In the Court of Appeals of Maryland

Petition Docket No. _____

September Term, 2015

Michelle L. Conover,

Petitioner,

v.

Brittany D. Conover,

Respondent.

Brief in Opposition to Petition for Writ
of Certiorari to the Court of Appeals

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COUNTERSTATEMENT OF FACTS

ARGUMENT

I. The Presumption Set Forth In Md. Code (1974, 2011 Repl. Vol.), Estates & Trusts ("ET"), § 1-208(b) Has No Application To This Case, As Michelle Is Not The "Father" Of Jaxon.

Judge Dwyer correctly determined that Michelle was not Jaxon's "father" and that therefore, she could not establish parental standing under ET § 1-208(b). The Court of Special Appeals properly affirmed. Michelle has changed her name to "Michael" by judicial decree since the case began. She/he explains in footnote three of her/his Petition of Writ of Certiorari.

> "Petitioner is a transgender man; in other words, although he was born biologically female, his gender identity (i.e., his deeply-held core sense of his own gender) is male. However, because Petitioner had not transitioned to living as a man when the circuit court ruled, the record does not reflect his identity as a transgender man. For clarity and consistency with the record and the legal issues as they were presented in the courts below, this petition refers to Petitioner, outside of this footnote, using female pronouns and his former name, Michelle…"

Jaxon, the child caught up in the middle of this firestorm, is but five years old. He would understand none of this, including the term “transgender man”.

Should Michelle have her way with the court, she would have a court order backed by the full powers of the court enabling her to walk down the sidewalk to Jaxon’s home, knock on the door with police behind her, and with court papers in hand announce that she is there for visitation with Jaxon and take him off for overnight visitations; for two weeks in the summer, for holidays and birthdays, etc. She will be attending back to school night at his school; PTA meetings. Other parents will be going home and having discussions behind closed doors. “Little pitchers have big ears.” Other five year old children in his class are going to be picking up terms easier for them to say in the colloquial vernacular. The term “transvestite” may be too long for them to say. We can almost guess at the other terms they’ll hear their father or mother say.

Children can be cruel (they are not politically correct) and on the playground and on the school bus they are going to taunt him “Your father’s a _____. Ha Ha Ha.” They’ll sing it with a sing-song ring as children do. They will bully him. Little children will think if his father is thus and so, he must be one too. They’ll think it is somehow passed on. They will shun him. The teacher will have her hands full. The hearts of little children are impacted by the pressure that’s been put

on the legislatures and the courts to bend over backwards to be politically correct. All in the name of "equality". And those running point for political correctness want it all. They would use this case to twist the arm of the Maryland Court of Appeals and the Maryland Legislature to march to their tune and whether little Jaxon likes it or not, he can just learn to live with it!

Michelle, whom the record below reflects was physically abusive to Brittany throughout the years of their relationship, has now taken a battle that began in the bedroom to the courtroom and is asking the court to lower it's scepter so that she may take up her sabre and pierce the heart of her long-time victim, Brittany, the mother of Jaxon, who carried him beneath her heart for 9 months and loves him truly as her own. The father is known. He was an anonymous sperm donor. There is simply no need to take this case up on appeal. The Circuit Court for Washington County entered a very cogent, proper ruling and the Court of Special Appeals affirmed it – one less stack of paper that needs to come upstairs.

While it is respectfully proffered that there is no need to say any more, if more must be said along strictly "legalese" lines, your respondent would proffer a very brief review of the law and case authority beginning with the fact that in construing ET § 1-208(b), including that statute's references to "father", it must be kept in mind that the cardinal rule of statutory construction is to ascertain and

effectuate the intention of the legislature. *Oaks v. Connors,* 339 Md. 24, 35, 660 A.2d 423 (1995). "This process begins with an examination of the plain language of the statute." *Reier v. Dept. of Assessments*, 397 Md. 2, 915 A.2d 970, 984 (2007).

Because the term "father" as used in ET § 1-208(b) is "undefined in the statute, [the Maryland courts] consult those editions of the dictionary that were in close proximity to the statute's enactment [in 1957]." *Richardson v. Boozer*, 209 Md. App. 1, 57 A.3d 1028, 1034 (2012); *see Harvey v. Marshall*, 389 Md. 243, 261 n. 11, 884 A.2d 1171, 1181 n. 11 (2005) ("Because we are attempting to ascertain the intent of the Legislature in choosing certain language at a point in time, resort to a dictionary, legal or otherwise, should logically include consultation of those editions (in addition to current editions) of dictionaries that were extant at the time of the pertinent legislative enactments."); *Maryland Overpak Corp. v. Mayor & City Council of Baltimore*, 395 Md. 16, 49 n. 20, 909 A.2d 235 (2006) ("We have pointed out that when courts find it prudent, in defining terms in the quest for understanding of statutory intent, to resort to dictionaries, it is advisable to make reference first to those dictionaries that were contemporaneous at the time the statutory language at issue was created.").

