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

Reply Brief of Petitioner

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ARGUMENT [1]

I. Michelle is Jaxon's legal parent under §1-208.

For more than forty years, in a line of cases beginning with *Thomas v. Solis*, 263 Md. 536 (1971), and continuing unbroken until the Court of Special Appeals' decision in this case, Maryland's appellate courts have held that the legitimation statutes in §1-206 and §1-208 of the Estates & Trusts Article establish parentage for purposes of child custody and visitation.[2]

And, although Brittany protests that "Michelle cannot be Jaxon's biological father due to biological impossibility," Resp. Br. at 3, the appellate courts have recognized in many cases, up to and including the lower court's decision in *Sieglein v. Schmidt*, 224 Md. App. 222, *cert. granted*, 445 Md. 487 (2015) (issued one day before its decision here), that biological impossibility does not foreclose legal parentage under the legitimation statutes.[3] Indeed,

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[1] Petitioner incorporates by reference the Statement of the Case, Questions Presented, Statement of Facts, and Standard of Review from the Brief of Petitioner previously filed.

[2] *See also, e.g.*, *Mulligan v. Corbett*, 426 Md. 670, 678 (2012) (applying §1-206 to determine parentage in visitation suit); *Evans v. Wilson*, 382 Md. 614, 629 (2004) (same); *Monroe v. Monroe*, 329 Md. 758, 766 (1993) (applying §1-208(b) to determine parentage in custody suit); *Turner v. Whisted*, 327 Md. 106, 113 (1992) (applying §1-206 and §1-208(b) to determine parentage in visitation suit).

[3] *See also, e.g.*, *Mulligan*, 426 Md. at 680, 684 (affirming ruling that man was legal parent of child under parentage presumption, despite having undergone vasectomy years before child's conception); *Kamp v. Dept. of Human Servs. ex rel. Duckworth*, 410 Md. 645, 648 (2009) (reversing ruling allowing man

cases where a statutory presumption of parentage is contrary to biological notions of parentage are the only cases where the statutory parentage presumptions ultimately make a difference.

Section 1-206(b), the statute at issue in *Sieglein*, makes the legitimation statutes' agnosticism about biological parentage particularly stark: that statute deals *only* with children conceived using assisted reproductive technology. The couple in *Sieglein* conceived their child via in vitro fertilization using donor eggs and sperm; neither the husband nor the wife was a genetic parent of the child. Nevertheless, faithfully applying this Court's precedents concerning the legitimation statutes (precedents that the lower court inexplicably ignored a day later in its decision in this case), the *Sieglein* court held that, where the spouses "willingly and voluntarily agreed to conceive a child through assisted reproductive services using anonymously donated genetic material, . . . ET § 1–206(b) applies to establish the legal parentage of both Mother and Father." *Sieglein*, 224 Md. at 243.[4]

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to obtain DNA test to rebut paternity, because he was legal parent of child under parentage presumption despite having undergone vasectomy years before child's conception); *Ashley v. Mattingly*, 176 Md. App. 38, 42 (2007) (affirming determination of legal parentage of man under parentage presumption despite results of privately obtained DNA test "reveal[ing] that there was a 0.0% probability" of biological paternity).

[4] The issue pending before this Court on certiorari in *Sieglein* is whether the statutory term "artificial insemination" in §1-206(b) encompasses only insemination with donor sperm using the procedure known as intrauterine

Although the parents in *Sieglein* were an opposite-sex couple and the parents in this case were of the same sex, it is equally biologically impossible for either Michelle or the husband in *Sieglein* to have been the biological fathers of their respective children. Michelle, just like the husband in *Sieglein*, gave "consent to the conception of a child via assisted reproductive services," and this "'volitional act resulted in the creation of a child.'" *Id.* (citation omitted). Both Michelle and the husband in *Sieglein* are legal parents, despite "biological impossibility," by operation of a statutory parentage presumption. As the lower court properly recognized in *Sieglein*, under Maryland case law, "the presumption of legal parentage established under [a legitimation statute] may only be rebutted after a showing that proceedings to disestablish parentage are in the best interests of the child." *Id.*

Respondent offers no substantial argument in opposition—only unsupported assertions and wild hyperbole (such as her claim that construing

