

# 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 Respondent**

R. Martin Palmer  
Law Offices of Martin Palmer  
21 Summit Avenue  
Hagerstown, MD 21740  
Telephone: (301) 790-0640  
Facsimile: (301) 790-0684  
Email: [info@martinpalmer.com](mailto:info@martinpalmer.com)

*Counsel for Respondent*

## TABLE OF CONTENTS

Table of Contents.....	i
Table of Contents – Record Extract.....	ii
Table of Authorities.....	iii
Questions Presented.....	1
Statement of the Facts.....	1
Standard of Review.....	3
Argument.....	3
I.    Michelle is a Third Party and Not Jaxon’s Parent.....	3
A.    Jaxon was born outside of a brief marriage.....	3
B. <i>Janice M. and Margaret K.</i> explicates proper law in a very well-reasoned and considered opinion.....	4
C.    Michelle chose not to adopt Jaxon.....	6
II.   The Maryland Legislature Must Determine the Wording and Thus Gender Language of the Laws They Pass.....	7
A.    We must follow the English language definition of “father” as male and “mother” as female because to do otherwise significantly rewrites basic tenants of the English language.....	8
B.    The Maryland Legislature must	

determine the definition of words used in statutes they pass..... 9

**III. Visitation is Not in Jaxon’s Best Interest.....10**

**Conclusion..... 12**

*Statement of Font and Type Size.....-*

*Certificate of Word Count and Compliance with MD Rule 8-112....-*

*Certificate of Service..... -*

**TABLE OF CONTEXT – RECORD EXTRACT**

Circuit Court Docket Entries..... E 1-13

June 4, 2013 Opinion and Order ..... E 14-20

Complaint ..... E 21-24

Answer ..... E 25-27

Counter-Complaint ..... E 28-31

Transcript of April 30, 2013 Hearing ..... E 32-149

Defendant’s Trial Exhibit 1 (“Parental Guardian” Agreement).... ..E 151

Defendant’s Memorandum of Law filed May 10, 2013 ..... E 152-68

## TABLE OF AUTHORITIES

### Cases

<i>Conover v. Conover</i> , 224 Md. App. 366 (2015).....	3
<i>Janice M. v. Margaret K.</i> , 404 Md. 661 (2008).....	1, 4, 5
<i>Koshko v. Haining</i> , 398 Md. 404 (2007).....	5
<i>McDermott v. Dougherty</i> , 385 Md. 320 (2005).....	5, 6
<i>Montgomery County v. Sanders</i> , 38 Md. App. 406 (1977).....	10
<i>S.F. v. M.D.</i> , 132 Md. App. 99 (2000).....	5
<i>Schisler v. State</i> , 394 Md. 519 (2006).....	3

### Statutes

The Civil Marriage Protection Act of 2012.....	1, 9
Md. Code, Family Law § 5-4C-01.....	8
Md. Code, Estates and Trusts § 1-208.....	1, 7

### Other Authorities

Merriam-Webster Dictionary (11 <sup>th</sup> ed. 2004).....	8
Oxford Dictionary of English (3 <sup>rd</sup> ed. 2010).....	8

## QUESTIONS PRESENTED

1. Does Md. Code Estates and Trusts § 1-208(b)(4) promulgated for purposes of resolving property and inheritance issues have any applicability to questions of custody and visitation?
2. Is the rational in *Janice M. v. Margaret K.* sound given the implications of the Civil Marriage Protection Act of 2012?

## STATEMENT OF THE FACTS

Jaxon William Lee Eckel Conover was born on April 4, 2010. E14. He is nearly six years old today. Jaxon was conceived by in vitro fertilization by an anonymous sperm donor in 2009, prior to the marriage in 2010. E14 - E15. Brittany Eckle is listed as his mother on the birth certificate. *Id.* No father is listed on the birth certificate. E14 – E15.

Petitioner and Respondent were married in the District of Columbia on September 28, 2010, when Jaxon was about six months old. Petitioner and Respondent separated in September 2011, roughly one year after getting married, when Jaxon was about a year and a half old. E58.