In 1957, and for sometime before and thereafter, the term "father" as used in

ET § 1-208(b)[1] had a well established meaning in the law and in common parlance, namely "[a] *male* parent." Black's Law Dictionary 737 (4th ed. 1968) (emphasis added); Black's Law Dictionary 484 (2d ed. 1910) ("The male parent. He by whom a child is begotten."); *see* Random House Dictionary of the English Language, College Edition 481 (1969) ("a male parent"); Webster's Third New International Dictionary 828 (1976) ("a man who has begotten a child: a male parent"). The term "father" was commonly understood as having a meaning that "is not as wide as the word 'parent' and cannot be so construed as to include a female." Black's Law Dictionary 737 (4th ed. 1968); Black's Law Dictionary 484 (2d ed. 1910) (same). Yet, this is exactly what Michelle advocated below and continues to advocate before this Court.

More specifically, given the context of the statute, "father" as used in § 1-208(b)(4) means "natural father and not adoptive parent," i.e., the "procreator of a child," the biological male parent. *See* Black's Law Dictionary 737 (4th ed. 1968).

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1 ET § 1-208(b) provides as follows:

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.

In other words, where a male has married the mother and acknowledged himself, either orally or in writing, to be the "father", he is acknowledging (and the legal presumption arises) that he is the natural/biological male parent and hence the legal father of the child.

In this case, it is undisputed that Jaxon's natural or biological male parent or "father" was an anonymous sperm donor. Thus, no need exists in this case for the application of the statutory presumption of ET § 1-208(b)(4) to determine the identity of Jaxon's natural or biological father.

More fundamentally, Michelle is improperly attempting to use the legitimation statute, ET § 1-208(b), for the entirely unrelated purpose of winning access rights to Jaxon as a non-biological, non-adoptive, "*de facto* parent"[2] upon the dissolution of the parties' same-sex marriage – a purpose the Maryland Legislature never intended for ET § 1-208(b). As Judge Nazarian put it in his concurring opinion below, "Michelle cannot back into a finding of parenthood via FL § 5-1005 and Md. Code (1974, 2011 Repl. Vol.), § 1-208 of the Estates and Trusts Article ("ET"), statutes designed to establish paternity for the purposes of inheritance and financial support." *Conover v. Conover*, slip op., at __ (Nazarian,

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2 This Court in *Janice M. v. Margaret K.*, 404 Md. 661 (2008) declined to recognize the *de facto* parent doctrine, because this method of "short-circuiting the requirement [of a third party] to show [parental] unfitness or exceptional circumstances is contrary to Maryland jurisprudence[.]" 404 Md., at 685.

J., concurring).

Moreover, to construe ET § 1-208(b) as conferring *de facto* parental status on Michelle, would, as the Court of Special Appeals correctly recognized, raise serious constitutional issues regarding such a construction's inevitable erosion of the biological mother's liberty interest in raising her child as she sees fit. *Conover v. Conover*, slip op., at __ (questioning "whether this construction of the statute would be consistent with a biological mother's liberty interest under the 14th Amendment to the U.S. Constitution and Article 24 of the Declaration of Rights."). Under well established principles of statutory construction, such a construction should be avoided. *Yangming Transport v. Revon Products*, 311 Md. 496, 509, 536 A.2d 633, 640 (1988) ("[A] a court will, whenever reasonably possible, construe and apply a statute to avoid casting serious doubt upon its constitutionality."). "'If a statute is susceptible of two reasonable interpretations, one of which would involve a decision as to its constitutionality, *the preferred construction is that which avoids the determination of constitutionality*.'" *VNA Hospice of Maryland v. Dept. of Health & Mental Hygiene*, 406 Md. 584, 961 A.2d 557, 569 (2008) (quoting *Curran v. Price*, 334 Md. 149, 172, 638 A.2d 93, 104-105 (1994)) (emphasis added).

In view of well established principles of statutory construction, the Circuit

Court and the Court of Special Appeals correctly determined that Michelle was not the "father" of Jaxon and therefore cannot be considered the legal parent of Jaxon under ET § 1-208(b)(4). Consequently, no need exists to grant the petition to determine whether the Court of Special Appeals erred in holding that Petitioner is a "third party".

CONCLUSION

In view of the reasons and citations to authority set forth above, Respondent Brittany D. Conover respectfully requests that the Court deny the writ.

Respectfully submitted,

Date: October __, 2015 _____

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Certificate of Service

I hereby certify that, on this __ day of October, 2015, I caused a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Court of Special Appeals to be served upon counsel for the Petitioner via first-class mail, postage prepaid, and email to the following addresses:

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