Same Sex Relationships Custody & Child Support Cases

A focus on the parentage issue

In most child custody & support cases

The issue of Parentage is outcome determinative

Why is parentage outcome determinative?

A nonparent has a much higher standard of proof in obtaining custody or visitation rights of a child

A nonparent has no legal obligation to pay child support

Presentation

- Virginia Assisted Conception Act – background
- Answer the question: Who are the legal parents under Virginia Assisted Conception Act
- L.F. v. Breit Case
- Hawkins v. Grese
- Virginia's Common Law Marital Presumption
- Full Faith & Credit Issues

How Babies Are Made

Virginia's Assisted Conception Act --

Virginia Code Sections 20-156 through 20-165

- Virginia's act is based on the Uniform Status of Children of Assisted Conception Act, which was written in 1988.
- Virginia adopted the uniform act in 1991, in response to *Welborn v. Doe*, 10 Va. App. 631, 394 S.E. 2d 732 (1990).
- In *Welborn*, a child was born of a gestational mother and a third-party sperm donor, and the only way for the mother's husband to become a parent was to adopt the child.
- Effective July 1, 2019 –gender neutral, unmarried couples, makes intended parent singular, adds provisions to cover when someone has legal or contractual custody of an embryo.

What is Assisted Conception:

- "Assisted conception" means a pregnancy resulting from any intervening medical technology. The inclusion of "medical technology" is important.
- The "medical technology" requirement differs from the uniform act.
- *Bruce v. Boardwine*, 64 Va. App. 623, 770 S.E.2d 774 (2015) – the Assisted Conception Act did not apply where mother had used a turkey baster to become pregnant, because she did not use "medical technology".

See VA Code 20-156 (Definition Statute)

Primary Purpose of the Assisted Conception Act:

The assisted conception statute was written specifically with married couples in mind. The statute's primary purpose is to protect cohesive family units from claims of third-party intruders who served as mere donors.

L.F. v. Breit, 285 Va. 163, 179, 736 S.E.2d 711,720 (2013)

Who is involved in Assisted Conception

“Intended parents” means a married couple or unmarried individual who enters into an agreement with a surrogate under the terms of which such parent will be the parent of any child born to the surrogate through assisted conception regardless of the genetic relationships between the intended parent, the surrogate, and the child.

Who is involved in Assisted Conception

- “Surrogate” means any adult woman who agrees to bear a child carried for the intended parent.
- “Gestational mother” means the woman who gives birth to a child, regardless of her genetic relationship to the child.
- “Genetic parent” means an individual who contributes a gamete(sperm or an ovum) resulting in a conception.
- “Donor” means an individual, other than a surrogate, who contributes the sperm or egg used in assisted conception.

Who are my legal parents?

- The mother is the gestational mother unless there is a surrogacy contract.
- The spouse of the gestational mother of a child is the child's other parent, unless such spouse did not consent to the assisted conception and files suit within two years after discovering the child’s birth. See VA Code § 20-158 for more details.
- A donor is not the parent of a child conceived through assisted conception, unless the donor is the spouse of the gestational mother.

Who are my legal parents?
Not Approved Surrogacy Contracts

- If there is a surrogacy contract not approved by the court:
  - The mother is the gestational mother unless the intended mother is a genetic parent. See below
  - If an intended parent is a genetic parent of the resulting child, such intended parent is the child's parent unless the surrogate is also a genetic parent, then the surrogate may retain custody and parental rights. See VA Code § 20-158 (E)(2) and VA Code § 20-162
  - If no intended parent is a genetic parent of the resulting child, but the embryo that was used is subject to the legal or contractual custody of an intended parent, then such intended parent is the parent; otherwise, the surrogate is the parent. The intended parents only recourse is adoption. See VA Code § 20-158 (E)(3).

Who are my legal parents? Approved Surrogacy Contracts

At least one of the intended parents is a genetic parent or the intended parent provides proof of his or her legal or contractual custody of the embryo, then the court shall place intended parent(s) on the child's birth certificate as the parents; otherwise, the surrogate and her spouse are the legal parents. The intended parents would have to adopt the child.

L.F. v.Breit, 285 Va. App. 163, 736 S.E.2d 711 (2013)

- A known sperm donor who donated at the request of a woman to whom he is not married is not barred from filing a parentage action pursuant to Virginia Code Section 20-49.2.
- Sections 20-49.1 et seq. do not bar parents who conceive through assisted conception from voluntarily establishing paternity through a written agreement.

L.F. v. Breit (cont.)

- The Assisted Conception Act must be read in conjunction with 20-49.1:
  - 20-158(A)(3) – a donor is not the parent unless the donor is the spouse of the gestational mother
  - 20-49.1 (B)(1) – Paternity may be established by genetic testing
  - 20-49.1 (B)(2) – Paternity may be established by acknowledgment

L.F. v. Breit (cont.)

- 20-49.1 (B)(1) directly conflicts with 20-158(A)(3), but 20-49.1(B)(2) does not
- If a sperm donor voluntarily executes an acknowledgment of paternity under 20-49.1(B)(2), then 20-158 (A)(3) will not undo that.
- Due process requires that unmarried parents who have demonstrated a full commitment to the responsibilities of parenthood be allowed to enter into voluntary agreements regarding the custody and care of their children.
- Parental rights do not arise solely from the biological connection between a parent and a child.

Hawkins v. Grese, 68 Va. App. 462, 809 S.E.2d 441 (2018)

FACTS:

Hawkins and Grese were unmarried partners in a ten-year, same-sex relationship. During this relationship they discussed having a child. Grese became pregnant via artificial insemination and gave birth to B.G. in 2007. The parties never married or formed a civil union in another state, nor did Hawkins ever adopt B.G. Nevertheless, B.G. was raised by Hawkins and Grese in their shared home until they ended their relationship in 2014. The parties informally shared custody of B.G. from that point for a further two years. Eventually, relations between Grese and Hawkins soured and Grese terminated B.G.'s contact with Hawkins.

Hawkins v. Grese, 68 Va. App. 462, 809 S.E.2d 441 (2018)

PROCEDURAL FACTS:

J&DR Court - The JDR court awarded joint legal and physical custody to Hawkins and Grese as well as shared visitation, finding that B.G. considered both women to be his parents. The JDR court further found that B.G. was developing behavioral problems based on his separation from Hawkins, and two psychologists, as well as the guardian *ad litem*, testified that removing either Hawkins or Grese from B.G.'s life would cause emotional and psychological harm.

Circuit Court - the circuit court first determined that Hawkins could not be considered a parent based on Virginia's rejection of the de facto parent doctrine. It further held that Hawkins, as a non-parent, interested party, did not rebut the parental presumption in favor of Grese's custody of B.G.

Court of Appeals affirmed the Circuit's ruling.

Hawkins v. Grese, 68 Va. App. 462, 809 S.E.2d 441 (2018)

Court of Appeals Rationale:

The Appellate Court couched the issues as (1) How is a parent defined for statutory purposes; (2) and is that definition constitutional?

- “[W]e hold that where custody disputes are concerned, the term "parent" is a relationship to a child only through either biological procreation or legal adoption”;
- The Court found that same-sex couple is not a suspect class and used a rational basis test to determine the constitutionality of Virginia’s definition of “parent”.

Hawkins v. Grese, 68 Va. App. 462, 809 S.E.2d 441 (2018)

Court of Appeals Rationale (cont):

In a rational basis analysis, "our judicial function permits us to ask only whether the judgment of relevance made by the [circuit court] is rational." *Id.* The relevant characteristics which classify here are entirely rational—people are considered parents on either biological or adoptive grounds, parties without these qualities retain a fair legal method to intervene if a parent is unfit.

Hawkins v. Grese, 68 Va. App. 462, 809 S.E.2d 441 (2018)

Court of Appeals Rationale (cont):

Further, "[a] classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.” Though Hawkins undoubtedly has a close relationship with B.G. and is in a sympathetic and difficult position, the circuit court did not violate her constitutional rights by declining to recognize her as a parent of B.G.

Hawkins v. Grese, 68 Va. App. 462, 809 S.E.2d 441 (2018)

Court of Appeals Rationale (cont):

- The Court rejected De Facto parent doctrine - *Stadter v. Siperko*, 52 Va. App. 81, 661 S.E.2d 494 (2008);
- In *Obergefell*, the Supreme Court held only that same-sex *marriage* was a constitutionally protected right. It did not afford the same right to same-sex couples.

Scenario Mike and Tyrone

- Mike and Tyrone are a same sex couple (not married) and decide that they want a child. With the use of Mike's sperm and an egg gifted to Tyrone on his 30th birthday by his sister, Billy is born to their Surrogate – Jill. Jill happens to be married to Anna.
- Without a surrogacy contract, who are Billy's parents?
- With a non-approved surrogacy contract who are Billy's parents?
- With an approved surrogacy contract who are Billy's parents?
- Would any of the outcomes be different if Mike and Tyrone were married in Las Vegas?

Scenario Mike and Tyrone: Answer

Mike and Tyrone are a same sex couple and decide that they want a child. With the use of Mike's sperm and an egg gifted to Tyrone on his 30th Birthday by his sister, Billy is born to their Surrogate – Jill. Jill happens to be married to Anna.

Without a surrogacy contract, who are Billy's parents? Jill & Anna

With a non-approved surrogacy contract who are Billy's parents? Mike, assuming Mike signed the assisted conception contract.

With an approved surrogacy contract who are Billy's parents? It depends who signed as the "intended parent" on the contract.

Would any of the outcomes be different if Mike and Tyrone were married in Las Vegas? Yes, with an approved surrogacy contract, Mike and Tyrone would be the parents.

Marital Presumption – Does it apply to same sex marriages?

- There is a common law presumption that the husband is the father, but that presumption can be rebutted.
- "A presumption of law exists in favor of the legitimacy of a child born in wedlock." *Wyatt v. Department of Social Services*, 11 Va. App.225, 229, 397 S.E.2d 412, 414 9 (1990), citing *Gibson v. Gibson*, 207 Va. 821, 825, 153 S.E.2d 189, 192 (1967).
- "The presumption can be rebutted by 'strong, satisfactory and conclusive' evidence." *Wyatt v. Department of Social Services*, 11 Va. App 225, 229, 397 S.E.2d 412, 414 (1990).
- Does VA Code § 20-157 - the provisions of this chapter shall control, without exception, … to enforce or adjudicate any rights or responsibilities arising under this chapter - take precedence over the marital presumption.

Scenario: Jill and Anna

Jill and Anna are married. They use a turkey baster to impregnate Anna with Tyrone's sperm. Does the marital presumption apply?

Maybe – Maybe not

See **Bruce v. Boardwine,** 64 Va. App. 623, 770 S.E.2d 774 (2015). The court found that a turkey baster did not fall within the assisted conception act;

Argument: VA Code § 20-157 would not be applicable since the birth did not fall under the Assisted Conception Act.

Scenario: Sarah and Sally

Sarah and Sally, residents of Virginia, entered into a valid Domestic Partnership in another state. Sally gives birth to Sadi prior to the termination of the Domestic Partnership. The other state statutes contain the following statutory presumption:

> There shall be a presumption that a woman is the mother of a child if she and the child's mother are or have been married, or in a domestic partnership, at the time of either conception or birth … and that the presumption of parentage can be overcome if upon proof by clear and convincing evidence that the presumed parent did not hold herself out as a parent of the child.

Sarah brings a custody suit in Virginia. Under Virginia's Assisted Conception statute Sarah is not a parent but under the other state statutory presumption statute Sarah is a presumed parent. Which law controls?

Scenario: Sarah and Sally cont.

- In applying the Full Faith and Credit Clause, the U.S. Supreme Court has distinguished between statutes and judgments. With regard to statutes, the Supreme Court has held that the Full Faith and Credit Clause does not require a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. Furthermore, the Full Faith and Credit Clause does not require a state to apply another State's law in violation of its own legitimate public policy.

Prashad v. Copeland, 55 Va. App. 247, 685 S.E.2d 199 (2009).

Caveat: Child Not Party to Action

If the child is not made a party to the action, the determination of parentage is not binding on him/her. Virginia Code Section 20-49.2; *Commonwealth of Virginia, Department of Social Services, Division of Child Support Enforcement ex rel. Gray v. Johnson*, 7 Va. App. 614, 376 S.E.2d 787 (1989).

Code of Virginia
Title 20. Domestic Relations

Chapter 9. Status of Children of Assisted Conception

§ 20-156. Definitions

As used in this chapter unless the context requires a different meaning:

"Assisted conception" means a pregnancy resulting from any intervening medical technology, whether in vivo or in vitro, which completely or partially replaces sexual intercourse as the means of conception. Such intervening medical technology includes, but is not limited to, conventional medical and surgical treatment as well as noncoital reproductive technology such as artificial insemination by donor, cryopreservation of gametes and embryos, in vitro fertilization, uterine embryo lavage, embryo transfer, gamete intrafallopian tube transfer, and low tubal ovum transfer.

"Compensation" means payment of any valuable consideration for services in excess of reasonable medical and ancillary costs.

"Cryopreservation" means freezing and storing of gametes and embryos for possible future use in assisted conception.

"Donor" means an individual, other than a surrogate, who contributes the sperm or egg used in assisted conception.

"Gamete" means either a sperm or an ovum.

"Genetic parent" means an individual who contributes a gamete resulting in a conception.

"Gestational mother" means the woman who gives birth to a child, regardless of her genetic relationship to the child.

"Embryo" means the organism resulting from the union of a sperm and an ovum from first cell division until approximately the end of the second month of gestation.

"Embryo transfer" means the placing of a viable embryo into the uterus of a gestational mother.

"Infertile" means the inability to conceive after one year of unprotected sexual intercourse.

"Intended parent" means a married couple or unmarried individual who enters into an agreement with a surrogate under the terms of which such parent will be the parent of any child born to the surrogate through assisted conception regardless of the genetic relationships between the intended parent, the surrogate, and the child.

"In vitro" means any process that can be observed in an artificial environment such as a test tube or tissue culture plate.

"In vitro fertilization" means the fertilization of ova by sperm in an artificial environment.

"In vivo" means any process occurring within the living body.

"Legal or contractual custody" means having authority granted by law, contract, or court order to make decisions concerning the use of an embryo.

"Ovum" means the female gamete or reproductive cell prior to fertilization.

"Reasonable medical and ancillary costs" means the costs of the performance of assisted conception, the costs of prenatal maternal health care, the costs of maternal and child health care for a reasonable postpartum period, the reasonable costs for medications and maternity clothes, and any additional and reasonable costs for housing and other living expenses attributable to the pregnancy.

"Sperm" means the male gametes or reproductive cells which impregnate the ova.

"Surrogacy contract" means an agreement between the intended parent, a surrogate, and her spouse, if any, in which the surrogate agrees to be impregnated through the use of assisted conception, to carry any resulting fetus, and to relinquish to the intended parent the custody of and parental rights to any resulting child.

"Surrogate" means any adult woman who agrees to bear a child carried for the intended parent.

1991, c. 600; 1997, c. 81;2019, c. 375.

§ 20-157. Virginia law to control

The provisions of this chapter shall control, without exception, in any action brought in the courts of this Commonwealth to enforce or adjudicate any rights or responsibilities arising under this chapter.

1991, c. 600.

§ 20-158. Parentage of child resulting from assisted conception

A. Determination of parentage, generally. — Except as provided in subsections B, C, D, and E, the parentage of any child resulting from the performance of assisted conception shall be determined as follows:

1. The gestational mother of a child is the child's mother.

2. The spouse of the gestational mother of a child is the child's other parent, notwithstanding any declaration of invalidity or annulment of the marriage obtained after the performance of assisted conception, unless such spouse commences an action in which the mother and child are parties within two years after such spouse discovers or, in the exercise of due diligence, reasonably should have discovered the child's birth and in which it is determined that such spouse did not consent to the performance of assisted conception.

3. A donor is not the parent of a child conceived through assisted conception, unless the donor is the spouse of the gestational mother.

B. Death of spouse. — Any child resulting from the insemination of a gestational mother's ovum using her spouse's sperm, with his consent, is the child of the gestational mother and her spouse notwithstanding that, during the 10-month period immediately preceding the birth, either party died.

However, any person who dies before in utero implantation of an embryo resulting from the union of the spouse's sperm or gestational mother's ovum with another gamete, whether or not the other gamete is that of the person's spouse, is not the parent of any resulting child unless (i) implantation occurs before notice of the death can reasonably be communicated to the physician

performing the procedure or (ii) the person consents to be a parent in writing executed before the implantation.

C. Divorce. — Any child resulting from insemination of a gestational mother's ovum using her spouse's sperm, with his consent, is the child of the gestational mother and her spouse notwithstanding that either party filed for a divorce or annulment during the 10-month period immediately preceding the birth. Any person who is a party to an action for divorce or annulment commenced by filing before in utero implantation of an embryo resulting from the union of the spouse's sperm or gestational mother's ovum with another gamete, whether or not the other gamete is that of the person's spouse, is not the parent of any resulting child unless (i) implantation occurs before notice of the filing can reasonably be communicated to the physician performing the procedure or (ii) the person consents in writing to be a parent, whether the writing was executed before or after the implantation.

D. Birth pursuant to court approved surrogacy contract. — After approval of a surrogacy contract by the court and entry of an order as provided in subsection D of § 20-160, the intended parent is the parent of any resulting child. However, if the court vacates the order approving the agreement pursuant to subsection B of § 20-161, the surrogate who is the genetic parent is the mother of the resulting child and her spouse, if any, is the other parent. The intended parent may only obtain parental rights through adoption as provided in Chapter 12 (§ 63.2-1200 et seq.) of Title 63.2.

E. Birth pursuant to surrogacy contract not approved by court. — In the case of a surrogacy contract that has not been approved by a court as provided in § 20-160, the parentage of any resulting child shall be determined as follows:

1. The gestational mother is the child's mother unless the intended mother is a genetic parent, in which case the intended mother is the mother.

2. If an intended parent is a genetic parent of the resulting child, such intended parent is the child's parent. However, if (i) the surrogate is a genetic parent, (ii) the surrogate is married and her spouse is a party to the surrogacy contract, and (iii) the surrogate who is a genetic parent exercises her right to retain custody and parental rights to the resulting child pursuant to § 20-162, then the surrogate and her spouse are the parents. If the surrogate is unmarried and (a) is a genetic parent, (b) is a party to the surrogacy contract, and (c) exercises her right to retain custody and parental rights to the resulting child pursuant to § 20-162, then the surrogate is the parent.

3. If no intended parent is a genetic parent of the resulting child, but the embryo that was used is subject to the legal or contractual custody of an intended parent, then such intended parent is the parent. However, if no intended parent is a genetic parent, and the embryo that was used is not subject to the legal or contractual custody of such intended parent, then the surrogate is the mother and her spouse, if any, is the child's other parent if such other parent is a party to the contract. In such an event, the intended parent may only obtain parental rights through adoption as provided in Chapter 12 (§ 63.2-1200 et seq.) of Title 63.2.