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insemination (which is sometimes colloquially referred to as "artificial insemination," *see* Amicus Br. of Md. Family Law Profs. *et al.* at 7 n.4; *see also* Amicus Br. of Amer. Acad. of Assisted Reproductive Tech. Att'ys *et al.* at 5 n.1), or is meant to encompass assisted reproductive technology methods generally, including methods such as in vitro fertilization that have been developed since the statute was enacted. The resolution of that question does not affect this case because Jaxon was conceived by artificial insemination. *See* E53, E78. By providing that a person can be the legal parent of a child conceived by artificial insemination using donor genetic material, §1-206(b) clearly demonstrates the legislature's intent that a person can be established as a child's legal parent despite a "biological impossibility" that they are a genetic parent of the child.

the legitimation statutes in a gender neutral manner, so as to avoid their unconstitutionality under the ERA, would cause "men and women [to] effectively no longer legally exist"). Resp. Br. at 9. For all of the reasons already stated in the Brief of Petitioner, Michelle is Jaxon's legal parent under §1-208(b).

II. Because Michelle is Jaxon's parent, it was not necessary for her to adopt Jaxon.

Brittany's insistence that Michelle ought to have adopted Jaxon, *see* Resp. Br. at 6-7, ignores the purpose and effect of the legitimation statutes. Michelle did not need to adopt Jaxon because, by acknowledging her parentage of him openly and notoriously, and in writing, and by marrying Brittany after his birth, she established that she is his parent under three of the four methods of legitimation under §1-208(b)—"any one of which is sufficient" to establish parentage. *Thomas*, 263 Md. at 544. Indeed, this Court has repeatedly said that establishing the legal parentage of a child by taking the meaningful actions specified in the legitimation statutes is "a less traumatic approach to the problem" than the expense and intrusiveness of an adoption proceeding, *Dawson v. Eversberg*, 257 Md. 308, 314 (1970), and that the "benefits that would be achieved through the adoption process could more simply be accomplished through legitimation of the child under [§1-208]." *Bridges v. Nicely*, 304 Md. 1,

7 (1985).[5]

As the lower court observed in *Sieglein*, in the context of a married couple who established their parentage under §1-206, adoption simply is "not currently required or considered normal practice" in order for "a non-genetic parent in a marriage [to] establish[ ] legal parentage of a child born in the marriage," where the legitimation statute applies. *Sieglein*, 224 Md. App. at 241. Requiring adoption in cases where a legitimation statute applies is "detrimental to the exercise of parental rights, was not intended by the General Assembly and is not recognized under Maryland case law." *Id.* Brittany's arguments concerning adoption are a red herring.

III. The legislature's inaction on *de facto* parentage does not prevent this Court from reconsidering its own decision in *Janice M.*

For all of the reasons explained in Part III of Petitioner's Brief and in the briefs of supporting amici, the Court should reconsider *Janice M. v. Margaret K.*, 404 Md. 661 (2008), and recognize *de facto* parentage. Indeed, Brittany does not

[5] It is also worth noting that Respondent's citation of the $165 civil case filing fee as the only cost of an adoption ignores other costs such as attorneys' fees, potentially amounting to thousands of dollars. Attorney representation in adoption proceedings is a practical necessity, especially given that the judiciary has not made forms available to assist self-represented litigants in filing for adoption. *See generally* http://mdcourts.gov/family/formsindex.html. It is unnecessary for someone who has established their parentage under a legitimation statute to go through the expensive, intrusive, and redundant process of adopting their own child—of whom they are *already* a legal parent.

dispute the circuit court's factual finding that Michelle is Jaxon's *de facto* parent. *See* Resp. Br. at 3 ("The facts in this case are not is [sic] dispute."). She offers no argument against recognition of *de facto* parentage except to suggest that recognition of *de facto* parentage should be left to the legislature. *Id.* at 9-10.

It is true that, since *Janice M.*, the legislature has considered a scattered handful of bills that would have established some form of *de facto* parentage, and that these bills did not become law. *See* S.B. 600 / H.B. 1241 (Md. 2010 Reg. Sess.); S.B. 402 / H.B. 557 (Md. 2015 Reg. Sess.); S.B. 550 / H.B. 1083 (Md. 2015 Reg. Sess.). But although "under some circumstances the failure to enact legislation is persuasive evidence of legislative intent," *Moore v. State*, 388 Md. 623, 641 (2005), that is not always so (and is not so here). Indeed, courts "walk on quicksand when … try[ing] to find in the absence of corrective legislation a controlling legal principle," *Helvering v. Hallock*, 309 U.S. 106, 121 (1940), because "the failure of a single bill in the General Assembly may be due to many reasons." *Moore*, 388 Md. at 641; *see Johnson v. Transp. Agency, Santa Clara, Cal.*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (noting various possible reasons for legislative inaction other than approval of the status quo, including "inability to agree upon how to alter the status quo" and "indifference to the status quo").

