

In the
Court of Appeals of Maryland

September Term, 2015

No. 79

MICHELLE L. CONOVER,

Petitioner,

v.

BRITTANY D. CONOVER,

Respondent.

On Writ of Certiorari to
the Court of Special Appeals

***Amicus Curiae* Brief of
The Women's Law Center of Maryland, Inc. et al.
in Support of Petitioner**

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STATEMENT OF THE CASE

The Women's Law Center of Maryland, Inc., joined by Planned Parenthood of Maryland (collectively, "*Amici*"), incorporates by reference the petitioner's statement of the case.¹

STATEMENT OF FACTS

Amici incorporate by reference the petitioner's statement of facts.

STATEMENT OF INTEREST

The Women's Law Center of Maryland, Inc. (WLC) is a non-profit, membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, employment law, family law and reproductive rights. Through its direct services and advocacy, the Women's Law Center seeks to protect women's legal rights and ensure equal access to resources and remedies under the law.

Among its other activities, the WLC operates the Family Law Hotline, staffed by Maryland attorneys. The Family Law Hotline attorneys do not represent callers in their family law cases, but may give callers the phone number of lawyer referral service in their area that may help them find an attorney. Hotline services are anonymous and available to men and women. The WLC also

¹ No person other than *Amici* and their attorneys made a monetary or other contribution to the preparation or submission of the brief.

administers the Baltimore County Judicare project, which pays attorneys reduced fees to represent men and women in contested custody hearings.

Planned Parenthood of Maryland (PPM), which joins in the WLC's brief, is a not-for-profit family planning agency that provides reproductive health care for women, men, and teens across the state regardless of ability to pay, gender identity, gender expression, or sexual orientation. PPM believes all people deserve high-quality, affordable health care and accurate, nonjudgmental sexual health information, no matter who they are or where they live. When people are truly cared for, they make their lives, their families, and their communities better and healthier. It is participating as an amicus in *Conover v. Conover* because it has long stood with the LGBTQ community - many of whom turn to Planned Parenthood for health care, information, and education - in the fight for full equality and believe the Petitioners position is in the best interest of families across the state.

STANDARD OF REVIEW

Statutory construction is a question of law that this Court reviews *de novo*. *Miller v. Mathias*, 428 Md. 419, 450, 52 A.3d 53, 71-72 (2012); *Moore v. State*, 388 Md. 446, 452-53, 879 A.2d 1111, 1114 (2005).

ARGUMENT

I. Petitioner's reading of Estates & Trusts § 1-208(b)(4) is correct.

Although *Amici* believe that petitioner's arguments on *de facto* marriage present no slippery slope for Maryland family law, *Amici* are mindful that the Court expressed such concerns in prior cases. See *Janice M. v. Margaret K.*, 404 Md. 661, 948 A.2d 73 (2008); *Koshko v. Haining*, 398 Md. 404, 921 A.2d 171 (2007). *Amici* therefore begin by stressing that petitioner's statutory arguments on Question 1 are correct, have a clear endpoint, and give effect to the will of the people of Maryland.

A. Through the Civil Marriage Protection Act, Marylanders protected the child-parent relationship without regard to gender or biology.

When Governor Martin O'Malley announced in 2011 that he was sponsoring marriage equality legislation, he began by stating: "Marylanders of all walks of life want their children to live in a loving, stable, committed home – protected under the law."² He publicly declared that "treating the children of families headed by same-sex couples with lesser protections under the law than the children of families headed by heterosexual parents[] is ... unjust."³ The General Assembly and the people of Maryland knew they were voting for that

² *Statements from Governor O'Malley and Lt. Governor Brown on Decision to Sponsor Same Sex Marriage Legislation in 2012 Legislative Session*, July 22, 2011.

³ John Wagner, *O'Malley, archbishop at odds over same-sex marriage, letters show*, WASH. POST, Aug. 8, 2011, <https://goo.gl/bJLBO8>.

principle when they approved the Civil Marriage Protection Act (“the Marriage Act”).⁴ The judgment for respondent does violence to the Marriage Act’s promise.

During the debate on the Marriage Act, Maryland legislators expressed that the purpose of the marriage equality bill was to protect same-sex parents’ rights and interests and thereby promote stability for their children – irrespective of biology or reproductive capabilities.⁵ It was clear, moreover, that they expected and intended for the Marriage Act’s expanded definition of marriage to apply to marital rights throughout the Maryland Code, irrespective of previous gender-specific provisions. Petitioner’s Brief at 36; Md. Code, Gen. Prov. § 1-201 (“Except as otherwise provided, a reference to one gender includes and applies to the other gender.”).