4. After the signing and filing of the surrogate consent and report form in conformance with the requirements of subsection A of § 20-162, the intended parent is the parent of the child and the surrogate and her spouse, if any, shall not be the parents of the child.

1991, c. 600; 1997, c. 81;2000, c. 830;2019, c. 375.

§ 20-159. Surrogacy contracts permissible

A. A surrogate, her spouse, if any, and the prospective intended parent may enter into a written agreement whereby the surrogate may relinquish all her rights and duties as parent of a child conceived through assisted conception, and the prospective intended parent may become the parent of the child as provided in subsection D or E of § 20-158.

B. Surrogacy contracts may be approved by the court as provided in § 20-160. However, any surrogacy contract that has not been approved by the court shall be governed by the provisions of §§ 20-156 through 20-159 and §§ 20-162 through 20-165 including the provisions for reformation in conformance with this chapter as provided in § 20-162.

1991, c. 600; 2019, c. 375.

§ 20-160. Petition and hearing for court approval of surrogacy contract; requirements; orders

A. Prior to the performance of assisted conception, the intended parent, the surrogate, and her spouse, if any, shall join in a petition to the circuit court of the county or city in which at least one of the parties resides. The surrogacy contract shall be signed by all the parties and acknowledged before an officer or other person authorized by law to take acknowledgments.

A copy of the contract shall be attached to the petition. The court shall appoint a guardian ad litem to represent the interests of any resulting child and shall appoint counsel to represent the surrogate. The court shall order a home study by a local department of social services or welfare or a licensed child-placing agency, to be completed prior to the hearing on the petition.

All hearings and proceedings conducted under this section shall be held in camera, and all court records shall be confidential and subject to inspection only under the standards applicable to adoptions as provided in § 63.2-1245. The court conducting the proceedings shall have exclusive and continuing jurisdiction of all matters arising under the surrogacy contract until all provisions of the contract are fulfilled.

B. The court shall hold a hearing on the petition. The court shall enter an order approving the surrogacy contract and authorizing the performance of assisted conception for a period of twelve months after the date of the order, and may discharge the guardian ad litem and attorney for the surrogate upon finding that:

1. The court has jurisdiction in accordance with § 20-157;

2. A local department of social services or welfare or a licensed child-placing agency has conducted a home study of the intended parents, the surrogate, and her spouse, if any, and has filed a report of this home study with the court;

3. The intended parent, the surrogate, and her spouse, if any, meet the standards of fitness applicable to adoptive parents;

4. All the parties have voluntarily entered into the surrogacy contract and understand its terms and the nature, meaning, and effect of the proceeding and understand that any agreement between them for payment of compensation is void and unenforceable;

5. The agreement contains adequate provisions to guarantee the payment of reasonable medical and ancillary costs either in the form of insurance, cash, escrow, bonds, or other arrangements satisfactory to the parties, including allocation of responsibility for such costs in the event of

termination of the pregnancy, termination of the contract pursuant to § 20-161, or breach of the contract by any party;

6. The surrogate has had at least one pregnancy, and has experienced at least one live birth, and bearing another child does not pose an unreasonable risk to her physical or mental health or to that of any resulting child. This finding shall be supported by medical evidence;

7. Prior to signing the surrogacy contract, the intended parent, the surrogate, and her spouse, if any, have submitted to physical examinations and psychological evaluations by practitioners licensed to perform such services pursuant to Title 54.1, and the court and all parties have been given access to the records of the physical examinations and psychological evaluations;

8. The intended parent is infertile, is unable to bear a child, or is unable to do so without unreasonable risk to the unborn child or to the physical or mental health of the intended parent or the child. This finding shall be supported by medical evidence;

9. At least one intended parent is expected to be the genetic parent of any child resulting from the agreement or such intended parent has the legal or contractual custody of the embryo at issue;

10. The spouse of the surrogate, if any, is a party to the surrogacy agreement;

11. All parties have received counseling concerning the effects of the surrogacy by a qualified health care professional or social worker, and a report containing conclusions about the capacity of the parties to enter into and fulfill the agreement has been filed with the court; and

12. The agreement would not be substantially detrimental to the interests of any of the affected persons.

C. Unless otherwise provided in the surrogacy contract, all court costs, counsel fees, and other costs and expenses associated with the hearing, including the costs of the home study, shall be assessed against the intended parent.

D. Within seven days of the birth of any resulting child, the intended parent shall file a written notice with the court that the child was born to the surrogate within 300 days after the last performance of assisted conception. Upon the filing of this notice and a finding that one intended parent is the genetic parent of the resulting child as substantiated by medical evidence, or upon proof of the legal or contractual custody of the embryo by such intended parent, the court shall enter an order directing the State Registrar of Vital Records to issue a new birth certificate naming the intended parent as the parent of the child pursuant to § 32.1-261.

If evidence cannot be produced that at least one intended parent is the genetic parent of the resulting child, or proof of the legal or contractual custody of the embryo by such intended parent cannot be produced, the court shall not enter an order directing the issuance of a new birth certificate naming the intended parent as the parent of the child, and the surrogate and her spouse, if any, shall be the parents of the child. The intended parent may obtain parental rights only through adoption as provided in Chapter 12 (§ 63.2-1200 et seq.) of Title 63.2.

1991, c. 600; 2000, c. 830;2010, c. 712;2019, c. 375.

§ 20-161. Termination of court-approved surrogacy contract

A. Subsequent to an order entered pursuant to subsection B of § 20-160, but before the surrogate

becomes pregnant through the use of assisted conception, the court for cause, or the surrogate, her spouse, if any, or the intended parent, for cause, may terminate the agreement by giving written notice of termination to all other parties and by filing notice of the termination with the court. Upon receipt of the notice, the court shall vacate the order entered under subsection B of § 20-160.

B. Within 180 days after the last performance of any assisted conception, a surrogate who is also a genetic parent may terminate the agreement by filing written notice with the court. The court shall vacate the order entered pursuant to subsection B of § 20-160 upon finding, after notice to the parties to the agreement and a hearing, that the surrogate has voluntarily terminated the agreement and that she understands the effects of the termination.

Unless otherwise provided in the contract as approved, the surrogate shall incur no liability to the intended parent for exercising her rights of termination pursuant to this section.

1991, c. 600; 2010, c. 712;2019, c. 375.

§ 20-162. Contracts not approved by the court; requirements

A. In the case of any surrogacy agreement for which prior court approval has not been obtained pursuant to § 20-160, the provisions of this section and §§ 20-156 through 20-159 and §§ 20-163 through 20-165 shall apply. Any provision in a surrogacy contract that attempts to reduce the rights or responsibilities of the intended parent, the surrogate, or her spouse, if any, or the rights of any resulting child shall be reformed to include the requirements set forth in this chapter. A provision in the contract providing for compensation to be paid to the surrogate is void and unenforceable. Such surrogacy contracts shall be enforceable and shall be construed only as follows:

1. The surrogate, her spouse, if any, and the intended parent shall be parties to any such surrogacy contract.

2. The contract shall be in writing, signed by all the parties, and acknowledged before an officer or other person authorized by law to take acknowledgments.

3. Upon expiration of three days following birth of any resulting child, the surrogate may relinquish her parental rights to the intended parent, if at least one intended parent is the genetic parent of the child, or the embryo was subject to the legal or contractual custody of such intended parent, by signing a surrogate consent and report form naming the intended parent as the parent of the child. The surrogate consent and report form shall be developed, furnished, and distributed by the State Registrar of Vital Records. The surrogate consent and report form shall be signed and acknowledged before an officer or other person authorized by law to take acknowledgments. The surrogate consent and report form, a copy of the contract, and a statement from the physician who performed the assisted conception stating either the genetic relationships between the child, the surrogate, and at least one intended parent, or proof of the legal or contractual custody of the embryo, shall be filed with the State Registrar within 180 days after the birth. The statement from the physician shall be signed and acknowledged before an officer or other person authorized by law to take acknowledgments. There shall be a rebuttable presumption that the statement from the physician accurately states the genetic relationships among the child, the surrogate, and the intended parent. Where a physician's statement is not available and at least one intended parent is a genetic parent, DNA testing establishing the genetic relationships between the child, the surrogate, and the intended parent may be

substituted for the physician's statement.

4. Upon the filing of the surrogate consent and report form and the required attachments, including the physician's statement, DNA testing establishing the genetic relationships between the child, the surrogate, and the intended parent, or proof of the legal or contractual custody of the embryo, within 180 days of the birth, a new birth certificate shall be established by the State Registrar for the child naming the intended parent as the parent of the child as provided in § 32.1-261.

B. Any contract governed by the provisions of this section shall include or, in the event such provisions are not explicitly covered in the contract or are included but are inconsistent with this section, shall be deemed to include the following provisions:

1. The intended parent shall be the parent of any resulting child when the surrogate relinquishes her parental rights as provided in subdivision A 3 and a new birth certificate is established as provided in subdivision A 4 of this section and § 32.1-261, unless parentage is instead established through Chapter 3.1 (§ 20-49.1 et seq.);

2. Incorporation of this chapter and a statement by each of the parties that they have read and understood the contract, they know and understand their rights and responsibilities under Virginia law, and the contract was entered into knowingly and voluntarily; and

3. A guarantee by the intended parent for payment of reasonable medical and ancillary costs either in the form of insurance, cash, escrow, bonds, or other arrangements satisfactory to the parties, including allocation of responsibility for such costs in the event of termination of the pregnancy, termination of the contract, or breach of the contract by any party.

C. Under any contract that does not include an allocation of responsibility for reasonable medical and ancillary costs in the event of termination of the pregnancy, termination of the contract, or breach of the contract by any party, the following provisions shall control:

1. If the intended parent and the surrogate and her spouse, if any, and if such spouse is a party to the contract, consent in writing to termination of the contract, the intended parent is responsible for all reasonable medical and ancillary costs for a period of six weeks following the termination.

2. If the surrogate is a genetic parent and voluntarily terminates the contract during the pregnancy, without consent of the intended parent, the intended parent shall be responsible for one-half of the reasonable medical and ancillary costs incurred prior to the termination.

3. If, after the birth of any resulting child, the surrogate is also a genetic parent and fails to relinquish parental rights to the intended parent pursuant to the contract, the intended parent shall be responsible for one-half of the reasonable medical and ancillary costs incurred prior to the birth.

1991, c. 600; 2000, c. 890;2010, c. 712;2019, c. 375.

§ 20-163. Miscellaneous provisions related to all surrogacy contracts

A. The surrogate shall be solely responsible for the clinical management of the pregnancy.

B. After the entry of an order under subsection B of § 20-160 or upon the execution of a contract pursuant to § 20-162, the marriage of the surrogate shall not affect the validity of the order or contract, and her spouse shall not be deemed a party to the contract in the absence of his explicit

written consent.

C. Following the entry of an order pursuant to subsection D of § 20-160 or upon the relinquishing of the custody of and parental rights to any resulting child and the filing of the surrogate consent and report form as provided in § 20-162, the intended parent shall have the custody of, parental rights to, and full responsibilities for any child resulting from the performance of assisted conception from a surrogacy agreement regardless of the child's health, physical appearance, any mental or physical disability, and regardless of whether the child is born alive.

D. A child born to a surrogate within 300 days after assisted conception pursuant to an order under subsection B of § 20-160 or a contract under § 20-162 is presumed to result from the assisted conception. This presumption is conclusive as to all persons who fail to file an action to test its validity within two years after the birth of the child. The child and the parties to the contract shall be named as parties in any such action. The action shall be filed in the court that issued or could have issued an order under § 20-160.

E. Health care providers shall not be liable for recognizing the surrogate as the mother of the resulting child before receipt of a copy of an order entered under § 20-160 or a copy of the contract, or for recognizing the intended parent as the parent of the resulting child after receipt of such order or copy of the contract.

F. Any contract provision requiring or prohibiting an abortion or selective reduction is against the public policy of the Commonwealth and is void and unenforceable.

1991, c. 600; 2019, c. 375;2022, c. 800;2023, cc. 148, 149.

§ 20-164. Relation of parent and child

A child whose status as a child is declared or negated by this chapter is the child only of his parent or parents as determined under this chapter, Title 64.2, and, when applicable, Chapter 3.1 (§ 20-49.1 et seq.) of this title for all purposes including, but not limited to, (i) intestate succession; (ii) probate law exemptions, allowances, or other protections for children in a parent's estate; and (iii) determining eligibility of the child or its descendants to share in a donative transfer from any person as an individual or as a member of a class determined by reference to the relationship. However, a child born more than ten months after the death of a parent shall not be recognized as such parent's child for the purposes of subdivisions (i), (ii) and (iii) of this section.

1991, c. 600; 1994, c. 919.

§ 20-165. Surrogate brokers prohibited; penalty; liability of surrogate brokers

A. It is unlawful for any person, firm, corporation, partnership, or other entity to accept compensation for recruiting or procuring surrogates or to accept compensation for otherwise arranging or inducing an intended parent and surrogates to enter into surrogacy contracts in this Commonwealth. A violation of this section shall be punishable as a Class 1 misdemeanor.

B. Any person who acts as a surrogate broker in violation of this section shall, in addition, be liable to all the parties to the purported surrogacy contract in a total amount equal to three times the amount of compensation to have been paid to the broker pursuant to the contract. One-half of the damages under this subsection shall be due the surrogate and her spouse, if any, and if such spouse is a party to the contract, and one-half shall be due the intended parent.

An action under this section shall be brought within five years of the date of the contract.

C. The provisions of this section shall not apply to the services of an attorney in giving legal advice or in preparing a surrogacy contract.

1991, c. 600; 2010, c. 712;2019, c. 375;2020, c. 900.

§ 20-49.1 How parent and child relationship established.

§ 20-49.1. How parent and child relationship established.

A. The parent and child relationship between a child and a woman may be established prima facie by proof of her having given birth to the child, or as otherwise provided in this chapter.

B. The parent and child relationship between a child and a man may be established by:

1. Scientifically reliable genetic tests, including blood tests, which affirm at least a ninety-eight percent probability of paternity. Such genetic test results shall have the same legal effect as a judgment entered pursuant to § 20-49.8.

2. A voluntary written statement of the father and mother made under oath acknowledging paternity and confirming that prior to signing the acknowledgment, the parties were provided with a written and oral description of the rights and responsibilities of acknowledging paternity and the consequences arising from a signed acknowledgment, including the right to rescind. The acknowledgement may be rescinded by either party within sixty days from the date on which it was signed unless an administrative or judicial order relating to the child in an action to which the party seeking rescission was a party is entered prior to the rescission. A written statement shall have the same legal effect as a judgment entered pursuant to § 20-49.8 and shall be binding and conclusive unless, in a subsequent judicial proceeding, the person challenging the statement establishes that the statement resulted from fraud, duress or a material mistake of fact. In any subsequent proceeding in which a statement acknowledging paternity is subject to challenge, the legal responsibilities of any person signing it shall not be suspended during the pendency of the proceeding, except for good cause shown. Written acknowledgments of paternity made under oath by the father and mother prior to July 1, 1990, shall have the same legal effect as a judgment entered pursuant to § 20-49.8.

3. In the absence of such acknowledgment or if the probability of paternity is less than ninety-eight percent, such relationship may be established as otherwise provided in this chapter.

C. The parent and child relationship between a child and an adoptive parent may be established by proof of lawful adoption.

1988, cc. 866, 878; 1990, c. 836; 1992, c. 516; 1997, cc. 792, 896; 1998, c. 884.

§ 20-49.2 Commencement of action; parties; jurisdiction.

§ 20-49.2. Commencement of action; parties; jurisdiction.

Proceedings under this chapter may be instituted upon petition, verified by oath or affirmation, filed by a child, a parent, a person claiming parentage, a person standing in loco parentis to the child or having legal custody of the child or a representative of the Department of Social Services or the Department of Juvenile Justice.

The child may be made a party to the action, and if he is a minor and is made a party, he shall be represented by a guardian ad litem appointed by the court in accordance with the procedures specified in § 16.1-266 or § 8.01-9. The child's mother or father may not represent the child as guardian or otherwise. The determination of the court under the provisions of this chapter shall not be binding on any person who is not a party.

The circuit courts shall have concurrent original jurisdiction of cases arising under this chapter with the juvenile and domestic relations district courts when the parentage of a child is at issue in any matter otherwise before the circuit court. The determination of parentage, when raised in any proceeding, shall be governed by this chapter.

1988, cc. 866, 878; 1989, c. 368; 2008, cc. 164, 201.

§ 20-49.3 Admission of genetic tests.

§ 20-49.3. Admission of genetic tests.

A. In the trial of any matter in any court in which the question of parentage arises, the court, upon its own motion or upon motion of either party, may and, in cases in which child support is in issue, shall direct and order that the alleged parents and the child submit to scientifically reliable genetic tests including blood tests. The motion of a party shall be accompanied by a sworn statement either (i) alleging paternity and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties or (ii) denying paternity.

B. The court shall require the person requesting such genetic test, including a blood test, to pay the cost. However, if such person is indigent, the Commonwealth shall pay for the test. The court may, in its discretion, assess the costs of the test to the party or parties determined to be the parent or parents.

C. The results of a scientifically reliable genetic test, including a blood test, may be admitted in evidence when contained in a written report prepared and sworn to by a duly qualified expert, provided the written results are filed with the clerk of the court hearing the case at least fifteen days prior to the hearing or trial. Verified documentary evidence of the chain of custody of the blood specimens is competent evidence to establish the chain of custody. Any qualified expert performing such test outside the Commonwealth shall consent to service of process through the Secretary of the Commonwealth by filing with the clerk of the court the written results. Upon motion of any party in interest, the court may require the person making the analysis to appear as a witness and be subject to cross-examination, provided that the motion is made at least seven days prior to the hearing or trial. The court may require the person making the motion to pay into court the anticipated costs and fees of the witness or adequate security for such costs and fees.

1988, cc. 866, 878; 1989, c. 598; 1992, c. 516; 1997, cc. 792, 896.

§ 20-49.4 Evidence relating to parentage.

§ 20-49.4. Evidence relating to parentage.

The standard of proof in any action to establish parentage shall be by clear and convincing evidence. All relevant evidence on the issue of paternity shall be admissible. Such evidence may include, but shall not be limited to, the following:

1. Evidence of open cohabitation or sexual intercourse between the known parent and the alleged parent at the probable time of conception;

2. Medical or anthropological evidence relating to the alleged parentage of the child based on tests performed by experts. If a person has been identified by the mother as the putative father of the child, the court may, and upon request of a party shall, require the child, the known parent, and the alleged parent to submit to appropriate tests;

3. The results of scientifically reliable genetic tests, including blood tests, if available, weighted with all the evidence;

4. Evidence of the alleged parent consenting to or acknowledging, by a general course of conduct, the common use of such parent's surname by the child;

5. Evidence of the alleged parent claiming the child as his child on any statement, tax return or other document filed by him with any state, local or federal government or any agency thereof;

6. A true copy of an acknowledgment pursuant to § 20-49.5; and

7. An admission by a male between the ages of fourteen and eighteen pursuant to § 20-49.6.

1988, cc. 866, 878; 1992, c. 516.

