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 Maryland Family Law Professors and Additional Family Law Professors as *Amici Curiae*

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STATEMENT OF THE CASE

Amici incorporate by reference and adopt the Statement of the Case as stated in the Brief of Petitioner.

STATEMENT OF INTEREST OF AMICI CURIAE AND WHY AMICI CURIAE BRIEF IS DESIRABLE

Maryland law professor *amici* are law professors at University of Maryland Francis King Carey School of Law and University of Baltimore School of Law with expertise in family law and related fields, including parentage law and children's rights in Maryland. They are particularly well-suited to provide this court with information about parentage law in this State. As family law scholars and employees in Maryland, *amici* have a strong interest in ensuring that the law protects the parent-child relationships that children form with their parents, regardless of whether there is a biological or adoptive relationship between the parent and child. Maryland law professor *amici* include:

- Karen Czapanskiy, University of Maryland Carey School of Law[1]
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- Leigh Goodmark, University of Maryland Carey School of Law
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- Margaret Johnson, University of Baltimore School of Law
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- Odeana Neal, University of Baltimore School of Law
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- Dana Shoenberg, University of Baltimore School of Law

Additional family law professor *amici* are law professors from every region of the country with extensive expertise in parentage law and children's rights, and also are well-suited to provide this Court with information about the history of parentage law, as well as how courts across the country have decided cases involving non-biological parents and same-sex parents. As family law and child welfare scholars, *amici* have a strong interest in ensuring that the law protects the parent-child relationships that children form with their parents, regardless of whether there is a biological or adoptive relationship between the parent and child. Family law professor *amici* include:

- Janie R. Abrams, University of Louisville Brandeis School of Law
- Kerry Abrams, University of Virginia School of Law
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- Katharine T. Bartlett, Duke University School of Law

- Cynthia Grant Bowman, Cornell Law School
- Michael Boucai, SUNY Buffalo Law School
- Naomi R. Cahn, George Washington University Law School
- Nancy E. Dowd, University of Florida Levin College of Law
- Theresa Glennon, Temple University Beasley School of Law
- Cynthia Godsoe, Brooklyn Law School
- Joanna L. Grossman, Hofstra Law School
- Leslie J. Harris, University of Oregon School of Law
- Joan Heifetz Hollinger, University of California, Berkeley School of Law
- Melanie B. Jacobs, Michigan State University College of Law
- Courtney Joslin, University of California, Davis School of Law
- Douglas NeJaime, UCLA School of Law
- Julie Shapiro, Seattle University School of Law
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QUESTIONS PRESENTED

Amici incorporate by reference and adopt the Questions Presented as stated in the Brief of Petitioner.

STATEMENT OF THE FACTS

Amici incorporate by reference and adopt the Statement of the Facts as stated in the Brief of Petitioner.

STANDARD OF REVIEW

Amici incorporate by reference and adopt the Standard of Review as stated in the Brief of Petitioner.

ARGUMENT

Maryland, like all states, has taken numerous steps to assure that children born to unmarried couples are afforded "the same rights to support, care, and education" as children born to married couples. *See* Md. Code, Family Law § 5-1002(b)(1). Jaxon Conover is such a child. Conceived through use of anonymous donor insemination performed under the auspices of a Maryland fertility center, Jaxon was welcomed into the world by his two parents: Brittany Eckel Conover, who gave birth to him, and Michelle Conover, who participated in the process that led to his conception, was present at his birth, cared for him during his early childhood, and whose last name he bears. When two Maryland statutes – Md. Code, Est. & Trusts § 1-206(b) and § 1-208(b) – are read together, along with the jurisprudence of Maryland and other state courts, the Court should conclude that Michelle Conover is Jaxon's legal parent.

Md. Code, Est. & Trusts § 1-206(b)

Michelle and Brittany married when Jaxon was five months old. Had they married before Jaxon's birth, a gender-neutral reading of Maryland law would undoubtedly confer legal parentage on Michelle. *See* Md. Code, Est. & Trusts § 1-206(b) ("A child conceived by artificial insemination of a married woman with the consent of her husband is the legitimate child of both of them for all purposes. Consent of the husband is presumed."). Maryland's 2012 enactment of marriage equality legislation, confirmed by popular vote,

coupled with this Court's gender neutral reading of paternity statutes in *In re Roberto d.B.*, 399 Md. 267 (2007), make the gendered term applicable to either a male or female spouse of a married woman.