On February 8, 2013 Brittany filed a Complaint for Absolute Divorce. E21. Jaxon was nearly two years and 10 months old at this time. In her Complaint, Brittany stated no children were born of the marriage. *Id.* In her Counter Complaint, Petitioner listed one minor child, Jaxon, was a product of the marriage. E28. Petitioner never adopted Jaxon. E62 – E63. E57. Jaxon has not seen Petitioner since July 15, 2012, when he was two years and three month old. E69. He is nearly six years old today.

Both parties signed a handwritten “Parental Guardian” Document, dated July 16, 2010 that states, “[I]t is of *our own will* that we agree... [to] joint custody.” E151 (emphasis added). Respondent claims she wrote the handwritten document because she was being “forced” by the Petitioner. E49. Respondent contends that the couple broke up many times while they were together. E75. She also claims there is a history of abuse by Petitioner of her. E49, E85, E98.

## STANDARD OF REVIEW

The facts in this case are not in dispute. Only questions of law are at issue. The interpretation and constitutionality of statutes are considered *de novo*. *Schisler v. State*, 394 Md. 519, 535 (2006).

## ARGUMENT

### I. Michelle is a Third Party and Not Jaxon's Parent.

Judge Nazarian, in his concurring opinion, applied a clear definition of the concept of "parent":

"[T]he rights and obligations of parenthood have arisen historically from a person's contribution of biological material at the time of conception, by marriage, or by legal adoption." *Conover v. Conover*, 224 Md. App. 366 at 388.

Michelle cannot be Jaxon's biological father due to biological impossibility. Moreover, Michelle and Brittany were unmarried at the time of Jaxon's birth and Michelle did not adopt Jaxon.

#### A. *Jaxon was born outside of a brief marriage.*

Both the Circuit Court and the Court of Special Appeals noted that the parties could have married *before* Jaxon was born, but did not. E16, *Conover* 224 Md. App at 369.

Same sex marriage was legalized in the District of Columbia in December 2009 and same sex marriage became available in March 2010. *Id.* Thus, the parties could have married before Jaxon birth.

Regardless of gender, Jaxon was born to Brittany before her and Michelle were legally married and thus marriage cannot be used to determine parentage regardless of sexual orientation because the two could have legally married, but did not until after Jaxon's birth.

*B. Janice M. and Margaret K.<sup>1</sup> explicates proper law in a very well-reasoned and considered opinion.*

*Janice M.* sets a standard that other states could and should follow rather than the opposite, which Petitioner urges upon this Court, that it strike down *Janice M.* and be influenced by other state courts. Gender is not at the heart of this case, as Petitioner suggests it is. If Petitioner were biologically male, these same facts would deny him parentage to Jaxon. The connections necessary are simply not present to meet any of the legal standards, regardless of gender.

This Court asked a telling question in *Janice M.*:

At oral argument, we inquired of the parties, whether the fact that the parties were of the same sex in the case before the Court should have any bearing on our analysis.

---

<sup>1</sup> *Janice M v. Margaret K.*, 404 Md. 661 at 686 (2008).



Neither argued that it should. *Janice M*, 404 Md. at 686 (2008).

*Janice M.* was not about the gender of the parties and neither is the instant case. If Petitioner were male and wished custody of Jaxon and the biological mother declined because it was not in the best interests of her child, Petitioner would still fail because he would be a third party. The constitutional rights of the parent prevail.

As this Court opined in *Janice M.*:

We will not recognize *de facto* parent status, as set forth in *S.F.*, as a legal status in Maryland. We refuse to do so because, even *assuming arguendo* that we were to recognize such a status, short-circuiting the requirement to show unfitness or exceptional circumstances is contrary to Maryland jurisprudence, as articulated in *McDermott* and *Koshko*. *Janice M. v. Margaret K*, 404 Md. 661, 685-86 (2008) (citations omitted).