§ 20-49.5 Support of children of unwed parents by the father; testimony under oath.

§ 20-49.5. Support of children of unwed parents by the father; testimony under oath.

Whenever in any legal proceedings a man voluntarily testifies under oath or affirmation that he is the father of a child whose parents are not married, or are not married to each other, the court may require that he complete an acknowledgment of paternity on a form provided by the Department of Social Services. This acknowledgment shall be sent by the clerk of the court within thirty days of completion to the Department of Social Services.

In any proceeding under this chapter, the petitioner may request a true copy of this form from the Department of Social Services and the Department shall remit such form to the court where the petition has been filed. Such true copy of an acknowledgment of paternity shall then be admissible in any proceeding under this chapter.

1988, cc. 866, 878.

§ 20-49.6 Proceedings to establish paternity or enforce support obligations of males between the ages of fourteen and eighteen.

§ 20-49.6. Proceedings to establish paternity or enforce support obligations of males between the ages of fourteen and eighteen.

In any proceeding to establish or enforce an obligation for support and maintenance of a child of unwed parents, a male between the ages of fourteen and eighteen who is represented by a guardian ad litem pursuant to § 8.01-9 and who has not otherwise been emancipated shall not be deemed to be under a disability as provided in § 8.01-2. The court may enter an order establishing the paternity of the child based upon an admission of paternity by such male made under oath before the court or upon such other evidence as may be sufficient in law to support a finding of paternity. The order may provide for support and maintenance of the child by the father and shall be enforceable as if the father were an adult.

1988, cc. 866, 878.

§ 20-49.7 Civil actions.

§ 20-49.7. Civil actions.

An action brought under this chapter is a civil action. The natural parent and the alleged parent are competent to testify. Testimony of a physician concerning the medical circumstances of the pregnancy and the condition and characteristics of the child upon birth shall not be privileged. Bills for expenses incurred for pregnancy, childbirth and genetic testing shall be admissible as prima facie evidence of the facts stated therein, without requiring third-party foundation testimony if the party offering such evidence is under oath.

1988, cc. 866, 878; 1997, cc. 792, 896.

§ 20-49.8 Judgment or order; costs; birth record.

§ 20-49.8. Judgment or order; costs; birth record.

A. A judgment or order establishing parentage may include any provision directed against the appropriate party to the proceeding, concerning the duty of support, including an equitable apportionment of the expenses incurred on behalf of the child from the date the proceeding under this chapter was filed with the court against the alleged parent or, if earlier, the date an order of the Department of Social Services entered pursuant to Title 63.2 and directing payment of support was delivered to the sheriff or process server for service upon the obligor. The judgment or order may be in favor of the natural parent or any other person or agency who incurred such expenses provided the complainant exercised due diligence in the service of the respondent. The judgment or order may also include provisions for the custody and guardianship of the child, visitation privileges with the child, or any other matter in the best interest of the child. In circumstances where the parent is outside the jurisdiction of the court, the court may enter a further order requiring the furnishing of bond or other security for the payment required by the judgment or order. The judgment or order may direct either party to pay the reasonable and necessary unpaid expenses of the mother's pregnancy and delivery or equitably apportion the unpaid expenses between the parties. However, when the Commonwealth, through the Medicaid program, has paid such expenses, the court may order reimbursement to the Commonwealth for such expenses.

B. A determination of paternity made by any other state shall be given full faith and credit, whether established through voluntary acknowledgment or through administrative or judicial process; provided, however, that, except as may otherwise be required by law, such full faith and credit shall be given only for the purposes of establishing a duty to make payments of support and other payments contemplated by subsection A.

C. For each court determination of parentage made under the provisions of this chapter, a certified copy of the order or judgment shall be transmitted to the State Registrar of Vital Records by the clerk of the court within thirty days after the order becomes final. Such order shall set forth the full name and date and place of birth of the person whose parentage has been determined, the full names of both parents, including the maiden name, if any, of the mother and the name and address of an informant who can furnish the information necessary to complete a new birth record. In addition, when the State Registrar receives a document signed by a man indicating his consent to submit to scientifically reliable genetic tests, including blood tests, to determine paternity and the genetic test results affirming at least a ninety-eight percent probability of paternity, a new birth record shall be completed as provided in § 32.1-261. When the State Registrar receives a copy of a judgment or order for a person born outside of this Commonwealth, such order shall be forwarded to the appropriate registration authority in the state of birth or the appropriate federal agency.

1988, cc. 866, 878; 1990, c. 615; 1992, c. 867; 1994, c. 869; 1996, c. 491; 1998, c. 592.

§ 20-49.10 Relief from legal determination of paternity.

§ 20-49.10. Relief from legal determination of paternity.

An individual may file a petition for relief and, except as provided herein, the court may set aside a final judgment, court order, administrative order, obligation to pay child support or any legal determination of paternity if a scientifically reliable genetic test performed in accordance with this chapter establishes the exclusion of the individual named as a father in the legal determination. The court shall appoint a guardian ad litem to represent the interest of the child. The petitioner shall pay the costs of such test. A court that sets aside a determination of paternity in accordance with this section shall order completion of a new birth record and may order any other appropriate relief, including setting aside an obligation to pay child support. No support order may be retroactively modified, but may be modified with respect to any period during which there is a pending petition for relief from a determination of paternity, but only from the date that notice of the petition was served on the nonfiling party.

A court shall not grant relief from determination of paternity if the individual named as father (i) acknowledged paternity knowing he was not the father, (ii) adopted the child, or (iii) knew that the child was conceived through artificial insemination.

2001, c. 814.

Code of Virginia
Title 32.1. Health
Chapter 7. Vital Records
Article 2. Birth Certificates

§ 32.1-257. Filing birth certificates; from whom required; signatures of parents

A. A certificate of birth for each live birth that occurs in the Commonwealth shall be filed with the State Registrar within seven days after such birth. The certificate of birth shall be registered by the State Registrar if it has been completed and filed in accordance with this section.

B. When a birth occurs in an institution or en route thereto, the person in charge of such institution or an authorized designee shall obtain the personal data, and prepare the certificate either on forms furnished by the State Registrar or by an electronic process as approved by the Board. Such person or designee shall, if submitting a form, secure the signatures required by the certificate. The physician or other person in attendance shall provide the medical information required by the certificate within five days after the birth. The person in charge of the institution or an authorized designee shall certify to the authenticity of the birth registration either by affixing his signature to the certificate or by an electronic process approved by the Board, and shall file the certificate of birth with the State Registrar within seven days after such birth.

C. When a birth occurs outside an institution, the certificate shall be prepared on forms furnished by the State Registrar and filed by one of the following in the indicated order of priority, in accordance with the regulations of the Board:

1. The physician in attendance at or immediately after the birth, or in the absence of such physician,

2. Any other person in attendance at or immediately after the birth, or in the absence of such a person,

3. The mother, the other parent, or, in the absence of the other parent and the inability of the mother, the person in charge of the premises where the birth occurred.

C1. When a birth occurs on a moving conveyance within the United States of America and the child is first removed from the conveyance in this Commonwealth, the birth shall be registered in this Commonwealth and the place where the child is first removed from the conveyance shall be considered the place of birth. When a birth occurs on a moving conveyance while in international waters or air space or in a foreign country or its air space and the child is first removed from the conveyance in this Commonwealth, the birth shall be registered in this Commonwealth although the certificate shall indicate the actual place of birth insofar as can be determined.

D. If the mother of a child is not married to the natural father of the child at the time of birth or was not married to the natural father at any time during the 10 months next preceding such birth, the name of the father shall not be entered on the certificate of birth without a sworn acknowledgment of paternity, executed subsequent to the birth of the child, of both the mother and of the person to be named as the father. In any case in which a final determination of the paternity of a child has been made by a court of competent jurisdiction pursuant to § 20-49.8, from which no appeal has been taken and for which the time allowed to perfect an appeal has

expired, the name of the father and the surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court.

Children born of marriages prohibited by law, deemed null or void, or dissolved by a court shall nevertheless be legitimate and the birth certificate for such children shall contain full information concerning the other parent.

For the purpose of birth registration in the case of a child resulting from assisted conception, pursuant to Chapter 9 (§ 20-156 et seq.) of Title 20, the birth certificate of such child shall contain full information concerning the mother's spouse as the other parent of the child and the gestational mother as the mother of the child. Donors of sperm or ova shall not have any parental rights or duties for any such child.

In the event that any person desires to have the name of the father entered on the certificate of birth based upon the judgment of paternity of a court of another state, such person shall apply to an appropriate court of the Commonwealth for an order reflecting that such court has reviewed such judgment of paternity and has determined that such judgment of paternity was amply supported in evidence and legitimate for the purposes of Article IV, Section 1 of the Constitution of the United States.

If the order of paternity should be appealed, the registrar shall not enter the name of the alleged father on the certificate of birth during the pendency of such appeal. If the father is not named on the certificate of birth, no other information concerning the father shall be entered on the certificate.

E. Either of the parents of the child shall verify the accuracy of the personal data to be entered on the certificate of birth in time to permit the filing within the seven days prescribed above.

Code 1950, § 32-353.15; 1960, c. 451; 1979, c. 711; 1983, c. 240; 1984, c. 189; 1991, c. 611; 1994, cc. 796, 919;2020, c. 900.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

ORDER DETERMINING PARENTAGE

Commonwealth of Virginia Va. Code §§ 20-49.5, 20-49.8

Case No. .....

VIRGINIA BEACH .....

[ ] Circuit Court

[X] Juvenile and Domestic Relations District Court

..... v./*In re* .....

Present: [ ] Putative Father [ ] Putative Father's attorney..... [ ] Other .....

[ ] Mother [ ] Mother's attorney ..... [ ] Other .....

Upon hearing the evidence, the Court finds that:

1. .....
FULL NAME (First, Middle, Last)

who is ..... and was born on ..... in .....
RACE DATE STATE OR FOREIGN COUNTRY

[ ] a. is the father of the following children:

	Full Name (First, Middle, Last)	Sex	Birth Place	Date of Birth
(1)				
(2)				
(3)				
(4)				

[ ] b. is not the father of the following children:

	Full Name (First, Middle, Last)	Sex	Birth Place	Date of Birth
(1)				
(2)				
(3)				
(4)				

2. .....,
FULL NAME

is the mother of the above-listed children, and her maiden name is: .....

3. [ ] yes [X] no The children were made parties to the proceeding.

4. [ ] yes [X] no The children were represented by a guardian ad litem or counsel.

5. .....
is the name and address of an informant who can furnish the information necessary to complete a new birth record.

(Complete the following if applicable)

6. [ ] The Court finds that the Virginia Department of Social Services is entitled to reimbursement for attorney's fees and other costs from the father.

7. [X] There being no other order providing for reimbursement by the father, the Court orders the father to pay to the Virginia Department of Social Services the sum of $ .....

8. [ ] The father voluntarily testified under oath or affirmation that he is the father of a child whose parents are not married (or are not married to each other).

   [ ] The court also required him to complete an acknowledgment of paternity on a form provided by the Department of Social Services pursuant to Va. Code § 20-49.5.

..... _____
DATE JUDGE

Clerk's Office: The Office of Vital Records cannot process this order without the highlighted information and the reverse completed.

[ ] VITAL RECORDS [ ] DCSE [ ] PETITIONER [ ] RESPONDENT [ ] OTHER

ORDER DETERMINING PARENTAGE

IMPORTANT BIRTH CERTIFICATE INFORMATION FOR PARENT/LEGAL GUARDIAN

Contact the Office of Vital Records for information on how to obtain a copy of the birth certificate including the amount of any fee required.

OFFICE OF VITAL RECORDS
P.O. Box 1000
Richmond, VA 23218-1000
(804) 662-6200

FOR COURT USE ONLY

VIRGINIA BEACH

[ ] Circuit Court
[x] Juvenile and Domestic Relations District Court

I, the undersigned clerk or deputy clerk of the above-named court, authenticate pursuant to Va. Code § 8.01-391 (C) on this date that the document to which this authentication is affixed is a true copy of a record in the above-named court, made in the performance of my official duties.

DATE

CLERK/DEPUTY CLERK

285 Va. 163
736 S.E.2d 711

L.F., a minor
v.
William D. BREIT, et al.
Beverley Mason
v.
William D. Breit, et al.

Record Nos. 120158, 120159.

Supreme Court of Virginia.

Jan. 10, 2013.

[736 S.E.2d 714]

Jerrold G. Weinberg (Weinberg & Stein, Norfolk, on briefs), for appellant, Record No. 120158.

Kevin E. Martingayle, Virginia Beach (William D. Breit; Bischoff Martingayle; Serious Injury Law Center, on brief), for appellee William D. Breit, Record No. 120158.

No brief filed on behalf of appellee Beverly Mason, Record No. 120158.

Amicus Curiae: The New Hope Center for Reproductive Medicine (Elizabeth Griffin Robertson; Goodman, Allen & Filetti,

[736 S.E.2d 715]

Glen Allen, on brief), in support of appellant, Record No. 120158.

Frank K. Friedman, Roanoke (Reeves W. Mahoney; Andrew T. Richmond; Poole Mahoney, Virginia Beach; Woods Rogers, on briefs), for appellant, Record No. 120159.

Kevin E. Martingayle, Virginia Beach (William D. Breit; Bischoff Martingayle; Serious Injury Law Center, on brief), for appellees, Record No. 120159.

No brief filed on behalf of L.F., a Minor, Record No. 120159.

Amicus Curiae: The New Hope Center for Reproductive Medicine (Elizabeth Griffin Robertson; Goodman, Allen & Filetti, Glen Allen, on brief), in support of appellant, Record No. 120159.

Amicus Curiae: Center for Global Justice, Human Rights and the Rule of Law at Regent University School of Law (Lynne Marie Kohm, Virginia Beach, on brief), in support of appellee, L.F., a Minor, Record No. 120159.

Present: KINSER, C.J., LEMONS, GOODWYN, MILLETTE, MIMS, and POWELL, JJ., and RUSSELL, S.J.

Opinion by Justice WILLIAM C. MIMS.

[285 Va. 170]In these appeals, we consider whether Code §§ 20–158(A)(3) and 32.1–257(D) bar an unmarried, biological father from establishing [285 Va. 171]legal parentage of his child conceived through assisted conception, pursuant to a voluntary written agreement as authorized by Code § 20–49.1(B)(2).

I. BACKGROUND AND MATERIAL PROCEEDINGS BELOW

Beverley Mason and William D. Breit had a long-term relationship and lived together as an unmarried couple for several years. They wished to have a child together. Unable to conceive naturally, they sought reproductive assistance from Dr. Jill Flood, a board-certified fertility doctor.

Dr. Flood performed two cycles of in vitro fertilization ("assisted conception"). Each time, she retrieved eggs from Mason, fertilized them outside her body using Breit's sperm, and transferred the resulting embryos into Mason's body. Breit was present for all

stages of the in vitro fertilization process and continued to live with Mason throughout the resulting pregnancy.

Prior to the child's birth, Mason and Breit entered into a written custody and visitation agreement providing Breit with reasonable visitation rights and agreeing that such visitation was in the child's best interests.

On July 13, 2009, Mason gave birth to L.F. Breit was present for L.F.'s birth and is listed as the father on her birth certificate. The couple named her after Mason's paternal grandmother and Breit's maternal grandmother, and her last name is a hyphenated combination of their surnames.

On the day after L.F.'s birth, Mason and Breit jointly executed a written agreement, identified as an "Acknowledgement of Paternity," stating that Breit is L.F.'s legal and biological father.[1] The couple jointly mailed birth announcements naming Mason and Breit as L.F.'s parents. They stated to friends and family that Breit was L.F.'s father, and continued to live together for four months following L.F.'s birth.

After the couple separated, Breit continued to provide for L.F. financially. He maintained her as his child on his health insurance policy and continued to provide child support. He consistently visited L.F. on weekends and holidays, thereby beginning to establish an ongoing parent-child relationship with her. Breit took an active role [285 Va. 172]in L.F.'s life until August 2010, when Mason unilaterally terminated all contact between Breit and L.F.

On August 24, 2010, Breit filed a petition for custody and visitation in the Juvenile and Domestic Relations District Court of the City of Virginia Beach. Mason filed a motion to dismiss and the court dismissed Breit's petition without prejudice. In November 2010, pursuant to Code § 20–49.2, Breit filed a petition to determine parentage and establish custody and visitation ("petition to determine

[736 S.E.2d 716]

parentage") in the Circuit Court of the City of Virginia Beach, naming Mason and L.F. (collectively "Mason") as co-parties defendant. He filed a motion for summary judgment, arguing that the acknowledgement of paternity that he and Mason voluntarily executed pursuant to Code § 20–49.1(B)(2) created a final and binding parent-child legal status between Breit and L.F. Mason filed pleas in bar asserting that, pursuant to Code §§ 20–158(A)(3) and 32.1–257(D), Breit was barred from being L.F.'s legal parent because he and Mason were never married and L.F. was conceived through assisted conception.

At the hearing on the motions, the circuit court appointed Jerrold Weinberg, an attorney who previously had been retained by Mason to represent L.F., to serve as L.F.'s guardian ad litem ("GAL"). The circuit court sustained the pleas in bar, denied Breit's motion for summary judgment, and dismissed by nonsuit the remainder of Breit's petition seeking custody and visitation. Breit appealed the circuit court's judgment to the Court of Appeals.

The Court of Appeals reversed the circuit court's decision to sustain the pleas in bar. *Breit v. Mason*, 59 Va.App. 322, 337–38, 718 S.E.2d 482, 489 (2011). It held that

a known sperm donor who, at the request of a woman to whom he is not married, donates his sperm for the purpose of uniting that sperm with that woman's egg to accomplish pregnancy through assisted conception and who, together with the biological mother, executes an uncontested Acknowledgement of Paternity under oath, pursuant to Code § 20–49.1(B)(2), is not barred from filing a parentage action pursuant to Code § 20–49.2 to establish

paternity of the child resulting from assisted conception.

Id. at 337, 718 S.E.2d at 489.

[285 Va. 173]In reaching its decision, the Court of Appeals "harmonized" Code §§ 20–49.1(B)(2) and 20–158(A)(3) to be consistent with "the intent of the legislature to ensure that all children born in the Commonwealth have a known legal mother and legal father." *Id.* at 336–37, 718 S.E.2d at 489. The Court of Appeals concluded that it would create a "manifest absurdity" to interpret Code § 20–158(A)(3) to foreclose any legal means for an intended, unmarried, biological father to establish legal parentage of a child born as a result of assisted conception, merely by virtue of his status as a "donor." [2]*Id.* at 336, 718 S.E.2d at 489. Mason appealed, and we granted the following assignments of error:

1. The Court of Appeals erred in rejecting the circuit court's decision that a sperm donor who is unmarried to the mother of a child conceived by "assisted conception" is not the child's father under Va.Code §§ 20–158(A)(3) and 32.1–257(D), and in overturning the circuit court's ruling sustaining the pleas in bar.

....