Md. Code, Est. & Trusts § 1-208(b)

Michelle and Brittany's failure to marry before Jaxon's birth does not foreclose adjudication of Michelle's parentage. Although Md. Code, Est. & Trusts § 1-206(b) on its face does not apply to an unmarried couple, that provision must be read in conjunction with § 1-208(b), the statute defining parentage of a child born outside marriage. Maryland policy requires parity of treatment for children of married and unmarried couples, and § 1-208(b)(1)-(4) operationalizes that policy.

With otherwise identical facts to the case at bar, had Michelle - Brittany's partner at the time of conception - been a man, that man would be Jaxon's father because he met the requirements of Md. Code, Est. & Trust § 1-208(b)(2), (3), and (4). Because this Court has already determined that "the paternity statutes in Maryland must be construed to apply equally to both males and females," *In re Roberto d.B.*, 399 Md. at 283, Michelle must similarly be adjudicated Jaxon's parent.

In the four decades since enactment of Md. Code, Est. & Trusts § 1-206(b), two categories of changes have taken place. The first is scientific, with greatly expanded methods of conception the drafters of Md. Code, Est. & Trusts § 1-206(b) could not have foreseen. The second is social, with a proliferation of family forms those drafters also could not have anticipated. This Court recognized almost a decade ago, in *In re Roberto d.B.*, 399 Md. at 284, that, although updated legislative action would be welcome, existing

statutes enable appropriate determination of a child's parentage in this changed world. Last year, in *Sieglein v. Schmidt*, 224 Md. App. 222, *cert. granted*, 445 Md. 487 (2015) the Court of Special Appeals considered a previously unimagined assisted conception method – in vitro fertilization – and properly interpreted section 1-206(b) to confer parentage on a man who allowed his wife to use that method to bear a child. *Id.* at 227-28.

Amici ask this Court to consider a family form unanticipated in 1968[2] – a lesbian couple, married or unmarried, who together chose to become parents – and to properly apply Md. Code, Est. & Trusts § 1-206(b) in conjunction with Md. Code, Est. & Trusts § 1-208(b) to recognize that Jaxon has two legal mothers.

I. MICHELLE IS JAXON'S PARENT PURSUANT TO MARYLAND CODE, ESTATES AND TRUSTS §§ 1-206(B) AND 1-208(B)(2), (3), AND (4)

A. Maryland Code, Estates and Trusts § 1-206(b) Applies to Married Lesbian Couples

Parentage can be established under either the Family Law Article or the Estates and Trusts Article of the Maryland Code. *See Mulligan v. Corbett*, 426 Md. 670, 677 (Md. 2012) ("The Estates and Trusts Article provides independent authority by which the Court may make a paternity determination"). As this Court acknowledged in *In re Roberto d.B.*, the paternity statute in the Family Law Article "did not contemplate anything outside of

[2] The proposal to adopt Md. Code, Est. & Trusts §1-206(b) first appeared in the Second Report of the Governor's Commission to Review and Revise the Testamentary Law of Maryland, dated December 5, 1968. Shale D. Stiller and Roger D. Redden, *Statutory Reform in the Administration of Estates of Maryland Decedents, Minors and Incompetents*, 29 Md. L. Rev. 85, 87 (1969) ("*Statutory Reform in the Administration of Estates of Maryland Decedents*"). The provision itself, with only slight modification, was enacted in March, 1969. *Id*. at 88.

traditional childbirth" and "does not provide for a situation where… children are conceived using an assisted reproductive technology." 399 Md. at 279. This case concerns the Estates and Trusts Article, which specifically addresses assisted conception, albeit in terms reflective of the era of its enactment over four decades ago.[3] Section 1-206(b) provides that "a child conceived by artificial insemination of a married woman with the consent of her husband is the legitimate child of both of them for all purposes. Consent of the husband is presumed." Md. Code, Est. & Trusts § 1-206(b).

Jaxon William Lee Eckel Conover was born on April 4, 2010. E14. He was conceived under the auspices of Shady Grove Fertility Center by anonymous donor artificial insemination[4] of Brittany Conover (then Brittany Eckel),[5] who at the time was in a nine-year unmarried relationship with Michelle Conover. E14. Had Brittany and

[3] At the time of its enactment, Md. Code, Est. & Trusts § 1-206(b) was a forward-thinking policy decision, closely tracking one of the "liberal provisions" in the 1967 Boulder draft of the Uniform Probate Code. *See* Nat'l Conf. of Comm. on Unif. State L., Third Working Draft Uniform Probate Code with Comments 10 (Nov. 1967). To contemporary sensibilities, such a rule seems unobjectionable, even unnecessary. Yet in the decades leading up to enactment of Md. Code, Est. & Trusts Code § 1-206(b), it was widely understood that a child conceived through artificial insemination, and thereby genetically unrelated to his/her mother's husband, was illegitimate.