Therefore, as this Court very recently reiterated, "while intent may be discerned from legislative inaction, it is considered most appropriate generally only when a specific bill has been repeatedly brought to the General Assembly and rejected." *Yonga v. State*, ___ Md. ___, No. 30, Sept. Term 2015, slip op. at 23 (Jan. 27, 2016). That is not the case here. In the legislative sessions from 2009 through 2015, only three pieces of legislation that would have recognized *de facto* parenthood were introduced (in only two years). Each of these legislative proposals differed markedly from the others, and none received a vote of the entire floor in either chamber.

The 2010 legislation was withdrawn by its House sponsor[6] and did not receive a committee vote in the Senate—thus, it never received a vote on the merits by any legislators.[7] One of the bills introduced in 2015 was an omnibus piece of legislation that would have affected many other areas of family law, and it likewise did not receive a committee vote in either chamber.[8] The other

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[6] *See* H.B. 1241, H. Judiciary Cmte. Voting Record (Md. 2010 Reg. Sess., Mar. 25, 2010), *available at* http://mgaleg.maryland.gov/2010rs/votes_comm/hb1241_jud.pdf

[7] *See* S.B. 600, Bill History (Md. 2010 Reg. Sess.), *available at* http://mgaleg.maryland.gov/webmga/frmMain.aspx?tab=subject3&ys=2010rs/billfile/sb0600.htm.

[8] *See* S.B. 550, Bill History (Md. 2015 Reg. Sess.), *available at* http://mgaleg.maryland.gov/webmga/frmMain.aspx?pid=billpage&stab=03&id=sb0550&tab=subject3&ys=2015RS; H.B. 1083, Bill History (Md. 2015 Reg.

2015 bill is the only one that received a committee vote (it was unfavorably reported in a Senate committee and then withdrawn by its House sponsor).[9]

This spotty record is not the kind of sustained, purposive rejection of legislation that the Court has previously found salient. *Compare Coleman v. Soccer Ass'n of Columbia*, 432 Md. 679, 693 & n.6 (2013) (cataloging ten failed bills in which "the General Assembly has continually considered and failed to pass bills that would abolish or modify the contributory negligence standard"); *Stearman v. State Farm*, 381 Md. 436, 455 (2004) ("Every year since 2000, legislators have introduced bills in the General Assembly that would" accomplish what the appellant urges, but "[n]one of these bills were enacted."); *Harrison v. Mont. Bd. of Educ.*, 295 Md. 442, 462 (1983) ("[I]n the period from 1966 through 1982, the General Assembly considered a total of twenty-one bills seeking [to adopt the appellant's position].... None of these bills was enacted.").[10]

Sess.), *available at* http://mgaleg.maryland.gov/webmga/frmMain.aspx?pid=billpage&stab=03&id=hb1083&tab=subject3&ys=2015RS.

[9] *See* S.B. 402, S. Judicial Proceedings Cmte. Voting Record (Md. 2015 Reg. Sess., Mar. 11, 2015), *available at* http://mgaleg.maryland.gov/2015RS/votes_comm/sb0402_jpr.pdf; H.B. 577, H. Judiciary Cmte. Voting Record (Md. 2015 Reg. Sess., Mar. 17, 2015), *available at* http://mgaleg.maryland.gov/2015RS/votes_comm/hb0577_jud.pdf.

[10] In candor, Respondent is mistaken in asserting that no legislation addressing the issue of *de facto* parentage has been introduced in the current session of the General Assembly. *See* Resp. Br. at 10 n.3. This session's S.B. 978

More fundamentally, decisionmaking regarding child custody and visitation is "an integral part of the broad and inherent authority of a court exercising its equitable powers," the contours of which are not statutorily prescribed. *Taylor v. Taylor*, 306 Md. 290, 298 (1986); *see also id.* at 307-11 (enumerating judicially determined factors to guide child custody and visitation decisionmaking). The "inquiry, therefore, is not whether the Legislature has granted a power, but whether it has attempted to limit a power that exists as a part of the inherent authority of the court." *Id.* at 298. The General Assembly certainly has not barred this Court from recognizing *de facto* parentage.[11]

The Washington Supreme Court, in recognizing *de facto* parentage, definitively rejected the notion that legislative silence should prevent courts

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/ H.B. 1232, if enacted, would recognize a form of *de facto* parentage (among several other revisions that this omnibus legislation would make to Maryland's family law). As of this writing, the legislation is scheduled to have committee hearings in both chambers, but no further action has been taken. However, the possibility that legislation might or might not be enacted in the future does not absolve this Court of its *parens patriae* responsibility to "'stand[ ] as a guardian of all children'" and to "'protect and advance [the] welfare and interests'" of children in cases that are now before it. *In re Adoption/Guardianship of Dustin R.*, 445 Md. 536, ___ (2015) (citation omitted).