⁴ 2012 Md. Laws ch. 2, H.B. 438 (eff. Jan. 1, 2013), *approved by referendum*, Question 6 (Nov. 6, 2013).

⁵ *See* H.B. 438, H. Debate, 3d Reader, H. Proc. #28 at 1:01, 1:08–1:10 (Md. 2012 Reg. Sess., Feb. 17, 2012) (discussing the advantages of children being raised in a stable home in both same-sex and heterosexual couple households, highlighting that as a result of the bill, children of same-sex couples would be taken care of because they would have the same rights as children from traditional family homes, and stating that, “all of you that especially care about children” will hopefully vote yes, so that “as a state, all our children are going to have the same rights so that they can prosper in this state.”), *available at* <http://goo.gl/WTPeSm>.

B. Because marriage conveys rights under Estates & Trusts § 1-208(b)(4), marriage equality demands a gender- and biology-neutral construction.

Even if Estates & Trusts § 1-208(b)(4) once applied only to biological fathers, the principle of marriage equality dictates that petitioner is Jaxon's parent, not some mere third party. Section 1-208 provides in full:

(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:

(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.

Md. Code, Estates & Trusts § 1-208 (emphasis added).

Subsection (b)(4), unlike the other prongs of § 1-208, specifically conveys rights and obligations based on marriage. By finding that no subsection (b)(4) rights or obligations flowed from the fact of the Conovers' marriage, the Court of Special Appeals necessarily held that their marriage carried fewer rights and obligations vis-à-vis Jaxon than if they were both his biological parents in an opposite-sex marriage. The very purpose of the Marriage Act, however, was to offer same-sex couples the very same marital rights and obligations, particularly

with respect to children, enjoyed by opposite-sex couples who choose to marry – regardless of biological and reproductive differences. *Supra* § I.A.

It was the case when the voters approved the Marriage Act – and, at least under current technology, still is the case – that only one same-sex parent ordinarily could be a child’s biological parent. A wide range of factors could affect who would be the biological parent: fertility, health, personal choice, job demands, or health insurance. The Marriage Act was intended to allow a wide range of couples to achieve equality for their families through marriage. In a two-female relationship, for instance, one woman’s fertilized egg could have been implanted in the other through in vitro fertilization. The couple may have had multiple children, alternating which parent would be biologically related to each child.

The Marriage Act made each of these families a promise: the family would have equal rights and dignity under the law if the couple chose to marry. A ruling for respondent would turn the Marriage Act into a false promise. If a family wanted to preserve the child’s and the non-biological parent’s legal relationship in the event of divorce or death, it needed to take extra steps – such

as through adoption or estate planning.⁶ Such added legal burdens on same-sex couples and their families are incompatible with the Marriage Act.

C. Public policy favors a gender- and biology-neutral construction of Estates & Trusts § 1-208(b)(4).

There is no slippery slope if the Court makes the unremarkable holding that all marriages – regardless of gender, biology, reproductive ability, or reproductive choices – can convey parenthood rights under § 1-208(b)(4). Marriage is a union between *two* adults. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015). A spouse, who has helped to raise a non-biological child within a marriage and who has called that child his or her son or daughter, is not a *third* party.

Even if the Court were, like the Court of Special Appeals, to decline to reach constitutional challenges to the judgment for respondent,⁷ it is clear that the people of Maryland, in approving the Marriage Act by referendum, acted in the same spirit as the Supreme Court in its landmark marriage equality decisions. As the Supreme Court held, “marriage also affords the permanency

⁶ Although the parties’ marriage was a District of Columbia marriage that predated the Marriage Act, the Attorney General opined before their marriage that such a union would qualify as a marriage under Maryland law. 95 Md. Op. Att’y Gen. 3 (2010). This Court confirmed the correctness of the Attorney General’s opinion in *Port v. Cowan*, 426 Md. 435, 439, 44 A.3d 970, 973 (2012).

⁷ This Court of course has broad discretion to address these constitutional questions, notwithstanding ordinary principles of party presentation, in this case of exceptional public importance. *See* Md. Rule 8-131.

and stability important to children's best interests." See *Obergefell*, 135 S. Ct. at 2600. "[M]any same-sex couples provide loving and nurturing homes to their children, *whether biological or adopted*." *Id.* (emphasis added). The parent-child bond within a marriage is entitled to dignity, and does not hinge on that parent's reproductive capabilities or reproductive choices. Contrary to the Marriage Act, respondent suggests that individuals who are unable to traditionally bear children, who choose for their spouses to bear children, or who utilize alternative measures to become a parent have diminished rights as parents.