[4] "Artificial insemination" is an archaic phrase, no longer in use in modern fertility centers, where the common term is "intrauterine insemination." S*ee* Shady Grove Fertility, https://www.shadygrovefertility.com/ (last visited Feb. 24, 2016). Modern legislation uses "intrauterine insemination" and, commonly, the more inclusive term "assisted reproduction." *See, e.g.*, Me. Rev. Stat. tit. 19-A § 1921 (2015). This Brief retains the use of "artificial insemination" to maintain consistency with the Maryland statute.

[5] At the time of Jaxon's conception and birth, Brittany's surname was Eckel. She changed her name upon marrying Michelle Conover. For simplicity, this Brief refers to her as Brittany Conover.

Michelle married before Jason's conception, Jaxon would unquestionably be Michelle's child by operation of the above provision because the use of the term "husband" in § 1-206(b) must, under current law and policy, include a married woman's female spouse.

At the time of the statute's enactment in 1969, a woman could not have a female spouse. That has changed. In 2011, the State Registrar issued a letter instructing Maryland Birth Registrars to record the female spouse of a married woman bearing a child on that child's birth certificate.[6] *See* Letter from Geneva Sparks, State Registrar and Deputy Director, Maryland Vital Statistics Administration to Birth Registrar (Feb. 10, 2011).[7] That policy remains in effect today. The Maryland Vital Statistics Administration website provides the form given to a birth mother with a female spouse that results in the issuance of a birth certificate identifying both the birth mother and her spouse as the parents of the child. *See* Maryland Department of Health and Mental Hygiene Vital Statistics Administration Form.[8]

Maryland's recognition of two mothers on a child's birth certificate pre-dates the 2012 Civil Marriage Protection Act. *See* The Civil Marriage Protection Act, 2012 Md.

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[6] These instructions followed the February 2010 opinion of Attorney General Douglas Gansler that this Court would likely recognize a same-sex marriage validly contracted in another jurisdiction. Maryland Attorney General Opinion: Marriage – Whether Out-of-State Same-sex Marriage that is Valid in the State of Celebration may be Recognized in Maryland (Feb. 23, 2010), http://www.oag.state.md.us/Opinions/2010/95oag3.pdf.

[7] *Available at* http://www.lambdalegal.org/sites/default/files/legal-docs/downloads/exec_md_20110210_ss-spouse-instructions-to-facilities.pdf.

[8] *Available at* http://dhmh.maryland.gov/vsa/Documents/EBR/Hospital%20Worksheets/Same_sex_mothers_worksheet.pdf.

Laws ch. 2. That Act, by which the legislature voted to allow same-sex couples to marry within Maryland effective January 1, 2013, confirms the equal status of husband/wife and wife/wife couples.[9] Just as any references to "husband" and "wife" in Maryland law[10] must now be read to encompass same-sex spouses, so too must any reference to "father" or "mother" be ready to encompass same-sex parents.

This Court should now acknowledge that the reference to "husband" in Md. Code, Est. & Trusts § 1-206(b) includes a female spouse of a married woman who conceives through artificial insemination. Such an interpretation is required by the Civil Marriage Protection Act, by this Court's gender neutral reading of the paternity statutes in *In re Roberto d.B.*, 399 Md. at 281-82, and by the Equal Protection Clause of the United States Constitution. *See Roe v. Patton*, No. 2:15-cv-253, 2015 WL 4476734, at *4 (D. Utah July 22, 2015) (enjoining Utah from differentiating between male and female spouses of a woman who gives birth through assisted conception using donor sperm, finding that the State had no rational basis for its position and that it therefore violated Equal Protection). Such an interpretation is in keeping with the court rulings in other states whose statutes also use gender specific terms. *See, e.g.*, *Della Corte v. Ramirez*, 961 N.E.2d 601, 603 (Mass. App. Ct. 2012) (applying husband/wife artificial insemination statute to find

[9] The legislation was subject to popular referendum in November 2012 where it was approved by 52.4% of the electorate. *See Maryland Question 6: Allow Same-Sex Marriage*, CNN (Dec. 10, 2012, 10:52 AM), http://www.cnn.com/election/2012/results/state/MD/ballot/01/.