2. The Court of Appeals erred in failing to rule that donor's acknowledgement of paternity was void *ab initio* and ineffective and that donor lacked any proper basis for asserting parentage.[3]

We also granted Breit's assignments of cross-error:

1. The Court of Appeals erred in failing to reverse the trial court for failing to enter summary judgment in favor of the father pursuant to § 20–49.1(B)(2) when the birth mother voluntarily signed an "acknowledgement of paternity" under oath acknowledging the biological father to be the legal father of the child.

2. The Court of Appeals erred in failing to rule that § 20–158(A)(3) and § 32.1–257(D) are unconstitutional and that any statutory interpretation that fully and finally terminates any [285 Va. 174]potential rights of a sperm donor violates the constitutionally protected liberty rights of equal protection and due process.

[736 S.E.2d 717]

II. LEGISLATIVE HISTORY AND POLICY

Before we analyze the issues in this case, it is helpful to review the legislative history and policy behind the two primary statutes.

A. TITLE 20, CHAPTER 3.1 (CODE § 20–49.1 *et seq.*)

Code § 20–49.1 *et seq.* is the statutory scheme designed to establish the legal parentage of children born to unmarried parents.

At common law, there was no recognized duty on the part of an unmarried father to support his biological child. *See Brown v. Brown*, 183 Va. 353, 355, 32 S.E.2d 79, 80 (1944). The first statutory modification of the common-law rule occurred in 1952, when the General Assembly allowed proof of paternity to establish such a duty, but only by the father's admission of paternity under oath before a court. 1952 Acts ch. 584 (formerly codified as Code § 20–61.1). In 1954, this statute was liberalized to allow proof of

paternity through the use of a father's out-of-court admission of paternity in writing under oath. 1954 Acts ch. 577. In 1988, Code § 20–61.1 was repealed, and the General Assembly amended and recodified the subject matter in Chapter 3.1, Title 20, Code § 20–49.1 *et seq.* 1988 Acts ch. 866.

Chapter 3.1 is entitled "Proceedings to Determine Parentage." The provision most pertinent to this case, Code § 20–49.1, is specifically labeled "[h]ow parent and child relationship established." Since its enactment in 1988, Code § 20–49.1 has provided for the establishment of paternity by a voluntary written agreement of the biological father and mother, made under oath, acknowledging paternity. In 1992, it was expanded to permit the establishment of paternity through the use of scientifically reliable genetic testing. 1992 Acts ch. 516. There is no limitation in Chapter 3.1 barring parents who conceive through assisted conception from *voluntarily* establishing paternity by such a written agreement. Consequently, Code § 20–49.1 *et seq.*, read without referencing other statutes, would control the determination of paternity in all cases concerning children of unwed biological parents who enter into such voluntary written agreements.

[285 Va. 175]B. TITLE 20, CHAPTER 9 (CODE § 20–156 *et seq.*)

Code § 20–156 *et seq.* (the "assisted conception statute") is intended to establish legal parentage of children born as a result of assisted conception. Unlike Code § 20–49.1 *et seq.*, it was enacted specifically to protect the interests of married parents.

The assisted conception statute was enacted in response to *Welborn v. Doe*, 10 Va.App. 631, 394 S.E.2d 732 (1990), a case involving a married couple and a third-party sperm donor. In *Welborn*, the Court of Appeals held that the only sure way for the husband of a gestational mother to secure parental rights, thereby divesting any rights of a third-party donor, was for the husband to adopt the child. *Id.* at 633, 394 S.E.2d at 733. The court noted the General Assembly's failure to enact legislation terminating the rights of such sperm donors, stating: "[u]ntil such time as the Code is amended to terminate possible parental rights of a sperm donor, only through adoption may the rights of the sperm donor be divested and only through adoption may the rights of Mr. Welborn and the twins born to his wife be as secure as their rights would be in a natural father-child relationship." *Id.* at 635, 394 S.E.2d at 734.

In 1991, at the next legislative session following *Welborn*, the General Assembly enacted the assisted conception statute, stating: "[t]he husband of the gestational mother of a child is the child's father" and "[a] donor is not the parent of a child conceived through assisted conception." 1991 Acts ch. 600 (enacting Code § 20–158(A)(2)–(3)). The statute clearly was enacted to ensure that infertile married couples such as the Welborns, referred to as "intended parents" under the statute, were not threatened by parentage claims from third-party donors. The policy goal was to ensure that a married couple could obtain sperm from an outside donor without fear that the donor would claim parental rights.

Code § 20–158(A)(3) was amended in 1997 to embody its current language: "[a] donor is not the parent of a child conceived through assisted conception, *unless the donor is the*

[736 S.E.2d 718]

husband of the gestational mother." (Emphasis added.) The amendment addressed situations in which the "donor" is also the husband of the gestational mother and therefore is permitted to establish parentage. In such cases, there is no possibility of interference from outside, third-party donors.

[285 Va. 176]III. ANALYSIS
A. STANDARD OF REVIEW

This appeal presents purely legal questions of statutory and constitutional interpretation which we review de novo. *Copeland v. Todd,* 282 Va. 183, 193, 715 S.E.2d 11, 16 (2011); *Addison v. Jurgelsky,* 281 Va. 205, 208, 704 S.E.2d 402, 404 (2011).

B. ASSISTED CONCEPTION STATUTE

Mason argues that the Court of Appeals erroneously harmonized the clear language of the assisted conception statute with Code § 20–49.1(B)(2). She claims that the assisted conception statute prevents all unmarried sperm donors from asserting parental rights with respect to children conceived by assisted conception, whether the mother is married or unmarried and without regard to her relationship with the donor. She argues that when a statute is unambiguous, we must apply the plain meaning of that language without reference to related statutes. *See Carter v. Nelms,* 204 Va. 338, 346, 131 S.E.2d 401, 406 (1963).

We disagree with Mason's interpretation of this statute, because her argument ignores a significant provision of the assisted conception statute. Code § 20–164 states:

> A child whose status as a child is declared or negated by this chapter [chapter 9] is the child only of his parent or parents as determined under this chapter, Title 64.1, *and, when applicable, Chapter 3.1 (§ 20–49.1 et seq.) of this title* for all purposes....

(Emphasis added.) This explicit cross reference to Chapter 3.1 (Code § 20–49.1 *et seq.*) requires that the assisted conception statute be read in conjunction with Code § 20–49.1 in the circumstances presented in this case.

Mason's argument is grounded in two provisions of the assisted conception statute, Code §§ 20–157 and 20–158(A)(3). We will consider these provisions in reverse order.

Code § 20–158(A)(3) provides that "[a] donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother." It is undisputed that Breit was a "donor" in an assisted conception, and that Breit was never married to Mason. Thus, Mason contends that the statute bars [285 Va. 177]Breit from establishing legal parentage of L.F., regardless of their voluntary written agreement.

Mason argues that Code § 20–49.1, despite being specifically referenced in the assisted conception statute, is not applicable in the present context and therefore their voluntary written agreement is a nullity. First, she contends that Code § 20–49.1 is merely a procedural vehicle by which *existing* parent-child relationships can be recognized, and that the statute cannot be used to *create* new parentage rights. We disagree. Code § 20–49.1(B) expressly provides that a parent-child relationship "may be established by" genetic testing or an acknowledgement of paternity:

> The parent and child relationship between a child and a man may be established by:
>
> 1. Scientifically reliable genetic tests, including blood tests, which affirm at least a ninety-eight percent probability of paternity. Such genetic test results shall have the same legal effect as a judgment entered pursuant to § 20–49.8.
>
> 2. A voluntary written statement of the father and mother made under oath acknowledging paternity.... The acknowledgement may be rescinded by either party within sixty days from the date on which it was signed.... A written statement shall have the same legal effect as a judgment

entered pursuant to § 20–49.8 and shall be binding and conclusive unless, in a subsequent judicial proceeding, the person challenging the statement establishes that the statement resulted from fraud, duress or a material mistake of fact.[4]

[736 S.E.2d 719]

Code § 20–49.1 has been amended four times since its enactment, including three times since the enactment of the assisted conception statute. Yet it has consistently been titled "[h]ow parent and child relationship *established*." [5] (Emphasis added.) Black's Law Dictionary defines "establish" as "[t]o make or form; to bring about or into existence," a definition that clearly contemplates the creation rather [285 Va. 178]than the mere recognition of parentage rights. Black's Law Dictionary 626 (9th ed. 2010).

Mason next argues that allowing unmarried sperm donors such as Breit to establish parentage pursuant to Code § 20–49.1(B) directly conflicts with Code § 20–158(A)(3). Code § 20–49.1(B) contains two independent and disparate provisions: (B)(1) allows paternity to be established unilaterally by scientifically reliable genetic testing, and (B)(2) allows paternity to be established by a voluntary written statement of both biological parents acknowledging paternity. We must examine these two independent sections separately.

Preliminarily, Code §§ 20–49.1(B) and 20–158(A)(3) clearly relate to the same subject matter: establishing legal parentage of children. As noted previously, Code § 20–49.1 is specifically referenced in the assisted conception statute, of which Code § 20–158(A)(3) is a part. We must therefore construe these linked statutes that address the same subject matter "so as to avoid repugnance and conflict between them." *City of Lynchburg v. English Constr. Co.*, 277 Va. 574, 584, 675 S.E.2d 197, 202 (2009). The two statutes must be read "as a consistent and harmonious whole to give effect to the overall statutory scheme." *Bowman v. Concepcion*, 283 Va. 552, 563, 722 S.E.2d 260, 266 (2012) (internal quotation marks omitted). The assisted conception statute specifically indicates that, when applicable, Code § 20–49.1 relates to the determination of parentage of children born as a result of assisted conception. Code § 20–164. This plain language cannot be ignored. *See English Constr. Co.*, 277 Va. at 584, 675 S.E.2d at 202 ("No part of an act should be treated as meaningless unless absolutely necessary."). At the same time, Code § 20–49.1 is only applicable to the extent there is no conflict between its provisions and those of the assisted conception statute. *See Ragan v. Woodcroft Vill. Apts.*, 255 Va. 322, 325, 497 S.E.2d 740, 742 (1998).

Mason argues that, under Code § 20–49.1(B)(1), donors could manufacture parent-child relationships over the gestational mother's objection through the use of genetic testing. Similarly, a gestational mother who became impregnated by a sperm donor could use Code § 20–49.1(B)(1) to force parental responsibilities on the donor, including the obligation of child support, solely by establishing a biological link. Mason asserts that the General Assembly intended to foreclose such scenarios when it enacted the assisted conception statute. We agree.

[285 Va. 179]Code § 20–49.1(B)(1) directly conflicts with Code § 20–158(A)(3), since it allows paternity to be established solely on the basis of biological ties, which circumvents Code § 20–158(A)(3)'s instruction that mere donors cannot establish parentage. Consequently, a sperm donor aided only by the results of genetic testing may not establish parentage.

Code § 20–49.1(B)(2) does not present such a conflict. Executing an

acknowledgement of paternity involves an assumption of rights and responsibilities well beyond biological ties. It is a voluntary agreement to establish an actual parent-child relationship that more closely approximates the status of a gestational mother's husband rather than a third-party donor. The assisted conception statute simply did not contemplate situations where, as here, unmarried donors have long-term relationships as well as biological ties that have been voluntarily acknowledged in writing pursuant to Code § 20–49.1(B)(2), and have voluntarily assumed responsibilities to their children.

[736 S.E.2d 720]

As previously discussed, the assisted conception statute was written specifically with married couples in mind.[6] The statute's primary purpose is to protect cohesive family units from claims of third-party intruders who served as mere donors. But Breit is not an intruder. He is the person whom Mason originally intended to be L.F.'s parent, whom she treated as L.F.'s parent for an extended period, and whom she voluntarily acknowledged as L.F.'s parent in a writing that she intended to be legally binding. Until Mason terminated Breit's visitation, Breit cared for, supported, and had begun to establish a parent-child relationship with L.F. Mason and Breit represented the closest thing L.F. had to a "family unit."

We agree with the Court of Appeals that the General Assembly did not intend to divest individuals of the ability to establish parentage solely due to marital status, where, as here, the biological mother and sperm donor were known to each other, lived together as a couple, jointly assumed rights and responsibilities, and [285 Va. 180]voluntarily executed a statutorily prescribed acknowledgement of paternity.

Having determined that Code § 20–49.1(B)(2) would apply in this context notwithstanding Code § 20–158(A)(3), we turn to Mason's next argument. Mason asserts that Code § 20–157 forecloses a conclusion that Code § 20–49.1(B)(2) applies. Code § 20–157 expressly states that the provisions of Chapter 9 control, without exception, in any related litigation:

> The provisions of this chapter [chapter 9] shall control, without exception, in any action brought in the courts of this Commonwealth to enforce or adjudicate any rights or responsibilities arising under this chapter.

This provision requires this Court to give precedence to Code §§ 20–158(A)(3) and 20–164 when confronted with contrary arguments. However, we must also harmonize Code § 20–49.1, *when applicable*, due to its explicit inclusion in Code § 20–164. Read in isolation, Code § 20–157 could support Mason's argument. But we do not read statutes in isolation. As stated above, we must construe statutes "to avoid repugnance and conflict between them." *City of Lynchburg*, 277 Va. at 584, 675 S.E.2d at 202. Likewise, we are bound to construe statutes in a manner that "avoid[s] any conflict with the Constitution." *Commonwealth v. Doe*, 278 Va. 223, 229, 682 S.E.2d 906, 908 (2009). In Virginia, it is firmly established that "[a]ll actions of the General Assembly are presumed to be constitutional." *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 52, 392 S.E.2d 817, 820 (1990). Breit contends that accepting Mason's argument would render the assisted conception statute unconstitutional. That we cannot do, if there is any reasonable interpretation that conforms to the Constitution. *See Ocean View Improvement Corp. v. Norfolk & W. Ry. Co.*, 205 Va. 949, 955, 140 S.E.2d 700, 704 (1965). Consequently, we must address Mason's argument regarding Code § 20–157 in the light of two constitutional imperatives.

C. EQUAL PROTECTION AND DUE PROCESS

Breit argues that if we accept Mason's argument the assisted conception statute violates the Equal Protection Clause of the Fourteenth Amendment. He suggests that the statute treats unmarried [285 Va. 181]male donors differently than unmarried female donors and treats unmarried donors differently than married donors.

The assisted conception statute does not distinguish between donors based on gender. The statute defines "[d]onor" as "an individual, other than a surrogate, who contributes the sperm *or egg* used in assisted conception." Code § 20–156 (emphasis added). Thus, a woman who is not the gestational mother also can be a donor. Neither a male nor a female donor is deemed to be a parent purely as a result of the donation of

[736 S.E.2d 721]

sperm or egg. *See*Code § 20–158(A)(3). It is true that an unmarried female egg donor who is also the gestational mother may be considered a parent, *see*Code § 20–158(A)(1); however, the fact that a male is unable to be the gestational carrier of the fertilized ovum is the result of biology, not discrimination.

Code § 20–158(A)(3) does make distinctions based on marital status: a male donor is afforded rights as a parent only if he is married to the gestational mother. But marital status is not a suspect classification under the Equal Protection Clause. *See Eisenstadt v. Baird*, 405 U.S. 438, 446–47, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1971). Therefore, disparate treatment of unmarried donors is analyzed to determine whether there is a rational basis for such treatment. "A classification reviewed under a rational basis standard 'is accorded a strong presumption of validity.' " *Gray v. Commonwealth*, 274 Va. 290, 308, 645 S.E.2d 448, 459 (2007) (quoting *Heller v. Doe*, 509 U.S. 312, 318–21, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993)). Such a classification will stand if there is a rational relationship between the disparate treatment and some legitimate governmental purpose. *Id.*

We have consistently recognized that the Commonwealth has a significant interest in encouraging the institution of marriage. *E.g., Cramer v. Commonwealth*, 214 Va. 561, 564, 202 S.E.2d 911, 914 (1974). Code § 20–158(A)(3)'s objective of protecting married couples from potential interference by donors is rationally related to that legitimate governmental purpose. Accordingly, Breit's equal protection argument must fail.

Next, Breit contends that the assisted conception statute, if applied as advanced by Mason without harmonization with Code § 20–49.1 *et seq.*, violates his constitutionally protected right to make decisions concerning the care, custody, and control of his child. We agree. That constitutional imperative therefore must guide our conclusion regarding statutory interpretation, particularly regarding Code § 20–157.

[285 Va. 182]The relationship between a parent and child is a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment.[7]*Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Wyatt v. McDermott*, 283 Va. 685, 692, 725 S.E.2d 555, 558 (2012) ("We recognize the essential value of protecting a parent's right to form a relationship with his or her child."); *Copeland*, 282 Va. at 198, 715 S.E.2d at 19. Indeed, the Supreme Court of the United States has characterized a parent's right to raise his or her child as "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, 530 U.S. at 65, 120 S.Ct. 2054. Any statute that seeks to interfere with a parent's fundamental rights survives constitutional scrutiny only if it is narrowly tailored to serve a compelling state interest. *McCabe v. Commonwealth*, 274 Va. 558, 563, 650 S.E.2d 508, 510 (2007); *see also*

Washington v. Glucksberg, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

Significantly, in *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983), the Supreme Court of the United States examined the extent to which an unmarried father's relationship with his child is protected under the Due Process Clause. The Court recognized that parental rights do not arise solely from the biological connection between a parent and child. *Id.* at 261, 103 S.Ct. 2985. The Court described the constitutionally protected right of unwed parents as follows:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the Due Process Clause.

Id. (internal quotation marks and citation omitted).

Prior to his visitation being terminated, Breit demonstrated a full commitment to the responsibilities of parenthood. He was actively participating in L.F.'s life, had agreed to be listed as the father on her birth

[736 S.E.2d 722]

certificate, had acknowledged paternity under oath, and had jointly agreed with Mason regarding parental rights and responsibilities. In light of this demonstrated commitment, we conclude that the Due Process Clause protects Breit's fundamental [285 Va. 183]right to make decisions concerning L.F.'s care, custody and control, despite his status as an unmarried donor.[8]

If applied without harmonization with Code § 20–49.1(B)(2), Code §§ 20–157 and 20–158(A)(3) would unconstitutionally infringe on Breit's fundamental parental rights. As argued by Mason, an unmarried donor could *never* be the parent of a child conceived through assisted conception. That interpretation would absolutely foreclose any legal means for Breit to establish parentage of L.F., solely by virtue of his status as an unmarried donor. It would prevent Breit from continuing the constitutionally protected relationship he had begun to establish with his infant child. Such a result cannot withstand constitutional scrutiny.

A governmental policy that encourages children to be born into families with married parents is legitimate. In fact, it is laudable and to be encouraged. Yet neither our jurisprudence nor that of the United States Supreme Court permits that policy to overcome the constitutionally protected due process interest of a responsible, involved, unmarried mother *or* father. *See Martin v. Ziherl*, 269 Va. 35, 42, 607 S.E.2d 367, 370 (2005). Simply put, there is no compelling reason why a responsible, involved, unmarried, biological parent should never be allowed to establish legal parentage of her or his child born as a result of assisted conception.