As petitioner highlights, under the ruling below the result of who is given parental rights completely changes depending on the parents' biology and sexual orientation. See Petitioner's Brief at 26 (citing *Mulligan v. Corbett*, 426 Md. 670, 680, 684, 45 A.3d 243, 249, 251 (2012); *Kamp v. Dept. of Human Services*, 410 Md. 645, 648, 980 A.2d 448, 450 (2009)). This unequal treatment of parents perversely de-values marriage as an institution by saying that same-sex married couples have a lesser form of marriage that does not automatically carry the rights and obligations that flow from marriage.

This matter cannot await a wholesale revision of the Maryland Code or some later constitutional challenge. Ironically, as set forth in petitioner's brief, Maryland legislators deemed such a rewrite unnecessary, given the rule of gender-neutral construction under Maryland Code, General Provisions § 1-201.

See Petitioner’s Brief at 36. Marylanders and their officials, including the Attorney General, have relied upon the understanding that no rewrite of the Code was necessary.⁸ Ever since 2011, following the Attorney General’s opinion correctly favoring comity for out-of-state same-sex marriages, the State Registrar has instructed county registrars that “if a mother (defined for the purpose of birth registration as the woman who delivers the child) indicates that she is married, information pertaining to her spouse, regardless of her spouse’s gender, is to be entered ... into the Electronic Vital Records System (EVRS) in the fields currently used to report the father’s information.”⁹

In six years since comity for out-of-state marriages and three years since the Marriage Act took effect, countless families have structured their lives on the assumption that their marriages were entitled to equal dignity and were sufficient to protect their children. Divorces and deaths have occurred in that time. The time that it takes for a legislative rewrite or for a test case is an eternity for a young child to be apart from Mommy, Momma, Daddy, or Papa. The best interest of the child is the touchstone of family law. There is no good reason for

⁸ Letter of State Registrar (Feb. 2011), *available at* <http://goo.gl/rjuwII>. For other examples, see 100 Md. Op. Att’y Gen. 105 (2015) (gender-neutral interpretation of adultery as statutory ground for divorce); Md. Att’y Gen., “The State of Marriage Equality in America” (April 2015).

⁹ 95 Md. Op. Att’y Gen. 3 (2010); *see Port*, 426 Md. at 439, 44 A.3d at 973.

this Court to hold – as did the courts below – that the child’s best interests are irrelevant.

II. The Court should recognize *de facto* parenthood.

Amici further urge the Court to reach Question 2 and recognize *de facto* parenthood. When the Court last addressed *de facto* parenthood in *Janice M.* in 2008, the legal landscape was fundamentally different. See *Conaway v. Deane*, 401 Md. 219, 238, 932 A.2d 571, 581 (2007). In light of the changes wrought by the Marriage Act and *Obergefell*, the Court should examine the question anew.

Many children in Maryland are living with and being raised by individuals who are not their biological parents. Children bond with and become deeply dependent on the adults who care for their physical and emotional needs. A parent-like relationship is intense and consuming. It includes day-to-day caretaking, such as feeding and bathing, emotional support to help the child navigate life and make good decisions and financial support ensure that basic needs are met. It is essential to a child’s well-being and development that the intertwined parental contributions of emotional and physical support remain consistent and stable throughout the child’s life.

Petitioner’s arguments would ensure that an individual who has established a high level of parent-like relationship with a child is afforded all the rights of a parent, such as visitation, as well as all the obligations, such as the

obligation for financial support. It is in the best interests of the children for the law to recognize their relationship with the adults who are parenting them because it protects their emotional and financial stability. The growing number of states embracing *de facto* parenthood shows that the concept is susceptible to judicially manageable standards. *See* Brief of Petitioner at 51 & n.19 (collecting authority). In the spirit of the Marriage Act, *Obergefell*, and the best interests of Maryland children, this Court should join the rising tide of jurisdictions recognizing *de facto* parenthood.

CONCLUSION

The Court should reverse the judgment below and remand for an evaluation of Jaxon's best interests, treating both petitioner and respondent as Jaxon's parents.

Respectfully submitted:



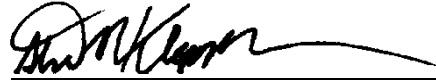
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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-1121

1. This brief contains 2,445 words, excluding the parts of the brief exempted from the word count by Rule 8-503.2.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

A handwritten signature in black ink, appearing to read "Steven M. Klepper", written over a horizontal line.

Steven M. Klepper