[10] *See, e.g.*, Md. Code, Family Law § 4-206 (Effect on third person of property transfer from husband to wife).

parentage for the birth mother's wife because "we do not read 'husband' to exclude same-sex married couples"); *G.M. v. G.M.*, 985 N.Y.S.2d 845, 855, 858 (2014) (holding that, even though the same-sex couple's written consent was not notarized as required, the birth mother's wife was the legal parent of the child); *Barse v Pasternak*, No. HHBFA1240305418, 2015 WL 600973, at *11 (Conn. Super. Jan. 16, 2015) (assuming husband/wife artificial insemination statute would apply to married lesbian couples and holding that, notwithstanding unfiled written consent, the birth mother's wife was the legal parent of the child).

B. Maryland Code, Estates and Trusts § 1-208(b) Applies To Unmarried Lesbian Couples Who Use Artificial Insemination

Maryland Code, Est. & Trusts § 1-206(b) establishes that, when artificial insemination is used, the spouse of a married woman need not be genetically related to her child to be that child's legal parent. That provision is not the sole way to establish parentage under the Estates and Trusts Article. Maryland Code, Est. & Trusts § 1-208 identifies the criteria for determining the parentage of a child born to an unmarried couple. That section must be read in parity with Md. Code, Est. & Trusts § 1-206(b). Where an unmarried couple together decides to use artificial insemination to bear a child, and the genetically unrelated partner fulfills at least one of the four criteria in Md. Code, Est. & Trusts § 1-208(b), then the resulting child is the child of both partners.

Michelle Conover easily satisfies § 1-208(b)'s criteria. She acknowledged in writing that she is Jaxon's parent. E51. She "subsequently married the mother and has asknoweldged" herself to be a mother. *See* Petitioner's Brief at 10-17. Importantly, she

"openly and notoriously recognized" Jaxon to be her child. Michelle and Brittany sought the services of Shady Grove Fertility together. E53-54. They were both present when Jaxon was born. Michelle served as a stay at home parent for Jaxon. E56, 58-60. Prior to marriage, Brittany and Jaxon referred to Michelle as "daddy" or "dada". E57. After Brittany and Michelle married, both continued to hold Michelle out to the community as Jaxon's parent. *See* E58. And Michelle's role as mother to Jaxon was not limited to the home. She testified she "attended everything with [Jaxon]." *See* E58. For example, Michelle would pack Jaxon's bags, get him ready for outings, change him, feed him; things a parent typically would do for their child. *See* E58. Michelle stated, "[E]veryone could tell we were together, that we were parents and Jaxon just clings to me." E58. Michelle testified that, even after she and Brittany separated, Brittany continued to hold Michelle out as Jaxon's parent. *See* E58-59. Brittany testified that she openly referred to Michelle as "daddy" in public from Jaxon's birth until June 2012. E84, E100. Thus, Michelle Conover "openly and notoriously recognized" Jaxon to be her child. *See* Md. Code, Est. & Trusts § 1-208(b)(3); *Hall v. Coates*, 62 Md. App. 252, 260 n.3 (1985) (a man who lives with the mother and raises the children with her has openly and notoriously recognized the children).

The use of the gendered term "father" in § 1-208(b) is no more a bar to this action than the term "husband" in § 1-206(b). Many lesbian couples, married and unmarried, use artificial insemination to conceive a child. Ruling that Michelle is not Jaxon's parent would violate one of the most basic public policies of this state – that a child receive care and support from both his parents, regardless of whether those parents marry.

A concordant reading of Md. Code, Est. & Trusts §§ 1-206(b) and 1-208(b) provides the "liberal construction" mandated by Md. Code, Est. & Trusts § 1-105(a). Section 1-208(b) closely tracks the language proposed by the Second Report of the Governor's Commission to Review and Revise the Testamentary Law of Maryland. The provision's legislative history includes the Commission's Comment that section 1-208 "reflects the modern policy in the direction of mitigating the impact of illegitimacy." *See* Second Report of the Governor's Commission to Review and Revise the Testamentary Law of Maryland, Article 93: Decedent's Estate 65 (Dec. 5, 1968). While the Governor's Commission was developing its proposals, the U.S. Supreme Court, in *Levy v. Louisiana*, 391 U.S. 68 (1968), determined for the first time that invidious discrimination between children born to a married woman and children born to an unmarried woman constitutes a violation of the Equal Protection Clause of the U.S. Constitution. By applying section 1-208(b) to a determination of the parentage of a child born to an unmarried couple using assisted conception, the "modern policy" advocated by the Governor's Commission can be fulfilled and the distinction between children of assisted conception born to married couples and those born to unmarried couples can be minimized.