The Court further stated:

Even were we to recognize some form of *de facto* parenthood, the real question in the case *sub judice* will remain, whether, in a custody or visitation dispute, a third party, non-biological, non-adoptive parent, who satisfies the test necessary to show *de facto* parenthood should be treated differently from other third parties. We have not been persuaded that they should be. In other words, where visitation or custody is sought over the objection of the parent, before the best interest of the child test comes into play, the *de facto* parent must establish that the legal parent is either unfit or that exceptional circumstances exist. A fair reading of *McDermott* and *Koshko* leads to no other conclusion. We reiterate what we said in *McDermott: Id.* (citations omitted).

Quoting *McDermott* the Court continued:

"In the balancing of court-created or statutorily-created `standards,' such as `the best interest of the child' test, with fundamental constitutional rights, in private custody [and visitation] actions involving private third-parties where the parents are fit, absent extraordinary (*i.e.*, exceptional) circumstances, the constitutional right is the ultimate determinative factor; and only if the parents are unfit or extraordinary circumstances exit is the `best interest of the child' test to be considered. . . . " *Id.* (quoting *McDermott v. Dougherty*, 385 Md. 320, 418-19 (2005)).

If the Court were to overrule such clear and purposeful reasoning, any non-biological third party could conceivably assert *de facto* parental rights and override the fundamental constitutional rights of the biological parent.

*C. Michelle chose not to adopt Jaxon.*

In Petitioner's testimony she stated, "we talked about the necessity for him (Jaxon) to be adopted by me, ah, in the event of any emergency or life threatening situation and also so *this* wouldn't happen." E62 (emphasis added).

It follows that Petitioner knew she was not Jaxon's parent if she knew adoption was a necessary step in securing her parentage of Jaxon. She knew she needed to act to establish parental rights and obligations yet she chose not to adopt.

The adoption petition fee in Washington County Circuit Court is \$165.00, without counsel.<sup>2</sup> Considering the importance of securing parental rights, not adopting Jaxon seems unconscionable given the low cost of adoption. The fact that Petitioner stated she knew she needed to adopt Jaxon in order to be his parent and chose not to because she “didn’t have the funds” seems suspect considering the low cost of adoption and the high stakes at risk by not adopting Jaxon. She knew she was not Jaxon’s parent and did not take the steps necessary to secure her right to custody of Jaxon.

## **II. The Maryland Legislature Must Determine the Wording and Thus Gender Language of the Laws They Pass.**

Petitioner has asked for a gender neutral reading and an application of Estates and Trusts law to the custody of a child.

§ 1-208 states:

- (a) A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his mother.
- (b) A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his father only if the father:

---

<sup>2</sup> Washington County Circuit Court Fee Schedule: \$165.00 for adoption petition without counsel and \$175.00 for adoption petition with counsel.

- (1) Has been judicially determined to be the father in an action brought under the statutes relating to paternity proceedings;
- (2) Has acknowledged himself, in writing, to be the father;
- (3) Has openly and notoriously recognized the child to be his child;  
or
- (4) Has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.

The laws of Estates and Trusts were intended to determine inheritance and property issues and not custody issues.

*A. We must follow the English language definition of “father” as male and “mother” as female because to do otherwise significantly rewrites basic tenants of the English Language*

Merriam-Webster Dictionary defines “father” as: “A male parent.”

The Oxford Dictionary defines “father” as: “A man in relation to his child or children.”

The Annotated Code of Maryland, Family Law Article Section 5-4C-01, relating to adoption may assist:

- (g) “Natural father” means a man who:
  - (1) was married to the adoptee’s natural mother at the time of conception;
  - (2) was married to the adoptee’s natural mother at the time of the adoptee’s birth;
  - (3) was named as the father on the adoptee’s pre-adoption birth certificate, unless the man has signed a denial of paternity or his nonpaternity has been determined by a court;
  - (4) was identified by the natural mother as the father of the adoptee, unless the man has signed a denial of paternity or his nonpaternity has been determined by a court;
  - (5) has been adjudicated to be the father of the adoptee; or

- (6) has acknowledged himself orally or in writing to be the father of the adoptee.