[11] Indeed, any attempt to divine a legislative opposition to *de facto* parentage from the General Assembly's failure to affirmatively enact legislation on the subject in the eight years following *Janice M.* is undercut by the fact that the General Assembly likewise failed for eight years to affirmatively reject *de facto* parentage after the Court of Special Appeals recognized the doctrine in *S.F. v. M.D.*, 132 Md. App. 99 (2000).

from giving legal protection to the lived reality of the children of *de facto* parents:

> [S]tatutes often fail to contemplate all potential scenarios which may arise in the ever changing and evolving notion of familial relations. Yet, simply because a statute fails to speak to a specific situation should not, and does not in our common law system, operate to preclude the availability of potential redress. This is especially true when the rights and interests of those least able to speak for themselves are concerned…. While the legislature may eventually choose to enact differing standards than those recognized here today, and to do so would be within its province, until that time, it is the duty of this court to "endeavor to administer justice according to the promptings of reason and common sense."

In re Parentage of L.B., 122 P.3d 161, 176 (Wash. 2005) (internal citation omitted), *cert. denied sub nom Britain v. Carvin*, 547 U.S. 1143 (2006).

It is no answer to Jaxon or to other children in Maryland who have *de facto* parents that the legislature might someday protect their interests. Jaxon's interests require protection now—in this case—and the legislature's failure to enact comprehensive legislation on the topic does not constrain this Court from recognizing that "children have a strong interest in maintaining the ties that connect them to adults who love and provide for them …. [arising] in the emotional bonds that develop between family members as a result of shared daily life." *V.C. v. M.J.B.*, 748 A.2d 539, 550 (N.J. 2000) (adopting *de facto* parentage doctrine, under the name "psychological parentage," by judicial decision). This Court should reconsider its decision in *Janice M.* and join the

twenty other supreme courts in sister states that have recognized *de facto* parentage by judicial decision.[12]

IV. Determining the child visitation arrangement that would best protect Jaxon's best interests, in light of Brittany's attempt to sever Michelle and Jaxon's parent-child bond, is not an issue before this Court on appeal.

In her brief, Brittany attempts to argue to this Court, in the first instance, that visitation with Michelle would not be in Jaxon's best interests. But no determination of Jaxon's best interests has ever been made by any court in this case, and the merits of a best interests determination are not before this Court on appeal. Indeed, the circuit court's determination that Michelle is not Jaxon's parent meant that it was prohibited from even considering Jaxon's best interests, as Judge Nazarian bemoaned in his concurrence. *Conover v. Conover*, 224 Md. App. 366, 386 (2015) (Nazarian, J., concurring) ("[U]nlike every other divorce case with child visitation in dispute that I have encountered in my time on this Court, we don't, and can't, even reach the question of Jaxon's best

[12] As cited in Petitioner's principal brief, 20 of the total 26 states that recognize *de facto* parentage or an equivalent doctrine have done so by judicial decision. *See* Pet. Br. at 39 (citing *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995) (recognizing *de facto* parentage)); *id.* at 40 n.16 (identifying eight states that have adopted *H.S.H.-K.* factors or functional equivalent by judicial decision, one that adopted *de facto* parentage by judicial decision and later codified the *H.S.H.-K.* factors, and two more that have adopted the *H.S.H.-K.* factors by statute); *id.* at 51 n.19 (identifying ten states that have adopted a non-*H.S.H.-K.* definition of *de facto* parentage or an equivalent doctrine by judicial decision, and four that have done so by statute).

interest.") (emphasis omitted). The question of Jaxon's best interests must be resolved by the circuit court on remand.

Having prevented Michelle from seeing Jaxon while this case has been pending, Brittany now seeks to leverage her own denial of contact with Jaxon into a finding that it is too late to repair the interruption that she has caused in Jaxon's relationship with Michelle. This cynical attempt to "run out the clock" on Jaxon's childhood should be unequivocally rejected.[13]

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[13] The amount of time that this case has been pending cannot be laid at Michelle's feet. Michelle's unrebutted testimony was that, when Brittany cut off her visitation with Jaxon, Brittany also moved and left Michelle with no way to contact her directly for months. *See* E69. When Michelle learned Brittany's address upon being served with Brittany's complaint for divorce, she timely filed her counter-complaint asserting her parentage of Jaxon and seeking visitation. *See* E69; *see also* E8 (docket).