Construing Md. Code, Est. & Trusts §§ 1-206(b) and 1-208(b) together will align Maryland law with current model laws and the laws of jurisdictions whose legislatures have updated their probate or family law codes to reflect contemporary methods of assisted conception and family forms. The current Uniform Probate Code recognizes a parent-child relationship between a child of assisted conception and an individual – male or female, married or unmarried – who consented to the child's conception with the intent to be the

child's parent.[11] So does the American Bar Association Model Act Governing Assisted Reproductive Technology.[12] The current Uniform Parentage Act recognizes an unmarried man and woman who have a child by assisted conception as the legal parents of that child.[13] Several states now have marital status-neutral consent to insemination statutes, most of which apply to both same-sex and different-sex unmarried couples.[14]

[11] *See* Unif. Probate Code § 2-120(f) (2010) ("a parent-child relationship exists between a child of assisted reproduction and an individual . . . who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child").

[12] *See* Model Act Governing Assisted Reproductive Technology, Art. 6 § 603 (2008), http://apps.americanbar.org/family/committees/artmodelact.pdf ("An individual who provides gametes for, or consents to, assisted reproduction by a woman . . . with the intent to be a parent of her child is a parent of the resulting child.")

[13] *See* Unif. Parentage Act § 703 (2002). A committee of the Uniform Laws Commission is currently working on amendments to the Uniform Parentage Act that will encompass same-sex couples. http://www.uniformlaws.org/shared/docs/parentage/2015nov23_AUPA_Draft%20Cmte%20resolution.pdf

[14] *See* Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 Fam. L. Q. 495, 504-505 (2014) (listing eight states). Two additional states are California, Cal. Family Code §7613(a) ("If a woman conceives through assisted reproduction with semen or ova or both donated by a donor not her spouse, with the consent of another intended parent, that intended parent is treated in law as if he or she were the natural parent of a child thereby conceived.") and Maine, effective July 1, 2016. Me. Rev. Stat. tit. 19-A § 1923 (2015) ("A person who . . . consents to assisted reproduction by a woman as provided [by this subchapter] with the intent to be a parent of the child is a parent of the resulting child.").

C. A Gender Neutral Reading of Maryland Code, Estates and Trusts §§ 1-206(b) and 1-208(b) is Necessary to Avoid Constitutional Infirmity Under the Maryland Equal Rights Amendment

The outcome urged by *amici* here is required by the Maryland Equal Rights Amendment, Maryland Constitution, Declaration of Rights, Art. 46, and by this Court's determination in *In re Roberto d.B.* that "because Maryland's E.R.A. forbids the granting of more rights to one sex than to the other, in order to avoid an equal rights challenge, the paternity statutes in Maryland must be construed to apply equally to males and females." 399 Md. at 283. In that case, a woman who gave birth to a child but was not that child's genetic parent, sought to challenge her parentage using the statutory scheme available to a man challenging his parentage. Although the statutes were written in gendered terms, this Court ruled that "the language of the paternity statutes need not be rewritten. Interpreting the statute to extend the same rights to women and maternity as it applies – and works quite well – to men and paternity is all that is required." *Id.* at 284.

The *Roberto d.B.* Court did not limit its ruling to *denials* of parentage. Rather, it indicated that "[u]nder the provisions set forth in this case, a *later-determined* mother's name could also be *added* to the [birth] certificate." 399 Md. at 278 n.12 (emphasis added). That is precisely what Michelle Conover seeks. Were this Court to disallow Michelle's assertion of parentage using the criteria available to a man under Md. Code, Est. & Trusts § 1-208(b), the Equal Rights Amendment would certainly be implicated because that grant of benefits to one sex (men) and not the other (women) would be "without substantial basis." *See Roberto d.B.*, 399 Md. at 279-80.

Thus, the Court should read Md. Code, Est. & Trusts §§ 1-206(b) and 1-208(b) together and find that Michelle is Jaxon's parent.

II. MARYLAND SHOULD JOIN NUMEROUS OTHER STATES THAT HAVE HELD THAT A CHILD BORN TO A LESBIAN COUPLE USING ASSISTED CONCEPTION CAN HAVE TWO LEGAL PARENTS, BOTH WOMEN

When determining the parentage of children born of assisted conception, courts in many jurisdictions have interpreted their statutes to harmonize legal requirements with familial reality. Maryland is not alone in having statutes enacted long before many assisted reproductive technology techniques in use today and long before same-sex couples could stand proudly among their neighbors and embrace the joys and responsibilities of raising children. As the cases below show, courts around the country have implemented various means of finding parentage for lesbian couples who engage in artificial insemination, even when statutory framework is not, on its face, a perfect fit.