The application of The Civil Marriage Protection Act of 2012 has created certain problems in interpreting family law issues, but this is a matter for the legislature to address.

The consequences of a gender neutral reading of any statute are far reaching and would cause more confusion in interpreting the law. If such a reading were given to an Estate and Trusts statute in a custody context, men and women would effectively no longer legally exist. The simple legal clarity of who is the “mother” and who is the “father” would become blurred.

*B. The Maryland Legislature must determine the words used in statutes they pass.*

The Maryland Legislature is aware of the implications of the recent Civil Marriage Protection Act. In the 2015 session of the General Assembly, several bills were introduced that would have addressed *de facto* parentage. Senate Bill 402 and House Bill 577 directly address establishing *de facto* parentage in Maryland. The bills did not pass, but

the introduction of such bills does show an awareness of the issue by the Legislature.<sup>3</sup>

The confusion in family law created by the introduction of same sex family problems does need to be resolved. The legislature, however, is the proper forum for resolving such complicated and expansive problems. It is for this reason that the legislature sets forth definitions of words and terms used in statutes in the beginning thereof.

### **III. Visitation is Not in Jaxon's Best Interest**

“The fact finder is called upon to evaluate the child’s life chances in each of the homes competing for custody and then to predict with whom the child will be better off in the future.” *Montgomery County v. Sanders*, 38 Md. App. 406, 419 (1977).

In the instant case, the Circuit Court did not reach a best interest of the child analysis because it found Petitioner a third party and Respondent to be a fit parent.

Unfortunately, Respondent was *pro se* during trial and consequently the record does not reflect the depth of evidence it

---

<sup>3</sup> No bills addressing *de facto* marriage have been introduced in the 2016 General Assembly session.

otherwise would had she been represented. Petitioner testified that Jaxon has no biological connection to her. E53.

The record does indicate that Petitioner has not seen Jaxon since July of 2012. In July of 2012 Jaxon was only two and a half years old. He does not remember Petitioner today.

Respondent testified that she was threatened, coerced and controlled by Petitioner. E76. She testified the relationship was rocky and there were “a lot of different breaks” where Respondent fled the abusive relationship.

From Jaxon’s perspective this must be perplexing. His mother is trying to avoid a woman, who he likely does not remember, who is fighting his mom to see him. This cannot be healthy for Jaxon in the fragile developmental stage he is currently in. It is not in his best interests to forcibly introduce Petitioner back into his life.

Finally, forcing visitation would harm Jaxon. He has not seen Michelle in years- nearly half of his short lifespan. Moreover, the hostility between Michelle and Brittany makes such an arrangement ultimately harmful to a young boy who does not understand why Brittany is afraid of Michelle and why his mother wants this virtual

stranger out of their lives. The introduction of Michelle would disrupt and harm Jaxon in a fragile developmental stage in his life.

## CONCLUSION

For the reasons stated herein, the decision of the Court of Special Appeals should be affirmed.

Respectfully submitted,

---

R. Martin Palmer  
Law Offices of Martin Palmer  
21 Summit Avenue  
Hagerstown, MD 21740  
Telephone: (301) 790-0640  
Facsimile: (301) 790-0684  
Email: info@martinpalmer.com

*Counsel for Respondent*



## Statement of Font & Type Size

This brief is printed in Century Schoolbook, with 14-point type.

Certification of Word Count & Compliance with Rule 8-112

1. This brief contains 2,352 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.

  
\_\_\_\_\_  
R. Martin Palmer

## Certificate of Service

Pursuant to Md. Rules 1-321 and 8-502(c), I hereby certify that, on this 16th day of February, 2016, two copies of the Brief of Respondent were served on Petitioner by first-class mail, postage prepaid, to her counsel of record at the following address:

Jer Welter  
Deputy Director and Managing Attorney  
FREE STATE LEGAL PROJECT, INC.  
231 East Baltimore Street, Suite 1100  
Baltimore, MD 21202

  
\_\_\_\_\_  
R. Martin Palmer