When we apply the necessary constitutional due process analysis, the Court of Appeals' harmonization of [285 Va. 184]Code §§ 20–158(A) (3) and 20–49.1(B)(2) must prevail. Code § 20–157 cannot be interpreted to foreclose that conclusion without being rendered unconstitutional. The assisted conception statute, read as a whole, cannot render Code § 20–49.1(B)(2) ineffective because the General Assembly, acting in a manner consistent with its constitutional charge, could not have intended to permanently bar parentage actions by sperm donors under these factual circumstances.[9] *See Hess*, 240 Va. at 52, 392 S.E.2d at 820. Due process requires that unmarried parents such as Breit, who have demonstrated a full commitment to the

responsibilities of parenthood, be allowed to enter into voluntary agreements regarding the custody and care of their children.

D. ENFORCEABILITY OF ACKNOWLEDGEMENTS OF PATERNITY

In a final, related argument, Mason contends that acknowledgements of paternity

[736 S.E.2d 723]

executed pursuant to Code § 20–49.1(B)(2) are unenforceable. She argues that the rights of children cannot be bartered away by agreement and that all such agreements are void ab initio and of no effect. As strange as it may seem, the thrust of Mason's argument is that the acknowledgement of paternity impinges on a child's right *not* to have a parent.

Mason relies on this Court's holding in *Kelley v. Kelley*, 248 Va. 295, 449 S.E.2d 55 (1994). In *Kelley*, we refused to honor an agreement relieving a divorced father of his child support obligations, holding that "parents cannot contract away their children's rights to support" and that "any contract purporting to do so is facially illegal and void." *Id.* at 298–99, 449 S.E.2d at 56–57. Mason miscomprehends the breadth of our holding. *Kelley* only addresses agreements contracting away a child's right to receive support and maintenance. Breit's acknowledgement of paternity provides for the exact opposite—it provides L.F. with a legal avenue to *receive* support from both parents. *Kelley* does not prohibit such an agreement.

Furthermore, we reject the notion that children have a purported right or interest in *not* having a father. To the contrary, Virginia[285 Va. 185]case law makes clear that it is in a child's best interests to have the support and involvement of both a mother and a father, even if they are unmarried. *See Copeland*, 282 Va. at 194–95, 715 S.E.2d at 17;*Wilkerson v. Wilkerson*, 214 Va. 395, 397–98, 200 S.E.2d 581, 583 (1973) (recognizing that one parent cannot arbitrarily deprive a child of a relationship with the other parent); *see also* June Carbone, Which Ties Bind? Redefining the Parent–Child Relationship in an Age of Genetic Certainty, 11 Wm. & Mary Bill Rts. J. 1011, 1023–24 (2003) (discussing children's interests in the continuing involvement of both parents in the child's life).

Although our analysis in this case rests on Breit's constitutionally protected rights as a parent, we recognize that children also have a liberty interest in establishing relationships with their parents. *Commonwealth ex rel. Gray v. Johnson*, 7 Va.App. 614, 622, 376 S.E.2d 787, 791 (1989). Consequently, it is incumbent on courts to see that the best interests of a child prevail, particularly when one parent intends to deprive the child of a relationship with the other parent. "The preservation of the family, and in particular the parent-child relationship, is an important goal for not only the parents but also government itself.... Statutes terminating the legal relationship between [a] parent and child should be interpreted consistently with the governmental objective of preserving, when possible, the parent-child relationship." *Weaver v. Roanoke Dep't of Human Res.*, 220 Va. 921, 926, 265 S.E.2d 692, 695 (1980). Here, L.F. faces a potential loss of liberty in the form of deprivation of a relationship with her biological father, solely because she was conceived through assisted conception by unmarried parents. Virginia's marital preference in assisted conception protects an intact family from intervention from third-party strangers, but it was not intended to deprive a child of a responsible, involved parent.

E. CODE § 32.1–257(D)

Finally, Mason argues that Code § 32.1–257(D), a statute intended to control the filing

of birth certificates for each live birth in the Commonwealth, bars Breit's ability to establish parentage. When a child is born to unmarried parents, Code § 32.1–257(D) states:

[T]he name of the father shall not be entered on the certificate of birth without a sworn acknowledgement of paternity, executed[285 Va. 186]subsequent to the birth of the child, of both the mother and of the person to be named as the father.

....

For the purpose of birth registration in the case of a child resulting from assisted conception, pursuant to Chapter 9 (§ 20–156*et seq.*) of Title 20, the birth certificate of such child shall contain full information concerning the mother's husband as the father of the child and the gestational mother as the mother of the child. Donors of sperm or ova shall not have any parental rights or duties for any such child.

Our interpretation of this statute is controlled by our analysis of the assisted conception

[736 S.E.2d 724]

statute. As with the assisted conception statute, we are bound to interpret Code § 32.1–257(D) in a manner that avoids constitutional conflict. *Doe*, 278 Va. at 229, 682 S.E.2d at 908.

Code § 32.1–257(D) is an administrative, ministerial enactment. Its purpose is to ensure that the Commonwealth's records accurately reflect the *intended* parent-child relationship. Where, as here, unmarried biological parents together undertake the process of assisted conception, voluntarily execute an acknowledgement of paternity naming the "donor" as the child's legal father, and together enter into a binding agreement regarding custody and care, prohibiting the "donor" from ever establishing parental rights would be contrary to the statute's stated purpose and contrary to the Due Process Clause of the United States Constitution. Consequently, Mason's argument must fail.

IV. CONCLUSION

For the reasons set forth above, we will affirm the judgment of the Court of Appeals.

Record No. 120158— *Affirmed.*

Record No. 120159— *Affirmed.*

Notes:

[1] Mason and Breit used the acknowledgement of paternity form promulgated by the Virginia Department of Health, Division of Vital Records, pursuant to Code § 32.1–257(D).

[2] The Court of Appeals also held that the circuit court erred in appointing Weinberg as L.F.'s GAL and directed the trial court to appoint a new GAL for L.F. on remand.

[3] The listed assignments of error are verbatim from Record No. 120159. The assignments of error in Record No. 120158 have slightly different wording but are substantively identical.

[4] Neither Mason nor Breit rescinded the acknowledgement of paternity within sixty days of signing it, and neither party asserted that the agreement resulted from fraud,

duress, or a material mistake of fact.

5. *See* 1988 Acts chs. 866, 878; 1990 Acts ch. 836; 1992 Acts ch. 516; 1997 Acts ch. 792; 1998 Acts ch. 884.

6. The definitions listed in the assisted conception statute reiterate the statute's emphasis on married couples. For instance, Code § 20–156 defines "[s]urrogate" as "any adult woman who agrees to bear a child carried for *intended parents*," and "[i]ntended parents" is defined as "a man and a woman, *married to each other*, who enter into an agreement with a surrogate under the terms of which they will be the parents of any child born to the surrogate through assisted conception...." (Emphasis added.)

7. The due process guarantees of Article I, Section 11 of the Constitution of Virginia are virtually identical to those of the United States Constitution.

8. Mason argues that Breit's relationship with L.F. is not sufficient to trigger constitutional protection. She asserts that under the Supreme Court's holding in *Michael H. v. Gerald D.*, 491 U.S. 110, 124, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), the existence of constitutionally protected parental rights turns not on the depth of the parent-child relationship, but on whether the *type* of relationship at issue has traditionally been afforded special protection. Because assisted conception has only existed in recent years, Mason argues that the relationship between a sperm donor and child could not possibly be a historically protected relationship.

Mason's reliance on *Michael H.* is misplaced. In that case, a biological father who spent a short amount of time as the mother's live-in boyfriend sought to establish paternity after the mother had reconciled with her husband. The Supreme Court refused to recognize a liberty interest on behalf of the boyfriend, holding that relationships between children and adulterous fathers should not be constitutionally protected given society's historical interest in safeguarding the family institution. *Michael H.*, 491 U.S. at 123–24 [109 S.Ct. 2333]. Interference with the family institution is not at issue here: Mason and Breit represent the closest thing L.F. has to a "family unit," as Mason has no husband to claim parentage over Breit. The Court in *Michael H.* specifically acknowledged that, although the typical family institution is the marital family, respect has also historically been accorded to relationships developed within households comprised of unmarried parents and their children. *Id.* at 124 n. 3 [109 S.Ct. 2333].

9. On the other hand and as stated previously, Code § 20–49.1(B)(1) directly conflicts with Code § 20–158(A)(3) and may not be applied in the context of assisted conception. This does not violate constitutional due process rights, however, because Code § 20–49.1(B)(1) contemplates the establishment of paternity solely on the basis of biological ties. Constitutionally protected rights do not arise merely from the biological connection between a parent and child. *Lehr*, 463 U.S. at 261, 103 S.Ct. 2985.

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809 S.E.2d 441

Denise HAWKINS
v.
Darla GRESE

Record No. 0841-17-1

Court of Appeals of Virginia, Newport News.

FEBRUARY 13, 2018

Elizabeth Lynn Littrell (Barbara A. Fuller ; Lambda Legal Defense and Education Fund, Inc.; Fuller, Hadeed & Ros-Planas, PLCC, Virginia Beach, on briefs), for appellant.

Brandon H. Zeigler, Virginia Beach (Allison W. Anders ; Parks Zeigler, PLLC, on brief), for appellee.

(Margaret V. Weaver; Weaver Law Services, on brief), Guardian ad litem for the minor child.

Present: Judges Humphreys, Malveaux and Senior Judge Frank

OPINION BY JUDGE ROBERT J. HUMPHREYS

[68 Va.App. 467]

Denise Hawkins ("Hawkins") appeals the custody determination of the Virginia Beach Circuit Court ("circuit court") awarding full custody of B.G. to his biological mother Darla Grese ("Grese").

I. BACKGROUND

Hawkins and Grese were unmarried partners in a ten-year, same-sex relationship. During this relationship they discussed having a child. Grese became pregnant via artificial insemination and gave birth to B.G. in 2007. The parties never married or formed a civil union in another state[1] nor did Hawkins ever adopt B.G. Nevertheless, B.G. was raised by Hawkins and Grese in their shared home until they ended their relationship in 2014. The parties informally shared custody of B.G. from that point for a further two years. Eventually, relations between Grese and Hawkins soured and Grese terminated B.G.'s contact with Hawkins.

On February 24, 2016, Hawkins filed a petition for custody and visitation of B.G. in the Juvenile and Domestic Relations District Court ("JDR court") for the City of Virginia Beach. The JDR court awarded joint legal and physical custody to

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Hawkins and Grese as well as shared visitation, finding that B.G. considered both women to be his parents. The JDR court further found that B.G. was developing behavioral problems based on his separation from Hawkins, and two psychologists, as well as the guardian *ad litem* , testified that removing either Hawkins or Grese from B.G.'s life would cause emotional and psychological harm.

Grese appealed the JDR court's decision to the Circuit Court of the City of Virginia Beach ("circuit court"). She initially appealed both the custody and visitation awards, but subsequently withdrew the visitation appeal. Addressing the remaining custody issue, the circuit court first determined that Hawkins could not be considered a parent based on Virginia's rejection of the de facto parent doctrine. It further held that Hawkins, as a non-parent, interested party, did not rebut the parental presumption in favor of Grese's custody of B.G. The circuit court couched

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these decisions in language that clearly showed grave concern that separation from Hawkins would cause B.G. continued harm but the circuit court concluded that the law of the Commonwealth left it little option. Hawkins now appeals the circuit court's decision, alleging that the circuit court erred in determining she was not a parent to B.G., that the circuit court violated her constitutional parental rights, violated B.G.'s constitutional rights, and finally, erred in finding she had not rebutted the parental custody presumption.

II. ANALYSIS

A. Standard of Review

"Where, as here, a court hears evidence *ore tenus* , its findings are entitled to the weight of a jury verdict, and they will not be disturbed on appeal unless plainly wrong or without evidence to support them." Gray v. Gray, 228 Va. 696, 699, 324 S.E.2d 677, 679 (1985). Further, "the appellate court should view the facts in the light most favorable to the party prevailing before the trial court." Bottoms v. Bottoms, 249 Va. 410, 414, 457 S.E.2d 102, 105 (1995).

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B. The Constitutional Standard to be Applied

Hawkins points to the landmark Supreme Court decision in Obergefell v. Hodges, --- U.S. ---, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), and its progeny, including Pavan v. Smith, --- U.S. ----, 137 S.Ct. 2075, 198 L.Ed.2d 636 (2017), to support her contention that "non-biological parents in planned families comprising same-sex couples and their children are in fact *parents* ." Hawkins argues that by refusing to so hold, the circuit court has violated the liberty and equality guaranteed her by the Fourteenth Amendment.

Hawkins' arguments regarding the manner in which her constitutional rights were allegedly violated are a bit convoluted. Hawkins asserts that

> By declining to recognize [Hawkins'] status as a parent and perform a best interest determination, the Trial Court violated the liberty and equality guarantees of the Fourteenth Amendment. First, the Trial Court impermissibly infringed upon [Hawkins'] fundamental liberty interest in parental autonomy. Second, the Trial Court impermissibly imposed a barrier to former members of same-sex couples seeking recognition of their parent-child relationships that does not exist for members of different-sex couples, and thereby discriminated with respect to the exercise of a fundamental right.

In other words, Hawkins apparently alleges that it is the circuit court's action itself, rather than the law of the Commonwealth it relied on, that is unconstitutional. While this is less common than challenging the constitutionality of a statute or regulation, it is certainly a legitimate argument, as the judiciary is considered a state actor for Fourteenth Amendment purposes.[2] However, it also narrows the focus of our analysis of these assignments of error.

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The United States Supreme Court in United States v. Carolene Prods. Co., 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), introduced the concept that challenges to constitutionality of a statute or a state action should be judged under a tiered review system, with "narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution." Id. at 152 n.4, 58 S.Ct. at 783 n.4. This footnote has evolved into the modern three-tiered constitutional review standard in which by default the laxest standard, rational basis review, applies. The highest standard, strict scrutiny, applies where "[w]here certain 'fundamental rights' " are involved, and requires

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that legislation or actions "limiting these rights may be justified only by a 'compelling state interest,' " requiring legislation and action "must be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. 113, 155, 93 S.Ct. 705, 728, 35 L.Ed.2d 147 (1973). Such fundamental rights include not only those listed in the Bill of Rights but additional implied rights protected by the Fourteenth Amendment.

Sexual orientation has not been characterized as a suspect or quasi-suspect classification deserving of strict scrutiny by the United States Supreme Court. Instead, the Court has chosen to rely on the rational basis test or to simply omit discussion of the proper standard when confronted with issues of homosexual rights. Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), overturned a Colorado constitutional amendment aimed at homosexuals using the rational basis test. Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), overturned Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92

L.Ed.2d 140 (1986), and invalidated a Texas anti-sodomy law on the grounds that Bowers had

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too narrowly characterized the behavior at issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." Lawrence, 539 U.S. at 566, 123 S.Ct. at 2478. Instead, the Lawrence Court apparently re-characterized the issue as derivative of the fundamental right to privacy but did not articulate a standard of review for invalidating the law. Id. at 578, 123 S.Ct. at 2483–84. In her concurrence, Justice O'Connor suggested rational basis grounds for the Court's decision. Id. at 579-85, 123 S.Ct. at 2484–88. Though the legal history on this point is confusing, presently it appears that sexual orientation based classifications are subject to rational basis review.

Turning to parental rights, the United States Supreme Court has held that the liberty guaranteed by the Fourteenth Amendment encompasses "not merely freedom from bodily restraint but also ... to marry, establish a home and bring up children." Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). However, the principal cases addressing this right of child rearing, Meyer and Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), predate the adoption of the modern tiered system of constitutional application. Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), later addressed this right but did so in tandem with religious concerns. As such, the United States Supreme Court has not stated clearly what level of scrutiny applies in addressing parental rights. See generally, Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). However, this Court has held that "the parents' right to autonomy in child rearing is a fundamental right protected by the Fourteenth Amendment of the United States Constitution and that state interference with that right must be justified by a compelling state interest." Williams v. Williams, 24 Va. App. 778, 780, 485 S.E.2d 651, 652 (1997), modified and aff'd on appeal, 256 Va. 19, 501 S.E.2d 417 (1998). Hawkins, however, is seeking an initial determination that she is a parent and thus has at least an equal right to the custody of B.G. as Grese, B.G.'s biological parent. Therefore, whether the issue is that Hawkins' rights were violated because she is

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a lesbian or because the circuit court determined that she is not a parent, we conclude that the rational basis test applies in either case to the constitutionality of the circuit court's judgment.

Under the rational basis test, "[t]he general rule is that legislation [or, in this case, judicial action] is presumed to be valid and will be sustained if the classification drawn by the [circuit court] is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). This standard is used to "determin[e] the validity of state legislation or *other official action* that is challenged as denying equal protection." Id. (emphasis added). This test applies equally to the liberty

guarantees of the Fourteenth Amendment. Thus, with the rational basis test in mind, we return to Hawkins' assignments of error.

C. Whether Hawkins is a Parent to B.G.

All but one of Hawkins' assignments of error rely on the foundational assertion that

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she is B.G.'s parent, and thus we begin by examining this underlying contention. In essence, she claims that the circuit court violated her constitutional rights as a parent by holding that she was not a parent. This begs two questions: How is a parent defined for statutory purposes; and is that definition constitutional?

Turning first to the statutory definition of parentage, the laws of the Commonwealth do not expressly define the term "parent" in the context of custody. Nevertheless, by looking to other areas within the Code of Virginia where parent is used, it is clear that the term "parent" contemplates a relationship to a child based upon either the contribution of genetic material through biological insemination or by means of legal adoption. For example, the Code provides that parentage may be established by "scientifically reliable genetic tests," "[a] voluntary written statement of the father and mother made under oath acknowledging paternity," or "proof of lawful adoption." Code § 20-49.1. In the case of children

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that are the result of assisted conception such as B.G., the law is clear that Grese, but not Hawkins, is a parent of B.G.[3] Further, the most germane section of the Code, dealing with custody and visitation, defines "person with a legitimate interest"—as a party *other than a parent* who may seek custody and visitation—as including but not limited to "grandparents, step-grandparents, stepparents, former stepparents, blood relatives and family members." Code § 20-124.1. If such "person[s] with a legitimate interest" are in contention with parents for custody they cannot simultaneously also be parents. It seems clear, and we hold that where custody disputes are concerned, the term "parent" is a relationship to a child only through either biological procreation or legal adoption.

This definition of a parent was implicitly employed by the circuit court in this case and is also consistent with the Commonwealth's refusal to adopt wider parental definitions through other legal constructions such as the de facto or psychological parent doctrines adopted by some of our sister states and urged on us by Hawkins.[4] In fact, the case relied upon by the circuit court expressly rejecting the de facto parent doctrine in Virginia, Stadter v. Siperko, 52 Va. App. 81, 661 S.E.2d 494 (2008), is factually similar to this one. In Stadter a woman sought visitation with her ex-partner's biological

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child after the end of their same-sex relationship. She asked the court to treat her as a parent under the de facto parent doctrine. This Court noted that the de facto parent doctrine was simply being urged as a tool for overcoming a constitutional presumption in favor of parents in custody disputes. Id. at 90-91, 661 S.E.2d at 498. We pointed out that such a tool already exists in Virginia—the "person with a legitimate interest" classification of Code § 20-124.1. Id. at 91-92, 661 S.E.2d at 499.