Courts in many states that have statutes similar to Md. Code, Est. and Trusts §1-208(b)(3), presuming the parentage of an unmarried man who holds out the child as his own, have applied their statutes gender neutrally to unmarried partners who have children through assisted reproduction. A recent New Hampshire Supreme Court case is instructive. In *In re Guardianship of Madelyn B.*, 98 A.3d 494 (N.H. 2014), Melissa and Susan, two unmarried women in a long-term relationship, decided to have a child together. *Id.* at 496. Melissa became pregnant via an anonymous donor and gave birth to Madelyn, who lived with the couple until she was six years old when the couple's relationship ended. Initially

the parties agreed on a visitation schedule and Susan paid weekly child support. Eventually, Melissa cut off Susan's visitation. *Id.*

Susan filed a petition to obtain parental rights. *Id.* at 497. The trial court dismissed the petition. On appeal, the court interpreted the statute providing that "a man is presumed to be the father of a child if . . . (d) [w]hile the child is under the age of majority, he receives the child into his home and openly holds out the child as his child." *Id.* at 498. The court looked to other states that had applied the "holding out" provision with male pronouns equally to females in the context of a lesbian couple who used artificial insemination. *Id.* at 499 (citing cases).

The court interpreted the statute in light of its overall purpose, which included an "implicit legislative preference for the recognition of two parents." *Id.* at 500. It determined that a child's second parent under the statute could be a woman, notwithstanding that only male pronouns were used and the lack of a biological connection between parent and child. *Id.* at 501; *see also Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005) (where California's artificial insemination statute applied only to a husband and wife, the unmarried lesbian partner of a woman who gave birth to twins was the children's legal parent under the state's "holding out" presumption, where she actively planned for the children, received them into her home, and held them out as her own); *Frazier v. Goudschaal*, 295 P.3d 542 (Kan. 2013) (where Kansas artificial insemination statute applied only to husband and wife, and lesbian couple had two children via artificial insemination and raised them together, non-biological mother had standing to assert her claim as their presumptive mother).

In *St. Mary v. Damon*, 309 P.3d 1027 (Nev. 2013), the Nevada Supreme Court reversed a trial court order that assumed that a child born of artificial insemination could not have two mothers. *Id.* at 1032-33. There, a lesbian couple decided to raise a child together as equal parents; one mother gave birth to a child conceived *in vitro* using her partner's egg. *Id.* at 1029-30. The high court refused to read Nevada's parentage statutes "as conveying clear legislative intent to deprive a child conceived by artificial insemination of the emotional, financial, and physical support of an intended mother who 'actively assisted in the decision and process of bringing [the child] into the world.'" *Id.* at 1033 (citation omitted).

Additionally, given the prevalence of older artificial insemination statutes, like Maryland's, enacted without same-sex and unmarried couples in mind, it is unsurprising that many state courts have looked to equality principles to appropriately adjudicate the parentage of a child born of assisted conception to an unmarried lesbian couple. For example, in *Shineovich v. Kemp*, 214 P.3d 29 (Or. App. 2009), an Oregon appellate court confronted a dispute very much like the case at bar. A lesbian couple in a ten-year relationship decided to have two children, conceived through unknown donor insemination. *Id.* at 32-33. When the couple separated and the birth mother opposed the non-biological mother's relationship with the children, the non-biological mother claimed parentage under the state statute providing that a husband who consents to his wife's insemination is a father. *Id.* at 33-34. The court held that, to save the statute from

constitutional infirmity, it had to be applied equally to an unmarried woman who consented to her female partner's insemination. *Id.* at 39-40.[15]

In a Florida case, *D.M.T. v. T.M.H.,* 129 So. 3d 320 (Fla. 2013), the assisted conception statutes did not contemplate an unmarried female couple conceiving a child using the egg of one woman, fertilized in vitro, and implanted into the other woman, who bore the child for the couple to raise together. D.M.T. and T.M.H. used that method to add a child to their family, using T.M.H.'s egg. *Id.* at 327. When their relationship ended, the birth mother insisted that she was the child's only legal parent under a strict application of Florida's statutes on assisted reproduction, which made T.M.H. a donor with no parental rights. *Id.* at 330. As applied to this lesbian couple and their deliberate plan to raise the child as two mothers, the Florida Supreme Court determined that such a ruling would violate T.M.H.'s constitutional rights and that therefore both women were the legal parents of the child. *Id.* at 340-41.

