time.

Michelle is among those parents who need these state law protections to maintain her relationship with her child. After raising Jaxon for almost 2 ½ years, Michelle was completely and permanently cut off from him by Brittany. But under state law (as interpreted by the court below), Maryland parents can only access the courts to petition

for custody and visitation and have those claims evaluated based on the best interest of the child when parentage can be established by biology or adoption; not even parentage based on a marital presumption opens the door according to the court below.

Because Michelle and Jaxon have a constitutionally protected relationship, excluding relationships like theirs from any of the means available under Maryland law to recognize parent-child relationships and from the mechanism that protects such relationships when families break up would violate the constitutional guarantees of due process and equal protection.

It is a well-established rule of constitutional law that a classification that creates differential access to a fundamental right is subject to strict scrutiny and can be upheld only if it is narrowly tailored to achieve a compelling government interest. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 383-390 (1978) (since the right to marry is fundamental, state law that limits access to marriage for non-custodial parents with court-ordered child support obligations is subject to close scrutiny); *Police Dep't. of Chicago v. Mosley*, 408 U.S. 92 (1972) (since ordinance that prohibited all pickets near schools except for labor pickets constituted differential access to the right to free speech, strict scrutiny was applied).

The State cannot create an exclusive system for getting access to certain fundamental constitutional rights, including the right to family integrity, and then ban someone who is entitled to those rights from using that system, without a compelling reason. In *M.L.B.*, 519 U.S. at 113, 116-21, the United States Supreme Court held that

the "State must provide access to its judicial processes" in the context of termination of parental rights because "a fundamental interest is at stake"– maintaining a parent-child relationship. *See also Little v. Streater*, 452 U.S. 1, 13-17 (1981) (state must pay for blood test sought by indigent defendant contesting paternity suit because at issue was the creation of a parent-child relationship). Similarly, in *Boddie v. Connecticut*, 401 U.S. 371, 375-77 (1971), the Supreme Court held that since a civil action is the only way to end a marriage, and marriage is a fundamental right, Connecticut could not effectively keep poor people from obtaining divorces by charging filing and service fees. "[G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship," due process "prohibit[s] a state from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." *Id.*, at 374.

Denying individuals like Michelle access to the courts to seek a determination of parentage—either based on the marital presumption or equitable principles recognizing parent-child relationships—and, if deemed to have a parental relationship, court-ordered custody or visitation based on the best interests of the child, amounts to differential access to the fundamental right to the "companionship, care, custody and management" of children, *Stanley*, 405 U.S. at 651. This unequal treatment must be subject to strict scrutiny.

Heightened scrutiny is warranted for the additional reason that it penalizes a child based on the status of his parents. The United States Supreme Court has long recognized

that laws discriminating between children based on the status of their parents or the circumstances of their birth are unconstitutional unless the distinction is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *see, e.g.*, *Trimble v. Gordon*, 430 U.S. 762 (1977) (striking down statute that prohibited non-marital children from inheriting from their father unless their parents had married); *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164 (1972) (striking down workman's compensation statute that denied benefits to unacknowledged non-marital children); *Levy v. Louisiana*, 391 U.S. 68 (1968) (striking down statute that prevented non-marital children from bringing a wrongful death tort action); *Plyler v. Doe*, 457 U.S. 202 (1982) (excluding undocumented immigrant children from public education violated the children's equal protection rights).

There is no government interest—let alone a compelling or important one—that is furthered by excluding a constitutionally protected parent-child relationship like Michelle and Jaxon's from the mechanisms the State has established to recognize and protect family relationships. To do so would violate the constitutional guarantees of due process and equal protection.

CONCLUSION

Michelle and Jaxon have a constitutionally protected parent-child relationship that formed as a result of living as parent and child for the first 2 ½ years of Jaxon's life.

Therefore, Michelle may not be fenced out of the system that exists in Maryland for protecting parent-child relationships—access to court-ordered custody or visitation if deemed to be in the best interest of the child. While *amici* agree with Michelle that she should be recognized as Jaxon's parent based on statutory presumptions of parentage, we also urge this Court to overrule *Janice M.* to ensure that neither Jaxon nor any other child is subjected to the grievous loss of a parental relationship because the courthouse is closed to *de facto* parents seeking the help so many parents depend on to protect their continued relationships with their children after a divorce.

Respectfully submitted this 24th day of February, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 2016, I sent by Federal Express Overnight two copies of the foregoing to each of the following:

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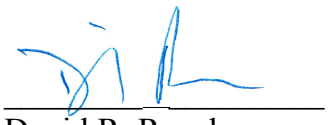

David R. Rocah

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 9-112

1. This brief contains 3,246 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.