When the circuit court issued its interlocutory order rejecting Michelle's visitation claim, *see* E20, it was by no means clear whether that order was immediately appealable as an order "[d]epriving a *parent*, grandparent, or natural guardian of the care and *custody* of his child" under §12-303(3)(x) of the Courts & Judicial Proceedings Article (emphasis added), given that Michelle had sought only visitation and not "custody" of Jaxon, and that the crux of the circuit court's ruling was that Michelle was *not* Jaxon's "parent." *Cf. Sieglein*, 224 Md. App. at 238 (holding that interlocutory determination of parentage was appealable after subsequent final divorce judgment, although "not[ing], without deciding, that an interlocutory appeal pursuant to CJP § 12–303(3)(x)[] *may* have been an option") (emphasis in original). Michelle did not contest the grounds for divorce, and promptly noted a timely appeal when a final judgment was entered a few months later. *See* E9-10 (docket).

The case then remained pending in the Court of Special Appeals for nearly two years (and for over ten months after it was argued), despite the requirement that child access proceedings be expedited and that a decision in

Undoubtedly, the circuit court will have a challenging determination to make on remand in order to ensure that Michelle is reintegrated into Jaxon's life in a sensitive, deliberate, and appropriate way. But Maryland courts are not strangers to the practice of reunification of a parent and child. *Cf. In re Ashley S.*, 431 Md. 678, 686-87 (2013) (stating, in child-in-need-of-assistance case, that ordinarily "'the plan should be to work toward reunification, as it is presumed that it is in the best interest of a child to be returned to his or her natural parent'") (quoting *In re Yve S.*, 373 Md. 551, 582 (2003)).

Because Michelle is Jaxon's parent, she and Jaxon are entitled to a "presumption that the child's best interests are served by reasonable maximum exposure to both parents." *Boswell v. Boswell*, 352 Md. 204, 225 (1998). Both Michelle and Jaxon "have fundamental federal and state constitutional rights to the maintenance of the parent/child relationship." *In re Adoption/ Guardianship Nos. J9610436 & J9711031*, 368 Md. 666, 669 (2002).[14] To prevent

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a child access case be rendered by that court within 60 days after argument. *See* Md. Rule 8-207(a)(5).

It is a travesty that Michelle and Jaxon have had no contact for so long, but it is not a travesty of Michelle or Jaxon's making.

[14] The Court of Special Appeals has held that a "'child has a right to rely on the unique contribution of each parent to material and emotional support. *The child therefore has a fundamental interest in the continuation of parental care and support….*'" *In re Adoption/Guardianship No. 6Z970003*, 127 Md. App. 33, 50-51 (1999) ("*Justus K.*") (quoting *Bowen v. Gilliard*, 483 U.S. 587, 612 (1987) (Brennan, J., dissenting)) (emphasis in *Justus K.*). Although this Court has "not reach[ed]

the frustration of Jaxon and Michelle's right to a continued parent-child relationship, this Court should provide guidance to the circuit court on remand that the time that Michelle and Jaxon have been kept apart by Brittany cannot justify rebutting the legal presumption of Michelle's parentage, and that the determination of appropriate visitation between Jaxon and Michelle should be guided by the principles that "a fit parent who is temporarily gone for extended periods" nevertheless retains a fundamental right to a continued parental relationship with their child, *McDermott v. Dougherty*, 385 Md. 320, 430 (2005), and that courts should presume that a child's best interests are served by reasonable visitation with each parent. *Boswell*, 352 Md. at 225.

CONCLUSION

For these reasons, the decision of the Court of Special Appeals should be reversed.

Respectfully submitted,

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Dated: March 7, 2016

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the constitutional question," it has recognized "that a child ordinarily has an interest" in maintaining established "close familial relationship[s]." *In re Adoption/Guardianship No. T97036005*, 358 Md. 1, 16 (2000) (citing *Justus K.*).

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Jer Welter

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Pursuant to Md. Rules 1-321 and 8-502(c), I hereby certify that, on this 7th day of March, 2016, two copies of the Reply Brief of Petitioner were served on Respondent by first-class mail, postage prepaid, to her counsel of record at the following address:

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