In a Tennessee case, *In re C.K.G.,* 173 S.W.3d 714 (Tenn. 2005), an unmarried heterosexual couple in their mid-forties, Cindy and Charles, decided to have children together. *Id.* at 716-17. They used a Nashville fertility center and conceived in vitro using donor eggs and Charles' sperm. *Id.* at 717. The embryos were implanted in Cindy, who

[15] In a subsequent case, the Oregon court limited its holding to same-sex couples who would have married had marriage been available to them. *See In re Madrone,* 350 P.3d 495, 496 (Or. App. 2015). That limitation has no bearing in this case, as Brittany and Michelle married shortly after Jaxon's birth. E14. In addition, Oregon has no statute such as Md. Code, Est. & Trusts § 1-208(b), leaving the court without the option of applying such a statute to determine the parentage of a child born to an unmarried couple using assisted conception.

gave birth to triplets but had no genetic connection to the children. When a dispute concerning custody of the children arose a year later, Charles asserted that Cindy's lack of genetic connection meant that she was not a legal parent of the children. *Id.* at 718-19.

Tennessee had an artificial insemination statute like Maryland's, providing for the parentage of a non-genetic husband consenting to his wife's insemination. Reasoning that the artificial insemination statute "reflects a policy which favors taking into account intent in establishing parentage when technological assistance is involved," *id.* at 728, the court held that Cindy was a legal parent. *Id*. at 730.

As these courts across the country have held, construing parentage and artificial insemination statutes in ways that recognize familial realities further the purposes of parentage statutes and protect the children of assisted reproductive technology by safeguarding established child-parent relationships. Maryland's statutory framework allows this Court to follow these examples.

III. IF THIS COURT DETERMINES THAT MICHELLE CONOVER IS NOT JAXON'S PARENT, THEN MICHELLE AND BRITTANY'S JOINT DECISION TO USE UNKNOWN DONOR ARTIFICIAL INSEMINATION TO CREATE A CHILD TO RAISE TOGETHER ESTABLISHES THE "EXCEPTIONAL CIRCUMSTANCES" REQUIRED TO JUSTIFY A BEST INTERESTS HEARING ON MICHELLE'S VISITATION RIGHTS WITH JAXON

If, as *amici* urge, this Court finds that Michelle is Jaxon's legal parent pursuant to Md. Code, Est. & Trusts §§ 1-206(b) and 1-208(b), then this Court need not reach the doctrine, established in *Janice M. v. Margaret K.*, 404 Md. 661 (2008), that a *de facto* parent must nonetheless prove exceptional circumstances before obtaining a best interests hearing on custody or visitation. If the Court finds, however, that Jaxon has only one legal

parent, then it must revisit *Janice M.* In that instance, the Court should hold that two equally important legal consequences flow from a couple's joint decision to use assisted conception: the non-biological mother has established "exceptional circumstances" sufficient to allow a hearing to proceed on whether an award of custody or visitation is in the child's best interests; and the non-biological mother has an obligation to support the child she participated in creating.

The intentional creation of a human being is a decision of overwhelming, indeed existential, importance. When two people choose anonymous donor artificial insemination, they assume the legal obligation to care for and support that child; the donor has no legal responsibilities or claims to the child. If the question of Jaxon's parentage had arisen in the context of a petition by Brittany to obtain a child support order – or by the County seeking to recoup some of the expense of public assistance - this Court would be justified in determining that Jaxon would not have been born but for Michelle's joint participation in his conception, and that therefore Michelle could not deny her responsibility to financially support Jaxon. *See Elisa B.*, 117 P.3d at 670 (affirming child support order for twins born of consensual artificial insemination of one partner in a long-term lesbian relationship).

Similarly, Jaxon William Lee Eckel Conover would not exist but for the joint decision of Brittany and Michelle. They consulted Shady Grove Fertility Center together. E14. Together they discussed their plans and values for raising a child. E54-55. They selected a donor based on qualities they agreed upon, including features that resembled Michelle. E55-56. Brittany could have given birth to a different child at a different time;

many parents have multiple children under varying circumstances. But *this* child was born because Brittany and Michelle jointly chose to have a child together and pursued an option – anonymous donor insemination – that gave no one else the right to raise Jaxon or the obligation to support him. This is the very essence of an "exceptional circumstance."

Illinois follows the path urged here. In *In re T.P.S.*, 978 N.E.2d 1070 (Ill. App. Ct. 2012), an Illinois appellate court extended the reasoning of *In re Parentage of M.J.*, 787 N.E.2d 144, 150, 152 (Ill. 2003), to a dispute similar to this one. Cathy and Dee were an unmarried lesbian couple for four years when, in 2004, they decided to have two children using artificial insemination. They agreed that Dee would carry the children. Like Michelle Conover, Cathy participated in the artificial insemination process, was present at the birth of the children, and stayed home with them after they were born. When the younger child was 13 months old, the couple's relationship ended. When Cathy later sought custody and visitation, the trial court dismissed her petition. *Id.* at 1072.