In sum, the Commonwealth uses a definition of parent tied to blood or adoption, while also providing a method for parties without these ties, but with similarly close relationships, to intervene as "persons with a legitimate interest" under some circumstances.

We now must consider whether this definition of parentage passes the rational basis test for constitutionality. Hawkins argues that Obergefell and its progeny have implicitly redefined "parent" or "family" in a

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manner that obviates the Commonwealth's definition and mandates a holding that, because her relationship with Grese was the functional equivalent of marriage, her relationship with B.G. was constitutionally a parent-child relationship.

We disagree with Hawkins on this point. The Commonwealth's definition of "parent" is not inconsistent with United States Supreme Court jurisprudence regarding the nature of the family and parentage. "[T]he usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 843, 97 S.Ct. 2094, 2109, 53 L.Ed.2d 14 (1977). When the state defers to the family, it is with the recognition that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children, ... *as well as from the fact of blood relationship*." Id. at 844, 97 S.Ct. at 2109

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emphasis added) (internal citations omitted). There is no "serious [ ] dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship," but natural, biological parentage is a unique relationship predating any legal arrangement. Id. A judicial expansion of the term "parent" to include someone not bound by blood or law would be a legal construct which, rather than greatly predating the bill of rights, would be "an arrangement in which the State has been a partner from the outset." Id. at 845, 97 S.Ct. at 2110.

Further, this definition of parentage does not discriminate between same-sex and opposite-sex couples. If the couple is not married, the non-biological/non-adoptive partner is not a parent irrespective of gender or sexual orientation. It is true that when Hawkins and Grese

began their relationship, the law of the Commonwealth barred Hawkins and Grese from marrying, but the record does not indicate this was the sole reason they remained unmarried. While those laws previously banning same-sex *marriage* were discriminatory, the Commonwealth's definition of parent is not as it applies equally regardless of an unmarried couple's gender or sexual orientation.

In applying the rational basis test, the United States Supreme Court has noted that "[a]ll laws classify, and, unremarkably, the characteristics that distinguish the classes so created have been judged relevant by the legislators responsible for the enactment." Toll v. Moreno, 458 U.S. 1, 39, 102 S.Ct. 2977, 2997, 73 L.Ed.2d 563 (1982). Here, the law classifies as parent and non-parent through the circuit court's application of the definition discussed above.

In a rational basis analysis, "our judicial function permits us to ask only whether the judgment of relevance made by the [circuit court] is rational." Id. The relevant characteristics which classify here are entirely rational—people are considered parents on either biological or adoptive grounds, parties without these qualities retain a fair legal method to intervene if a parent is unfit. Further, "[a] classification

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does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.' " Heller v. Doe, 509 U.S. 312, 321, 113 S.Ct. 2637, 2643, 125 L.Ed.2d 257 (1993) (quoting Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970)). Though Hawkins undoubtedly has a close relationship with B.G. and is in a sympathetic and difficult position, the circuit court did not violate her constitutional rights by declining to recognize her as a parent of B.G.

In Obergefell, the Supreme Court held only that same-sex *marriage* was a constitutionally protected right. The majority's analysis in Obergefell is ordered around four principles which, according to the Court, demonstrate why constitutional marriage guarantees must apply with equal force to same-sex couples. These principles do indeed stress that confusion surrounding the status of children of same-sex couples is a source of social instability and suffering, stating that the right to marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation,

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and education." Obergefell, --- U.S. at ----, 135 S.Ct. at 2600. Further, the Court described these rights as a "unified whole," identifying the conglomerate right to " 'marry, establish a home and bring up children' " as " 'a central part of the liberty protected by the Due Process Clause.' " Id. (quoting Zablocki v. Redhail, 434 U.S. 374, 384, 98 S.Ct. 673, 680, 54 L.Ed.2d 618 (1978)). More starkly, the Court stated that "[t]he marriage laws at issue here ... harm and humiliate the children of same-sex couples." Id. at ---- - ----, 135 S.Ct. at 2600-01. Pavan relied on Obergefell to overturn an Arkansas law which required the father of a child to be listed on that child's birth certificate. The consolidated appellants in

Pavan were two legally married lesbian couples. As with B.G., the fathers were anonymous sperm donors. The law was invalidated because it infringed "the constellation of benefits that the States have linked to marriage." Pavan, 137 S.Ct. at 2077 (quoting Obergefell, --- U.S. at ----, 135 S.Ct. at 2601). In sum, the entire basis of the holding of Obergefell is the significance and importance of *marriage* as an institution that should not be withheld from

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same-sex couples. Barring procreation or adoption, pre-Obergefell, different-sex marriages did not automatically result in the spouses becoming legal parents of each other's children and the analysis of the Obergefell majority opinion does not compel a different conclusion with respect to same-sex marriages, far less unmarried couples of any sexual orientation.

Hawkins suggests that the "special facts and circumstances," of this case provide an avenue for carving out an exception in this admittedly exceptional case. However, were we to do so, it is clear to us that the constitutional presumption of parental fitness would begin the process of suffering a death by a thousand cuts.

We certainly acknowledge that society has evolved new family structures while simultaneously concluding that qualitatively and quantitatively assessing which among a kaleidoscope of those structures should be given legal recognition is more properly the province of the people's representatives in the General Assembly rather than the courts and Obergefell does not require a different conclusion.[5] Were we to adopt the "know it when we see it," "special circumstances" definition of parentage urged on us by Hawkins, it would open a Pandora's box of unintended consequences to hold that a legal parent-child relationship is created simply by virtue of such factors as the amount of time a child spends with, or the strength of an emotional bond that exists between, another living in the same household. It is not hard to imagine profound consequences for society and the courts if a parent knows that an ex-wife, ex-husband, ex-boyfriend, ex-girlfriend, former nanny, au pair or indeed virtually anyone not related to their child through biology or legal adoption, can be placed on equal footing as a

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biological or adoptive parent solely through a significant emotional bond with the child.

Much of the Obergefell language Hawkins cites is aspirational, seeking normality for same-sex families. It would be ironic for us to hold that the very decision expressing these aspirations became a tool for the erosion of the object of its aspiration—a family structure based upon marriage. The logical fallacy of this approach is apparent as well, if restricting marriage to opposite sex couples was unconstitutional because it denied same-sex couples the "constellation of benefits" heterosexual couples received, it could not possibly also then require the redefinition of every star in that constellation.

More fundamentally, Hawkins did not adopt B.G. during her relationship with Grese and thus relies upon her construction of Obergefell for relief. However, Obergefell provides no help for Hawkins because she and Grese were never married. Hawkins does not expressly ask us to recognize a formal "marriage" to Grese, but her reliance on Obergefell implies that we should retroactively construct an informal one. Our Supreme Court has recently held that ceremonial intent trumps legalistic form in marital

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matters and that solemnization is the *sine qua non* of any marriage, which need not coincide with the formal licensing of the union by the Commonwealth. See Levick v. MacDougall, 294 Va. 283, 805 S.E.2d 775 (2017). Even given this wide latitude, there is no marriage here. Hawkins concedes that the parties made no attempt to marry. Whatever a "solemnization" of marriage may be, it is not present in this record. That Hawkins and Grese were legally forbidden to marry in the Commonwealth at the time they began their relationship does not establish that they would have exercised the option if it were available. Moreover, currently, for civil matters, the general rule of retroactivity for Supreme Court precedent holds that

> [w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of

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> whether such events predate or postdate our announcement of the rule.

Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97, 113 S.Ct. 2510, 2517, 125 L.Ed.2d 74 (1993).

How retroactivity applies to the "constellation of rights" discovered in Obergefell is a question which has not yet been answered, nevertheless, this principle of retroactivity does not license this Court to engage in forensic retrospective marriage construction. For all of these reasons, Hawkins is not a parent to B.G. and the circuit court did not err in reaching that conclusion. Therefore, we need not further consider Hawkins' assignments of error dependent upon that status.

D. Hawkins' Standing to Assert B.G.'s Constitutional Rights

The final constitutional concern Hawkins raises are B.G.'s constitutional rights to association with Hawkins. Hawkins argues that the circuit court wrongly denied her third party (*jus tertii*) standing to assert B.G.'s constitutional right to association with her. Hawkins claims that B.G. has a constitutional right "to be raised and nurtured by [his] parents," meaning herself, and attempts to assert that right on his behalf. D.B. v. Cardall, 826 F.3d 721, 740 (4th Cir. 2016) (quoting Berman v. Young, 291 F.3d 976, 983 (7th Cir. 2002)).

The Supreme Court of the United States has divided standing issues into two categories, Article III Standing and Prudential Standing. The former restricts federal jurisdiction to

"cases" and "controversies." U.S. Const. art. III, § 2, cl 1. While the latter traditionally encompasses third party standing as well as other areas where the Court has restrained itself through " 'judicially self-imposed limits on the exercise of federal jurisdiction.' " Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11-12, 124 S.Ct. 2301, 2308, 159 L.Ed.2d 98 (2004).

Further, the Supreme Court has recently signaled doubt on whether third party standing doctrine is rightly considered prudential, noting that, though most cases address it as such,

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"[t]he limitations on third-party standing are harder to classify" and that it might be more suited to an Article III case and controversy analysis. See Lexmark Int'l, Inc. v. Static Control Components, Inc., --- U.S. ----, 134 S.Ct. 1377, 1387 n.3, 188 L.Ed.2d 392 (2014).

However, "under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." Tafflin v. Levitt, 493 U.S. 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990). This concurrent sovereignty has led the United States Supreme Court to "recognize[ ] often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute." ASARCO, Inc. v. Kadish, 490 U.S. 605, 617, 109 S.Ct. 2037, 2045, 104 L.Ed.2d 696 (1989) (citations omitted). This includes federal standing rules. "Although the state courts are not bound to adhere to federal standing requirements, they possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on

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their own interpretations of federal law." Id. This means that the federal standing grounds which Hawkins and Grese argue while persuasive, are not binding on this Court. Neither party has addressed the Commonwealth's standing requirements in their argument.

The Commonwealth's third party standing exceptions are much narrower than those found in the federal system. In the Commonwealth, unless a statute provides otherwise,[6] the general rule with respect to third party standing is quite straightforward: "[An individual] may challenge the constitutionality of a law only as it applies to him or her." See

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Coleman v. City of Richmond, 5 Va. App. 459, 463, 364 S.E.2d 239, 241 (citation omitted), reh'g denied, 6 Va. App. 296, 368 S.E.2d 298 (1988). "That the statute may apply unconstitutionally to another is irrelevant; one cannot raise third party rights." Id. at 463, 364 S.E.2d at 242. See also Pedersen v. Richmond, 219 Va. 1061, 1066, 254 S.E.2d 95, 99 (1979) (finding one lacks standing to assert the privacy rights of third parties). "Simply put, one cannot raise third party rights. Exceptions to the standing rule only apply to certain

challenges under the First Amendment, and where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves." Tackett v. Arlington County Dep't of Human Servs., 62 Va. App. 296, 325, 746 S.E.2d 509, 523 (2013) (internal quotations omitted).

With respect to whether this latter exception should apply to B.G., we examine the requirements of federal prudential third party standing for its persuasive impact on this Court. Under federal precedent, an exception to the general bar on third party standing requires that the party seeking standing must show that they themselves have suffered an injury and then further demonstrate both "a 'close' relationship with the person who possesses the right" and "a 'hindrance' to the possessor's ability to protect his own interests." Kowalski v. Tesmer, 543 U.S. 125, 130, 125 S.Ct. 564, 567, 160 L.Ed.2d 519 (2004). While the United States Supreme Court has "been quite forgiving with these criteria in certain circumstances," namely in cases involving the First Amendment and where "enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights," id. (quoting Warth v. Seldin, 422 U.S. 490, 510, 95 S.Ct. 2197, 2211, 45 L.Ed.2d 343 (1975)), "[b]eyond these examples ... [the Supreme Court has] not looked favorably upon third-party standing," id.

By contrast, the United States Supreme Court has repeatedly demonstrated its reluctance to interfere with the rights of parents to represent the interests of their children unless absolutely necessary, having recognized that the "primary

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role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." Yoder, 406 U.S. at 232, 92 S.Ct. at 1541–42. Though this parental power is not absolute as against the state, it may only be contravened in rare cases where "it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." Id. at 233-34, 92 S.Ct. at 1542. Many of these contraventions have occurred in medical scenarios. See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52, 74-75, 96 S.Ct. 2831, 2843–44, 49 L.Ed.2d 788 (1976) (invalidating statutory requirement for parental consent to minor's abortion as challenged by abortion providers). However, even in the medical context, "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." Parham v. J.R., 442 U.S. 584, 603, 99 S.Ct. 2493, 2504–05, 61 L.Ed.2d 101 (1979). There are no First Amendment implications for B.G. here nor is Hawkins a doctor or medical provider seeking to preserve B.G.'s health or safety on an emergency basis.

Even with respect to parents, the third party standing issue in such a situation is

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less than clear. In Elk Grove an atheist father sought third party standing to prevent his daughter's school from forcing her to recite the pledge of allegiance daily. The child's mother sought to intervene as the child's custody was governed by a court order granting her sole control over the child's health, education, and welfare. The father contended that, despite this order, he retained a constitutional right to control his child's education. See Elk Grove, 542 U.S. at 15, 124 S.Ct. at 2310–11. The Court held that the father's rights, "as in many cases touching upon family relations, cannot be viewed in isolation." Id. The father's claimed standing was entirely based on third party standing which the Court refused to grant because, "the interests of this parent and this child are not parallel and, indeed, are potentially in conflict." Id. The Court recognized that the question of parental constitutional standing must follow the state law determination of

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parental status. Id. at 15-16, 124 S.Ct. at 2310–11. The present case is no different. Hawkins is not a parent under the law of the Commonwealth and therefore does not attain *jus tertii* standing to assert B.G.'s constitutional rights where the court has determined Grese is not an unfit parent and has custody of B.G.

Finally, we note B.G. is not without an "effective avenue of preserving [his] rights." The Commonwealth provides alternative avenues for protecting a minor third party's legal interests. First, the law provides for a guardian *ad litem* , as was appointed in this case, whose role "is to rise above the fray of the contending parties to ensure that the interests of persons under a legal disability are 'represented and protected.' " Wiencko v. Takayama, 62 Va. App. 217, 233, 745 S.E.2d 168, 176 (2013) (quoting Code § 8.01-9). Hawkins does not assign error to the manner in which the guardian *ad litem* exercised her statutory responsibilities toward B.G. in this case. Second, the "person with a legitimate interest" provisions of Code § 20-124.1, discussed in detail below, as we noted in Stadter, are sufficient to protect the rights of minor third parties. See Stadter, 52 Va. App. at 91-92, 661 S.E.2d at 499.

E. Whether Special Facts and Circumstances Rebut the Presumption in Favor of Custody with a Biological Parent.

Although Hawkins is not B.G.'s parent, all parties concede and the circuit court found that she is a "person with a legitimate interest" as defined by Code § 20-124.1. This term is to be broadly construed in the best interests of the child and includes non-blood relatives. See Code § 20-124.1. In any child *custody* dispute, "the best interests of the child are paramount and form the lodestar for the guidance of the court in determining the dispute." Walker v. Brooks, 203 Va. 417, 421, 124 S.E.2d 195, 198 (1962). However, "as between a natural parent and a third party, the rights of the parent are, if at all possible, to be respected." Id. This presumption favoring the parent is a strong one, and can only be rebutted by establishing certain factors by clear and convincing evidence,

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including "(1) parental unfitness ...; (2) a previous order of divestiture, ...; (3) voluntary relinquishment, ...; and (4) abandonment, ... [and (5)] ... a finding of 'special facts and circumstances ... constituting an extraordinary reason for taking a child from its parent, or parents.' " Bailes v. Sours, 231 Va. 96, 100, 340 S.E.2d 824, 827 (1986) (quoting Wilkerson v. Wilkerson, 214 Va. 395, 397-98, 200 S.E.2d 581, 583 (1973)) (internal citations omitted). "Once the presumption favoring parental custody has been rebutted, the natural parent who seeks to regain custody must bear the burden of proving that custody with him is in the child's best interests." Florio v. Clark, 277 Va. 566, 571, 674 S.E.2d 845, 847 (2009). This subsequent best interest determination is made by the preponderance of the evidence. See Walker v. Fagg, 11 Va. App. 581, 586, 400 S.E.2d 208, 211 (1991).

Hawkins claims that the circuit court erred as a matter of law in finding that she did not demonstrate special facts and circumstances sufficient to rebut the presumption in favor of Grese, thereby justifying a best interest determination by the court. She argues that the circuit court's findings that Hawkins and Grese intended to create a family, that Hawkins and B.G. share a parent-child bond, and that B.G. would be

[809 S.E.2d 452]

harmed if that bond was severed are sufficient evidence to overcome the presumption in favor of Grese. She notes that in Bailes, where a stepmother was awarded custody instead of a biological mother, the court predicated its award on "the likelihood of inflicting serious harm." Bailes, 231 Va. at 101, 340 S.E.2d at 827. Ergo, she reasons that since the court recognized that B.G. would be harmed by severing his bond with Hawkins, she is entitled to custody of B.G. as a matter of law. The problem with Hawkins' argument is that the special facts and circumstances required by Bailes must be such as to "constitut[e] an extraordinary reason for taking a child from its parent...." Id.

In Bailes, the court found the biological mother was a virtual stranger to her son, who had only visited with him "eight or ten times" over a nine-year period despite having

[68 Va.App. 485]

visitation rights. Id. at 98, 340 S.E.2d at 826. Under these extreme circumstances, the Court found that stripping the child from the only mother he had ever known rendered "the presumption favoring the mother ... repugnant to the child's best interest." Id. at 101, 340 S.E.2d at 827-28. The same cannot be said of Grese, who has remained a consistent parental presence in B.G.'s life. Given that B.G. would benefit from a continuing relationship with Hawkins, that alone does not rebut the presumption that Grese is a fit mother capable of making child rearing decisions for B.G.

Further, Hawkins alleges the psychological evidence shows that harm will necessarily flow from the severance of the relationship between herself and B.G., but such severance is not a necessary outcome of this dispute. Hawkins also cites O'Rourke v. Vuturo, 49 Va. App. 139, 638 S.E.2d 124 (2006), for her premise. In that case the non-biological father was awarded

visitation rights, not *custody* .[2] Id. at 146, 638 S.E.2d at 127. Thus, the standard required that "a court must find an actual harm to the child's health or welfare without such visitation." Id. at 148, 638 S.E.2d at 128 (quoting Williams, 256 Va. at 22, 501 S.E.2d at 418).

The JDR court awarded Hawkins visitation with B.G., and Grese withdrew her appeal on this issue. If a new visitation dispute is forthcoming, that proceeding will take place under the more favorable standard discussed in O'Rourke. The guardian *ad litem* argues on brief that the established emotional bond between Hawkins and B.G. is more appropriately a relevant factor supporting "special facts and circumstances" with respect to appropriate *visitation* of B.G. with Hawkins but that issue is not currently before us and we offer no opinion on that point.

[68 Va.App. 486]

Finally, in what amounts to a "catch-all" argument, Hawkins asserts that the recent judicial changes regarding same-sex marriage embodied in Obergefell are, themselves, sufficient evidence to warrant ignoring the Bailes factors and moving straight to a best interest determination. Her arguments regarding the scope of Obergefell are addressed above, but, to reiterate, we do not read Obergefell as mandating the wholesale rewriting of the Commonwealth's domestic relations statutes. A redefinition of marriage does not render the Bailes factors a nullity.

III. CONCLUSION

Taking the evidence in the light most favorable to Grese, the prevailing party below, the circuit court's judgment that Hawkins was not a parent of B.G. and that the evidence presented by Hawkins was insufficient to rebut the parental presumption in favor of custody of B.G. by Grese is not plainly wrong and therefore should not be overturned. For these reasons, the judgment of the circuit court is affirmed.

Affirmed.

Notes:

[1] Same-sex marriages were not legal in the Commonwealth until 2014 following the decision of the United States Court of Appeals for the Fourth Circuit in Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014).

[2] E.g., "Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government." Shelley v. Kraemer, 334 U.S. 1, 18, 68 S.Ct. 836, 844, 92 L.Ed. 1161 (1948). More relevantly, in Palmore v. Sidoti, 466 U.S. 429, 104 S.Ct.

1879, 80 L.Ed.2d 421 (1984), the Supreme Court overturned a Florida custody order using the strict scrutiny test, the highest tier of review, because it had been based on racial considerations.

[3] Code § 20-158(A) in pertinent part provides that

> the parentage of any child resulting from the performance of assisted conception shall be determined as follows:
>
> 1. The gestational mother of a child is the child's mother.
>
> 2. The husband of the gestational mother of a child is the child's father, notwithstanding any declaration of invalidity or annulment of the marriage obtained after the performance of assisted conception, unless he commences an action in which the mother and child are parties within two years after he discovers or, in the exercise of due diligence, reasonably should have discovered the child's birth and in which it is determined that he did not consent to the performance of assisted conception.

[4] See, e.g., Conover v. Conover, 450 Md. 51, 146 A.3d 433 (2016) (adopting de facto parent status in Maryland in a same-sex custody dispute); Ramey v. Sutton, 362 P.3d 217, 220-21 (Okla. 2015) ("The [same-sex] couple's failure to marry cannot now be used as a means to further deprive the nonbiological parent, who has acted *in loco parentis* , of a best interests of the child hearing.").

[5] The current definition of "parent" that we hold in this case represents the intent of the General Assembly for use in custody cases, may well require that one or both spouses in a same-sex marriage formally adopt any children intended to become part of the family unit but the process of legal adoption provides a mechanism and forum for the rights of all the parties in interest to be considered.

[6] See e.g. Yokshas v. Bristol City Dep't of Soc. Servs., No. 0065-17-3, 2017 WL 5329291, 2017 Va. App. LEXIS 286 (Va. Ct. App. Nov. 14, 2017).

[7] Visitation does not consider the Bailes factors but does include a best interest determination. The visitation standard requires that a court must find "an actual harm to the child's health or welfare without such visitation" before reaching a best interest determination. Williams, 24 Va. App. at 785, 485 S.E.2d at 654.

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64 Va.App. 623
770 S.E.2d 774

Joyce Rosemary BRUCE
v.
Robert Preston BOARDWINE.

Record No. 1250–14–3.

Court of Appeals of Virginia, Richmond.

April 21, 2015.

[770 S.E.2d 774]

Monica Taylor Monday (Kristen Konrad Johnstone ; Gentry Locke Rakes & Moore, LLP; Osterhoudt, Prillaman, Natt, Helscher, Yost, Maxwell & Ferguson, P.L.C., on briefs), for appellant.

Thomas W. Roe, Jr. (Spigle, Roe, Massey & Clay, PLC, on brief), for appellee.

James P. Cargill (James P. Cargill, P.C., on brief), Guardian ad litem for the infant child.

[770 S.E.2d 775]

Present: HUFF, C.J., and PETTY and McCULLOUGH, JJ.

Opinion

McCULLOUGH, Judge.

[64 Va.App. 625]

Joyce Rosemary Bruce, the biological and birth mother of a child, J.E., asked the circuit court to dismiss a petition for custody and visitation filed by the child's biological father, Robert Preston Boardwine. Bruce argues that Boardwine is nothing more than a sperm donor under Virginia's assisted conception statute and that he has no right to custody or visitation. Boardwine responds that the assisted conception statute does not apply and that he established his paternity through DNA testing. We agree with Boardwine and affirm the judgment below.

BACKGROUND

I. The Child's Conception

Bruce wanted to conceive a child she could raise on her own, without the involvement of a father. Bruce apparently believed that if she became pregnant in a way that did not involve sexual intercourse, the biological father would not have a claim to any parental rights. To accomplish this goal, Bruce approached Boardwine, a longtime friend, and asked him to be a sperm donor. After some hesitation, Boardwine agreed. Although the parties discussed a written contract regarding any resulting pregnancy, none was ever signed.

Bruce explained the method she used to try to become pregnant. Boardwine would stop by Bruce's house. He would go to a separate room. Then, he would give her a plastic container containing his sperm. After a brief conversation, Boardwine would leave. Bruce used an ordinary turkey baster to inseminate herself. No other person was involved. They did not go to a doctor's office or to a medical facility.

[64 Va.App. 626]

When this procedure did not cause Bruce to become pregnant, she turned to a fertility doctor, Dr. Robert Slackman. Dr. Slackman ran some tests, suggested assistance from drugs, and attempted two inseminations with sperm from unknown donors. Neither attempt succeeded, and Bruce again turned to Boardwine.

In June 2010, Boardwine went to Bruce's home several times. On these occasions, Bruce did not urge him to sign a contract. She explained that she trusted him and, if it worked, they could "talk about it some more." Bruce and Boardwine employed the same insemination procedure they had used

previously. On July 7, 2010, she discovered that she was pregnant.

Bruce and Boardwine have never engaged in sexual relations. They have never lived together, and they do not intend to live together.

II. Bruce and Boardwine's Subsequent Relationship

Initially, Bruce and Boardwine remained on good terms. When Bruce informed Boardwine about the pregnancy, he visited and brought gifts, a stuffed bear and clothes for her and the baby.

Bruce testified that her expectation was that Boardwine would visit and "be involved as [her] other friends were involved." She never anticipated that Boardwine would have the child alone away from her or that he would have formal visitation. She stated that she had no problem with Boardwine "having some involvement" with the child and the child "eventually knowing" that Boardwine was the biological father. Her desire was to be the child's sole parent. They did not discuss Boardwine's role. Bruce never asked Boardwine for financial support. Bruce testified that Boardwine attended one of her sonogram visits but did not participate in her prenatal care.

Boardwine explained that he intended "to always be involved" with the child. According to Boardwine, the two agreed that Bruce would be the sole parent and that he would

[64 Va.App. 627]

be able to see the child as little or as much as he wanted. He stated that he expected to be a part of the child's life, including attending the child's sporting activities and being involved in the child's educational and health decisions.

Bruce and Boardwine's relationship deteriorated around October 2010, when Bruce would not agree to Boardwine's suggested name for the child. After this argument,

[770 S.E.2d 776]

they did not speak until shortly after the child's birth, a period of about five months. Bruce did not inform Boardwine of the birth and did not list Boardwine on the birth certificate. Boardwine, however, learned about the birth and went to the hospital with friends and family. Bruce said that she never asked Boardwine for money or supplies and never asked him to visit or to care for the child. After she returned home from the hospital, Boardwine would come over to her home to visit. She characterized the visits as "[s]ort of strained." Boardwine was never alone with the child. Eventually, Bruce told Boardwine to "[s]top coming by."

III. The legal proceedings below

Boardwine initiated proceedings in the Roanoke City Juvenile and Domestic Relations District Court to establish his rights regarding the child, whom we will refer to as J.E. The court ordered the appointment of a guardian *ad litem* for J.E. By consent of the parties, Boardwine's petitions were dismissed or withdrawn and, then, appealed to the circuit court. Boardwine sought a finding of his paternity over J.E. as well as joint custody and visitation. Bruce filed a plea in bar and motion to dismiss, arguing, among other things, that Boardwine was merely a sperm donor and had no legal rights to the child. The court ordered a DNA test, which established Boardwine as J.E.'s father. Bruce does not contest that Boardwine is the child's biological father.

Following a hearing, the court denied Bruce's plea in bar and motion to dismiss and granted Boardwine's petitions. In a detailed memorandum opinion, the court made a

number of alternative findings. As relevant here, the court held that the assisted conception statute, Code § 20–156 *et seq.*, did not

[64 Va.App. 628]

apply because Bruce's "pregnancy did not result from 'artificial insemination' or any other 'intervening medical technology.' " The court also found, as a factual matter, that, when Boardwine provided his sperm, the parties intended for him to be J.E.'s legal father. Applying the factors listed in Code § 20–124.3, the court held that it was in J.E.'s best interests to award Boardwine joint legal and physical custody of J.E. as well as visitation.

ANALYSIS

This case presents questions of statutory construction. We review such questions *de novo* on appeal. *L.F. v. Breit*, 285 Va. 163, 176, 736 S.E.2d 711, 718 (2013).

I. The assisted conception statute does not apply .

The General Assembly patterned Virginia's assisted conception statute, Code § 20–156 *et seq.*, after the Uniform Status of Children of Assisted Conception Act.[1] The statute defines the child's father as "[t]he husband of the gestational mother of [the] child." Code § 20–158(A)(2). In contrast, a "donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother." Code § 20–158(A)(3). In *L.F. v. Breit*, the Supreme Court explained that the origin and purpose of the assisted conception statute is to protect the interests of married parents by ensuring that "a married couple could obtain sperm from an outside donor without fear that the donor would claim parental rights." 285 Va. at 175, 736 S.E.2d at 717. If Boardwine is a "donor" under this statute, then he is

[64 Va.App. 629]

not J.E.'s "parent," and he would have no statutory right to custody or visitation.

The statute defines a "donor" as "an individual, other than a surrogate, who contributes the sperm or egg used in assisted conception." Code § 20–156. In turn, Code § 20–156 defines "assisted conception" as

> a pregnancy resulting from any intervening medical technology, whether in vivo or in vitro, which completely or partially replaces sexual intercourse as the means of conception. Such intervening medical technology includes, but is not limited to, conventional medical and surgical treatment

[770 S.E.2d 777]

> as well as noncoital reproductive technology such as artificial insemination by donor, cryopreservation of gametes and embryos, in vitro fertilization, uterine embryo lavage, embryo transfer, gamete intrafallopian tube transfer, and low tubal ovum transfer.

The phrase "medical technology" is noteworthy because it does not appear in the Uniform Status of Children of Assisted Conception Act.[2]

Bruce argues that, under a plain meaning of the assisted conception statute, Boardwine is nothing more than a sperm donor and, therefore, he "is not the legal father of the child born of that conception." Bruce argues that her method of becoming pregnant falls within the statute's provision for assisted conception through "noncoital reproductive technology" and, specifically, "artificial insemination by donor."

We construe statutes to " 'ascertain and give effect to the intention of the legislature.' " *Rutter v. Oakwood Living Ctrs. of Va., Inc.*, 282 Va. 4, 9, 710 S.E.2d 460, 462 (2011)

[64 Va.App. 630]

quoting *Va. Polytechnic Inst. & State Univ. v. Interactive Return Serv., Inc.*, 271 Va. 304, 309, 626 S.E.2d 436, 438 (2006)). Ordinarily, "this only requires applying the plain meaning of the words used in the statute because the General Assembly's intent 'is usually self-evident from the statutory language.' " *Sheppard v. Junes*, 287 Va. 397, 403, 756 S.E.2d 409, 411 (2014) (quoting *Rutter*, 282 Va. at 9, 710 S.E.2d at 462).

The statute's plain language does not support Bruce's interpretation. The word "medical," in its ordinary use, means "of, relating to, or concerned with physicians or with the practice of medicine" and "requiring or devoted to medical treatment." *Webster's Third New International Dictionary* 1402 (unabr.1981). The statute does not encompass all technology. Instead, its language is limited to "medical technology." The plain meaning of the term "medical technology" does not encompass a kitchen implement such as a turkey baster.

The examples listed in Code § 20–156 shed further light on the General Assembly's intent in crafting this statute. "Such intervening medical technology," under the statute,

> includes, but is not limited to, conventional medical and surgical treatment as well as noncoital reproductive technology such as artificial insemination by donor, cryopreservation of gametes and embryos, in vitro fertilization, uterine embryo lavage, embryo transfer, gamete intrafallopian tube transfer, and low tubal ovum transfer.

Code § 20–156. The meaning of words in a statute "may be determined by reference to their association with related words and phrases." *Andrews v. Ring*, 266 Va. 311, 319, 585 S.E.2d 780, 784 (2003). "When general words and specific words are grouped together, the general words are limited and qualified by the specific words and will be construed to embrace only objects similar in nature to those objects identified by the specific words." *Id.* Bruce did not become pregnant through "conventional medical and surgical treatment." Furthermore, the examples of "noncoital reproductive technology" listed in Code § 20–156 involve procedures performed

[64 Va.App. 631]

with the assistance of medical personnel. An ordinary kitchen implement used at home is simply not analogous to the medical technologies that are listed in Code § 20–156, nor does it constitute a "reproductive" technology under the plain meaning of the term.

Relying on the plain language of Code § 20–156, we conclude that the assisted conception statute does not apply to Boardwine.

II. Bruce established that he is J.E.'s father under Code § 20–49.1.

There is no serious dispute that Boardwine established that he is the biological

[770 S.E.2d 778]

father of J.E. Boardwine relied on Code § 20–49.1(B)(1), which provides that "[t]he parent and child relationship between a child and a man may be established by ... [s]cientifically reliable genetic tests, including blood tests, which affirm at least a ninety-eight percent probability of paternity." Boardwine's test established his paternity by a probability greater than 99.999%. The path to fatherhood may have been unconventional, but as the

father of J.E., Boardwine was entitled to seek (and as the trial court found, receive), visitation with his son.[3]

CONCLUSION

We affirm the judgment of the trial court.

Affirmed.

Notes:

[1] The Uniform Status of Children of Assisted Conception Act was drafted by the National Conference of Commissioners of Uniform State Laws, also known as the Uniform Law Commission. This organization is a non-profit, unincorporated association consisting of commissioners appointed by each state, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands. Its purpose is to discuss and debate which areas of the law require uniformity among the states and territories and to draft model legislation in those areas.

[2] The Uniform Status of Children of Assisted Conception Act defined "assisted conception" as

> a pregnancy resulting from (i) fertilizing an egg of a woman with sperm of a man by means other than sexual intercourse or (ii) implanting an embryo, but the term does not include the pregnancy of a wife resulting from fertilizing her egg with sperm of her husband.
>
> Unif. Status of Children of Assisted Conception Act § 1(1) (definitions) (Nat'l Conf. of Comm'rs of Unif. State Laws 1988).

[3] Based on our resolution of the case, we need not reach Bruce's additional arguments.

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432 S.E.2d 16
16 Va.App. 653
Scottie M. DUNBAR
v.
Dorothy HOGAN.
Record No. 0780-92-3.
Court of Appeals of Virginia.
June 29, 1993.

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[16 Va.App. 655] Leroy Moran, Roanoke (Leroy Moran & Associates, on briefs), for appellant.

Tonita M. Foster, Roanoke, for appellee.

V. Anne Edenfield, guardian ad litem, for Stephanie Dawn Dunbar.

Present: COLEMAN, KOONTZ * and BRAY, JJ.

COLEMAN, Judge.

In this domestic relations appeal, we hold that a sworn Declaration of Paternity, although it "ha[s] ... the same legal effect as a judgment entered pursuant to Code § 20-49.8," [1] is not res judicata of paternity, nor does it collaterally estop a party in interest from adjudicating the issue of paternity, where no previous judicial determination of paternity has been made.

On August 8, 1990, Scottie Dunbar signed a Declaration of Paternity acknowledging under oath that he is the father of a female child born out of wedlock on June 24, 1980, to Dorothy Hogan. Three [16 Va.App. 656] months after Dunbar signed the Declaration, Hogan filed a petition in the Roanoke juvenile court seeking child support from him. On Dunbar's motion, the court ordered that an HLA paternity test be performed, the results of which excluded any possibility that Dunbar is the biological father of the child. [2] Dunbar defended Hogan's support petition on the ground that Hogan had obtained Dunbar's signature on the Declaration of Paternity by fraud and on the ground that Dunbar was not the child's biological father. The trial judge ruled that the Declaration of Paternity was not obtained by fraud and held that the provisions of former Code § 20-49.1 estopped Dunbar from disclaiming that he is the child's father and from disproving his paternity with evidence of the HLA test results. Thus, the judge ruled that Dunbar could not litigate the issue of paternity in

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the support petition. Dunbar appeals the trial judge's rulings.

I. FRAUD AND DECLARATION OF PATERNITY

Dunbar testified that Hogan asked him to accompany her to her attorney's office to sign a sworn Declaration of Paternity form so that she could obtain an amended birth certificate for the child that would list Dunbar as the father and that would change the child's last name to Dunbar. Because Hogan had told Dunbar that he was the father of her child, he had no reason to doubt that fact or to take steps to ascertain the truth of Hogan's assertion. He assumed that he was the child's father. Dunbar, who had only a seventh grade education, argues that, because he was not advised by counsel before signing the Declaration of Paternity and because Hogan had concealed from him her actual purpose and intention, she defrauded him.

Hogan testified that her attorney explained to Dunbar the significance of the Declaration of Paternity form before Dunbar signed it. She also stated that she believed, and continues to believe, that Dunbar is the father of her child because, according to her, "no one else possibly could be." Hogan brought her ten-year-old daughter to the

hearing to demonstrate that she resembled Dunbar.

A party alleging fraud must prove by clear and convincing evidence that a person knowingly and intentionally made a false representation of a material fact with the intent to mislead and that the other party relied on the misrepresentation to his detriment. Batrouny v. [16 Va.App. 657] Batrouny, 13 Va.App. 441, 443, 412 S.E.2d 721, 723 (1991). Where the credibility of witnesses is crucial to the determination of whether the facts support a finding of fraud, the judge's evaluation of the witnesses' testimony heard ore tenus and the weight to be given the testimony will not be disturbed on appeal unless the judge's findings are plainly wrong or without evidence to support them. Shortridge v. Deel, 224 Va. 589, 592, 299 S.E.2d 500, 502 (1983).

Although the HLA test results show that Dunbar is not the biological father of Hogan's daughter, the evidence does not show that Hogan knew this fact or that she concealed or misrepresented it to Dunbar to obtain his sworn Declaration of Paternity in order to obtain child support. In fact, Hogan maintains that she continues to believe that Dunbar is the father of her child. The evidence fails to prove that Hogan knowingly and intentionally made a false representation of a material fact to Dunbar intending to mislead him. The trial court did not err in finding the evidence insufficient to prove fraud.

II. COLLATERAL ESTOPPEL

"The determination of parentage, when raised in any proceeding, shall be governed by [Chapter 3.1 of Title 20 of the Code of Virginia]." Code § 20-49.2. Proceedings to determine parentage under Chapter 3.1 may be instituted by a sworn petition from any of several specified parties. Id. Former Code § 20-49.1(B) provided the manner by which a party in interest could establish the paternity of a man:

The parent and child relationship between a child and a man may be established by a written statement of the father and mother made under oath acknowledging paternity or subsequent genetic blood testing which affirms at least a 98 percent probability of paternity. Such statement or blood test result shall have the same legal effect as a judgment entered pursuant to Code § 20-49.8.

(Repl.Vol.1990) (emphasis added). When there is no affidavit of paternity, or when the results of a genetic blood test show a probability of paternity of less than ninety-eight percent, the paternal relationship "may be established as otherwise provided" in the chapter. Id.

The trial judge ruled that, by giving the Declaration of Paternity "the same legal effect as a judgment entered pursuant to Code § 20-49.8" as required by Code § 20-49.1(B), the issue of paternity has been decided as if by a judgment and Dunbar is forever estopped from denying or litigating

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the fact of paternity. The question of Dunbar's [16 Va.App. 658] paternity has never been judicially decided. We hold that the provision in former Code § 20-49.1(B) that an affidavit of paternity shall have the same legal effect as a judgment "entered pursuant to Code § 20-49.8" means that for purposes of determining or enforcing support or custody, visitation, or guardianship, the statement or test results shall support adjudicating those issues without having to adjudicate paternity. The statement or a ninety-eight percent test result does not have the same legal effect as a judgment of paternity for all purposes, particularly for purposes of collaterally estopping a party from adjudicating the fact or issue of paternity that has never been judicially determined.

The doctrine of collateral estoppel provides that parties to an action and their privies are precluded from litigating in a subsequent action " 'any issue of fact actually litigated and essential to a valid and final personal judgment in the first action.' " Slagle v. Slagle, 11 Va.App. 341, 344, 398 S.E.2d 346, 348 (1990) (quoting Norfolk & W. Ry. v. Bailey Lumber Co., 221 Va. 638, 640, 272 S.E.2d 217, 218 (1980)). "A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the parties.' " Id. (quoting Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979)). Dunbar, unlike his counterpart in Slagle who wanted to use HLA test results disproving paternity to assail a prior adjudication that he was the father, has never had the issue of paternity "actually litigated" in a "court of competent jurisdiction." The first occasion that he has been called upon to litigate the issue of his paternity was when Hogan filed the petition for child support.

Although a man may acknowledge paternity under oath, or even though the results of a blood test may show a ninety-eight percent probability of paternity, a putative father cannot be deprived of the right to have the issue of paternity litigated. The provision of former Code § 20-49.1 that the sworn statement and test results shall have the same legal effect as a judgment "entered pursuant to Code § 20-49.8" was not intended to foreclose adjudication of that issue. While the sworn statement or test results may "have the same legal effect" as a judgment of paternity for purposes of support, custody, and visitation, the fact of paternity carries with it other rights, such as inheritance, with which Code § 20-49.8 is not concerned.

[16 Va.App. 659] The drafters of former Code § 20-49.1 adopted the provision that a sworn statement of paternity or the ninety-eight percent blood test results would have the same legal effect as a judgment of paternity in order to alleviate the backlog of child support cases by providing a means to expedite the paternity/support proceedings where fathers willingly acknowledged paternity, but contested support, custody, visitation or guardianship issues. See 1990 General Assembly, Summary of Legislative Proposal Priority 1, Department of Social Services, Legislative Draft File, House Bill 961 (1990). The statute was not intended to preclude, and did not preclude, a father from adjudicating paternity where there had been no prior adjudication, even when the blood test results showed a ninety-eight percent probability of paternity or where he may have acknowledged paternity under oath. The statute, as amended in 1990, was intended to permit parties who acknowledged paternity, or who did not dispute paternity and the blood test results showed a ninety-eight percent probability of paternity, to have support, visitation, and custody determined without having to fully litigate paternity.

An order of support or custody or visitation entered pursuant to Code § 29-49.8 which is based on the sworn Declaration of Paternity or on the blood test results would, based on the provisions of former Code § 20-49.1, be res judicata or would collaterally estop the parties from relitigating

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the fact and issue of paternity. However, where no judgment or order establishing parentage pursuant to Code § 20-49.8 has been entered based on the sworn Declaration of Paternity or on the blood test results, there has been no judicial determination of the fact or issue of paternity and the putative father may contest that issue in the support proceedings.

Affirmed in part, Reversed in part, and remanded.

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* When the case was argued, Judge KOONTZ presided. Judge MOON was elected Chief Judge effective May 1, 1993.

1 At the time of these proceedings, Code § 20-49.1 provided as follows:

A. The parent and child relationship between a child and a woman may be established prima facie by proof of her having given birth to the child, or as otherwise provided in this chapter.

B. The parent and child relationship between a child and a man may be established by a written statement of the father and mother made under oath acknowledging paternity or subsequent genetic blood testing which affirms at least a 98 percent probability of paternity. Such statement or blood test result shall have the same legal effect as a judgment entered pursuant to § 20-49.8. In the absence of such acknowledgment or if the probability of paternity is less than 98 percent, such relationship may be established as otherwise provided in this chapter. Written acknowledgments of paternity made under oath by the father and mother prior to July 1, 1990, shall have the same legal effect as a judgment entered pursuant to § 20-49.8.

C. The parent and child relationship between a child and an adoptive parent may be established by proof of lawful adoption.

2 The results of a second HLA test which Hogan requested were admitted in evidence; they, too, excluded Dunbar as the child's biological father.

48 U. Rich. L. Rev. 1419

University of Richmond Law Review
May, 2014

Comments

Lauren Maxey[a1]

TWO DADS ARE BETTER THAN ONE: THE SUPREME COURT OF VIRGINIA'S DECISION IN L.F. V. BREIT AND WHY VIRGINIA'S ASSISTED CONCEPTION STATUTE SHOULD ALLOW GAY COUPLES TO LEGALLY PARENT A CHILD TOGETHER

I. Introduction

In May 2012, Roanoke Athletic Club in Virginia revoked a family club membership from two dads and their two-year-old son Oliver, after discovering that the two dads were gay and that they did not qualify for club membership. [1] William Trinkle, Juan Granados, and Oliver applied for membership at the athletic club so that they could enjoy the summer by the pool as a family. [2] Trinkle purchased a family membership and club officials approved his application, but soon after the family started using the facilities, the operations director contacted the couple. [3] The director revoked their membership because they did not qualify under the club's definition of a family. [4] Thus, Trinkle, Granados, and Oliver were denied a family membership simply because of Trinkle's and Granados' sexual orientations. In addition, Oliver was denied the access available to children of heterosexual couples. [5] Although the athletic club later changed its definition of a family to allow families like Trinkle, Granados, and Oliver to gain membership, this event highlights one of the many problems gay dads face in Virginia as a result of the current state of Virginia law regarding legal parentage. [6] Virginia law essentially prohibits two gay dads, ***1420** such as Trinkle and Granados, from both establishing legal rights over their children. [7]

As of 2012, there were more than 110,000 same-sex couples in the United States raising children. [8] One way same-sex couples become parents is through assisted reproductive technology ("ART"). [9] ART includes all fertility treatments in which both the egg and the sperm are manipulated. [10] Typically, ART involves removing eggs from a woman's ovaries, combining the ovaries with sperm in a laboratory, and placing the eggs in a woman's body. [11] ART allows gay couples to create a family through gestational surrogacy. Gestational surrogacy is a treatment process where a woman, designated as the surrogate, carries to term a fertilized egg not genetically related to her. [12] One of the men in a same-sex couple may choose to donate his own sperm, thus allowing one partner to have a genetic connection to the child. [13] Before initiating any gestational surrogacy treatment, the surrogate and the intended parents typically form a surrogacy contract. A surrogacy contract usually requires the surrogate to surrender any legal rights to the child once the child is born. [14] Although gestational surrogacy allows two gay men hoping for a child to take part in the creation of a child, and a surrogacy contract has the potential to terminate the legal parental rights of the surrogate, ***1421** legal problems still arise when attempting to establish parentage of the two dads.

Gestational surrogacy allows gay men to have a child with the help of a surrogate and an egg donor, but it does not come without legal, ethical, and social implications. One important question that must be addressed is who the child's legal parents are. [15] Virginia, along with many other states, has passed statutes regulating the legal status of children conceived through ARTs in an effort to address the legal questions arising from this new form of reproductive technology. [16] These Virginia statutes prohibit both gay men from establishing legal parentage.

There are two options for surrogacy: gestational or traditional. [39] Traditional surrogacy is when the surrogate agrees to be the egg donor and the carrier of the child. [40] For male gay couples, one of the intended fathers can donate the sperm to artificially inseminate the surrogate, but this is not always the case. [41] Prospective gay dads could also choose to use the sperm of a third-party donor to inseminate the carrier. Although traditional surrogacy allows a gay couple to choose one partner to be genetically related to the child, the gay couple can also choose that neither of them be genetically related to the child. In contrast, the egg donor and the surrogate in traditionally surrogacy are the same woman, so the surrogate will always be genetically related to the child she gives birth to.

In traditional surrogacy, the surrogate and the intended parents typically enter into an agreement called a surrogacy contract. [42] In uncontested cases, once the child is born, the surrogate terminates her parental rights and the intended parents, the gay dads, become the child's legal parents. [43] In contested cases, an issue appears if the surrogate decides to retain parental rights of ***1425** the child that she gave birth to and is genetically linked. [44] Traditional surrogacy agreements are typically not well received in common law courts. [45]

Many ethical and legal debates arise in traditional surrogacy when the surrogate decides to retain parental rights. On the one hand, the woman is depriving the intended parents of their child, but on the other, many argue that surrogacy exploits the woman by treating her as an object. [46] One solution to this ethical dilemma is gestational surrogacy, where a third-party donor egg as well as a donor sperm is used. This form of surrogacy has become more socially acceptable, since the surrogate is not genetically related to the child. [47] Gestational surrogacy helps to curb characterization of a woman as an object and a baby-seller. [48] It has also transformed the legal debate surrounding surrogacy. [49]

Gestational surrogacy contracts are significantly different from traditional surrogacy contracts. Unlike traditional surrogacy, the surrogate in gestational surrogacy has no biological relation to the child she is carrying and giving birth to. [50] Gestational surrogacy complicates the determination of who the legal parents of the resulting child will be. [51] In some circumstances where a third-party egg and donor sperm are used, there can be up to five prospective parents for the child. [52] These five potential parents are the intended mother, the intended father, the gestational mother, the egg donor, and the sperm donor. [53] For gay male couples, one of the intended fathers can donate sperm, but there must be a third-party egg donor. [54] At most, only one of the intended fathers can be genetically related to the child. [55]

***1426** Gay male couples attempting to create a family not only face obstacles in creating a child and establishing legal parentage, but they also face financial obstacles. In both gestational and traditional surrogacy contracts, the intended parents must provide for the surrogate's reasonable medical and ancillary expenses. [56] These costs can include payment to the surrogacy agency connecting the parties, legal fees for the creation of the surrogacy contract, and medical expenses. [57] Despite the cost and complications, gestational surrogacy is becoming more common, with about 1400 children born in 2008 through gestational surrogacy. [58] Many of those children are the son or daughter of gay couples.

III. Adoption and Establishment of Parentage

Parentage is the lawful recognition of a child's parents. [59] Parentage can be established through genetic relation to the child, giving birth to the child, or adoption. [60] Adoption is a viable option for a homosexual male couple looking to have a child. Generally adoption occurs in one of two ways: traditional adoption or second-parent adoption. [61] In traditional adoption, the identities of the birth parents and the adoptive parents are unknown to each other, [62] and the couple or individual person adopts the child from foster care or another child placement source. [63] In contrast, in second-parent adoption one partner or spouse already has parental rights over the child, and the other spouse or partner adopts the child so that both partners have parental rights. [64] Second-parent adoption provides enormous benefits to the child, including allowing the child to receive health benefits from both parents, enabling parents to make important decisions regarding the ***1427** child's health, and ensuring the child has another legally recognized parent if one parent should die. [65]

The purpose of the USCACA, which Virginia adopted as its own, was to ensure that a child created by an ART had two legal parents when possible. [93] The National Conference of Commissioners on Uniform State Laws drafted the USCACA in 1988. [94] The committee's mission was "to effect the security and well-being of children born and living in our midst as a result of assisted conception," which included the "use of such limited and monitored surrogacy procedures as might be necessary to accomplish" the committee's instructions. [95] Under the provisions of the USCACA, the "intended parents" in a surrogacy agreement are restricted to "a man and woman, married to each other." [96] This requirement reflects the committee's goal of protecting the interests of the child by providing the child with two legal parents. However, this provision harms unmarried couples, including homosexuals, who wish to procreate using ARTs. [97]

The statutory language of the Assisted Conception Act effectuates the purpose of ensuring a child has two legal parents, but discriminately limits these two parents to a man and woman who are married. The Assisted Conception Act begins with a list of definitions, [98] and the definition that stands as an obstacle to gay ***1431** couples who wish to become parents through ARTs is the definition of "intended parents." [99] Virginia Code section 20-156 defines "intended parents" through assisted conception as:

> [A] man and a woman, married to each other, who enter into an agreement with a surrogate under the terms of which they will be the parents of any child born to the surrogate through assisted conception regardless of the genetic relationships between the intended parents, the surrogate, and the child. [100] Virginia Code section 20-160 allows circuit courts to approve surrogacy contracts that comply with a list of qualifications, including a surrogacy contract signed by the "intended parents," the surrogate, and her husband. [101] This section, read in connection with the definitions section, effectively prevents gay couples from forming a valid surrogacy contract under the statute. Section 20-160 also requires the intended parents, the surrogate, and her husband to fulfill the "standards of fitness applicable to adoptive parents" and requires the surrogate be married with at least one living child. [102] The statute further requires the intended parents, the surrogate, and her husband to undergo physical and psychological evaluations before the surrogacy contract can be approved. [103] Additionally, the statute indicates that "[a]t least one of the intended parents is expected to be the genetic parent of any child resulting from the agreement." [104] Section 20-160 then lists a number of requirements for the court to find in order to approve a surrogacy contract, and section 20-162 provides the circuit courts with guidance as to approval of contracts that do not necessarily meet all of those requirements. [105]

The Virginia Code offers guidelines for how courts should treat surrogacy contracts not approved by the courts in sections 20-162 and 20-158. Section 20-162 allows the surrogate to finalize the ***1432** surrogacy contract if one of the intended parents is genetically related to the child by delivering the child to the intended parents and signing a consent form, or alternatively allows the surrogate to break the surrogacy contract by retaining her parental rights if she is genetically related to the child. [106] Under section 20-158(E), in a non-approved surrogacy contract, the genetic father of a child, often a gay man who donates his sperm, is precluded from any parental rights if the surrogate is married and decides to retain her parental rights. [107] Thus, in a non-approved surrogacy contract, if the surrogate is married, her husband is part of the contract, the surrogate is genetically related to the child, and the surrogate decides to retain her parental rights to the child, the intended parents, often the prospective gay dads, no longer have any parental rights over the child. [108] The surrogate and her husband in this circumstance would be considered the parents of the child. [109] Sections 20-162 and 20-158 thus allow the circuit court to deny a homosexual male his parental rights as result of these explicit provisions. [110]

B. Parentage on Birth Certificates

Virginia Code section 32.1-261 defines the requirements for a new birth certificate after adoption or proof of paternity. [111] The issuance of a new birth certificate after surrogacy or adoption is limited based on marital status. [112] Section 32.1-261 states that birth certificates for children born through surrogacy shall be issued in compliance with sections 20-160 and 20-158, which deny homosexuals parental rights. [113]

The best outcome available in Virginia is that the same-sex couple can request a Joint Custody and Co-Guardianship Order by a court, but entry of this order is at the court's discretion and it still does not establish both gay dads as parents. [138] Additionally, Virginia does not allow second-parent adoptions for any couple--gay or straight. [139] For the second parent to be added to the birth certificate, the family must move to another state that allows second-parent adoption. [140] Then the second parent, gay or straight, can be added to a birth certificate after the couple moves back to Virginia, because the Full Faith and Credit Clause forces the Department of Vital Records to abide by the other state's adoption order. [141] This is an option for homosexual couples to establish legal parentage, but it is not reasonable since it requires the couples to ***1436** reside in another state for a period of time for the sole purpose of getting a second-parent adoption. Thus, homosexual male partners cannot attain legal parentage of a child together in Virginia because they are not married and there is no second-parent adoption.

V. L.F. v. Breit

In January 2013, Virginia took a significant step towards recognizing the rights of unmarried parents who participate in assisted conception with the Supreme Court of Virginia's decision in L.F. v. Breit. [142] In Breit, the court interpreted the Assisted Conception Act, Virginia Code sections 20-156 through 20-164, concluding that the right of a child to have two parents is more important than the state's goal in preserving and promoting traditional marriage. [143]

A. The Lower Court's Approach to Parentage of a Child Created Through ART

In L.F. v. Breit, an unmarried father filed a petition for parentage of child he conceived with an unmarried mother through in vitro fertilization. [144] Beverley Mason and William D. Breit were in a long-term relationship and lived together several years as an unmarried couple when they decided to have a child together through in vitro fertilization using Breit's sperm and Mason's egg. [145] Prior to the child's birth, Mason and Breit filed a written custody and visitation agreement providing Breit with visitation rights and stating that those rights were in the best interest of the child. [146] On July 13, 2009, Mason gave birth to a daughter, L.F. [147] Breit was present at the birth and named on the birth certificate ***1437** as the father. [148] Breit and Mason named the child after Mason's paternal grandmother and Breit's maternal grandmother, and the couple hyphenated the child's last name as a combination of both their surnames. [149]

After the child's birth, the couple entered a jointly executed "Acknowledgment of Paternity" agreement, which stated that Breit was the legal and biological father of the child. [150] Additionally, the couple mailed birth announcements together, naming both as parents to the child. [151] They lived together as a family for the next four months. [152] The couple then separated and Breit paid child support to Mason and maintained the child's health insurance. [153] Breit also established a relationship with the child by visiting her on weekends and holidays. [154]

In August 2010, Mason terminated all contact between Breit and the child. [155] In response, Breit filed a petition for custody and visitation in the Juvenile and Domestic Relations District Court for the City of Virginia Beach and Mason responded with a motion to dismiss. [156] The court dismissed Breit's petition without prejudice. [157] