

Obergefell's far-reaching impact on family law issues involving same-sex couples

Frosh's opinion reflects next wave of law

The plight of same-sex couples did not end in June 2015 with the U.S. Supreme Court ruling in *Obergefell v. Hodges* that all states must legally recognize marriage between same-sex couples. With marriage equality comes a host of other issues, including adoption, divorce, custody and visitation.

In July, Maryland Attorney General Brian E. Frosh issued an opinion clearing up one of those issues when he expanded the definition of the term "adultery" for purposes of filing for divorce in Maryland. Under Maryland's family law, adultery is one of the six fault-based grounds for an absolute divorce.

Adultery can also become a factor in a determination of alimony and child custody. Frosh's opinion expanded the term "adultery" to include any extramarital affair, regardless of the sex of the individuals involved.

The attorney general's opinions are ordinarily considered strongly persuasive to Maryland judges and lawyers.

The central theme taken from Frosh's opinion – which was hailed by such organizations as Equality Maryland, FreeState Legal Project and the Maryland State Bar Association – was its underlying principle: That is, his opinion was "compelled by the respect and dignity owed to same-sex marriages as equal to opposite-sex marriages under State law." The impact of this particular opinion by Frosh is expected to extend beyond the definition of a single ground for divorce.

A look at Conover

In the wake of Frosh's opinion, the Court of Special Appeals decided *Conover v. Conover*, a same-sex divorce case with child visitation in dispute. Brittany and Michelle Conover were together for seven years before they decided to have a child together by artificial insemination. (Michelle Conover is now Michael Conover, a transgender man, but is referred to by his former name in court filings.) Michelle was involved in selecting the child's



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sperm donor, ultimately selecting an individual with similar physical characteristics to she and Brittany.

The child was conceived in 2009. In March 2010, the District of Columbia, where the parties lived at the time, began to issue marriage licenses to same-sex couples. When the child was born in April 2010, his full name included both of Brittany and Michelle's last names. The parties were not married until September 2010 in the District of Columbia.

Brittany and Michelle lived together as a family until the child was approximately 17 months old. After the parties' separation, Michelle continued to have visitation with the child for nine months.

When Michelle requested visitation as part of their divorce, Brittany argued that her wife's request should be denied because Michelle was not the child's parent.

Relying on the seminal case *Janice M. v. Margaret K.*, a Washington County Circuit Court judge held that Michelle did not have parental standing to challenge her wife's denial of

visitation or custody. *Janice M.* requires a non-biological, non-adoptive same-sex partner seeking visitation or custody over the objection of a legal parent to show that the legal parent is either unfit or that exceptional circumstances exist to justify the Court intruding into his or her right to parent. Upon the non-biological, non-adoptive same-sex partner satisfying that stringent standard, the Court can then begin a visitation analysis based on the child's best interest.

In *Conover*, the circuit court likened Michelle's relationship to the child to that of a stepparent and denied Michelle's request for visitation. The Court of Special Appeals affirmed, holding that Michelle was a third party to the child for purposes of the visitation analysis. Accordingly, the circuit court first had to find exceptional circumstances before considering the child's best interests, which it did not.

Michelle Conover has since appealed the Court of Special Appeals' ultimate decision and the case is currently pending before the Court of Appeals.

The next wave

In spite of this, however, appellate Judge Robert A. Zarnoch suggested a change in the application of the *Janice M.* standard by noting that the current recognition of same-sex marriages raises doubt about whether *Janice M.* should apply to a same-sex spouse where the parties had been married at the time of the child's conception or birth.

Thus, had Michelle and Brittany Conover been legally married, at least by the time of the child's birth, the court suggests that it would have decided the case differently.

Judge Douglas R.M. Nazarian, in his concurring opinion, echoed the implications established by Zarnoch. In fact, Judge Nazarian went one step further in expressly asserting that the premise underlying *Janice M.*'s rejection of de facto parenthood should no longer hold in cases involving married same-sex couples. Nazarian's concurring opinion, which cited Frosh's opinion in support, concluded, "If, as Maryland law now provides, a valid marriage between two women (or two men) has the same legal validity and force as a man-woman marriage, courts should analyze the visitation rights of same-sex spouses the same way they analyze the visitation rights of opposite-sex spouses."

In the era of marriage equality, Frosh's opinion, followed by the evocations in *Conover v. Conover*, reflects the next wave in the area of law surrounding same-sex marriages founded on the principle of equal treatment in all aspects of marriage.

There is still much work to be done, adjusting the laws and adapting how the laws are applied, to accommodate all family types. But, as Nazarian so aptly stated, "We have to start somewhere."

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