The appeals court acknowledged that Cathy's relationship with the children fell outside Illinois parentage statutes, which included a provision making a consenting husband the parent of a child born to his wife using artificial insemination.[16] The Court continued:

> Without an express legislative intent, we will not assume that the legislature intended for the children born to unmarried couples through the use of reproductive technology to have less security and protection than that given to children born to married couples whose parentage falls within the purview of the Illinois Parentage Act.

[16] Notably, Illinois lacked any provision like Maryland's conferring parentage on a man "openly and notoriously" recognizing a child as his own.

Id. at 1077. The court concluded that "not only may parental responsibility be imposed but also *parental rights* may be asserted based on conduct evincing actual consent to the artificial insemination procedure by an unmarried couple along with active participation by the non-biological partner as a coparent." *Id.* at 1079. It therefore remanded the case to the trial court for a determination of custody and visitation based on the best interests of the children.

In Maryland, the "exceptional circumstances" doctrine allows a person who is not a legal parent to obtain custody and visitation based on a child's best interests. Should this Court conclude that Michelle is not Jaxon's legal parent, it should hold that Brittany and Michelle's joint decision to conceive a child using artificial insemination, and Michelle's role as Jaxon's parent after Jaxon's birth, constitute such exceptional circumstances.

CONCLUSION

For the reasons stated herein, amicus respectfully request the Court reverse the Court of Special Appeals and apply Md. Code, Est. & Trusts §§ 1-206(b)and 1-208(b) to find that Jaxon Conover has two legal parents.

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Respectfully submitted,

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APPENDIX OF PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment 14, Section 1 (Equal Protection Clause)

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Maryland Declaration of Rights, Article 46. The Equal Rights Amendment ("ERA")

> Equality of rights under the law shall not be abridged or denied because of sex.

Maryland Code, Estates and Trusts §1-105 Purpose of law; construction and application of article

> **In general**
>
> (a) The purpose of the estates of decedents law is to simplify the administration of estates, to reduce the expenses of administration, to clarify the law governing estates of decedents, and to eliminate any provisions of prior law which are archaic, often meaningless under modern procedure and no longer useful. This article shall be liberally construed and applied to promote its underlying purpose.
>
> **Rebuttable presumption of fact**
>
> (b) Unless otherwise expressly provided, whenever the estates of decedents law states that a fact is presumed, the presumption is rebuttable.

Maryland Code, Estates and Trusts § 1-206. Legitimacy of child

Child born or conceived during marriage

(a) A child born or conceived during a marriage is presumed to be the legitimate child of both spouses. Except as provided in § 1-207 of this subtitle, a child born at any time after his parents have participated in a marriage ceremony with each other, even if the marriage is invalid, is presumed to be the legitimate child of both parents.

Child conceived by artificial insemination of married woman

(b) A child conceived by artificial insemination of a married woman with the consent of her husband is the legitimate child of both of them for all purposes. Consent of the husband is presumed.

Maryland Code, Estates and Trusts § 1-208. Children of unmarried parents.

In general

(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.

Paternity of child

(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.

Maryland Code, Family Law § 5-1002. Legislative findings; purpose

In general

(a) The General Assembly finds that:

(1) this State has a duty to improve the deprived social and economic status of children born out of wedlock; and

(2) the policies and procedures in this subtitle are socially necessary and desirable.

Purpose

(b) The purpose of this subtitle is:

(1) to promote the general welfare and best interests of children born out of wedlock by securing for them, as nearly as practicable, the same rights to support, care, and education as children born in wedlock;

(2) to impose on the mothers and fathers of children born out of wedlock the basic obligations and responsibilities of parenthood; and

(3) to simplify the procedures for determining paternity, custody, guardianship, and responsibility for the support of children born out of wedlock.

Scope of subtitle

(c) Nothing in this subtitle may be construed to limit the right of a putative father to file a complaint to establish his paternity of a child.

Me. Rev. Stat. tit. 19-A § 1921 (2015). Scope of subchapter

This subchapter does not apply to the birth of a child conceived by means other than assisted reproduction.

Me. Rev. Stat. tit. 19-A § 1923 (2015). Parentage of child of assisted reproduction.

A person who provides gametes for and consents to or a person who consents to assisted reproduction by a woman as provided in section 1924 with the intent to be the parent of a resulting child is a parent of the resulting child.

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 6000 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.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of February, 2016, two copies of the Brief of Maryland Family Law Professors and Additional Family Law Professors as *Amici Curiae* were served on Petitioner and Respondent by first-class mail, postage prepaid, to counsel of record at the following addresses:

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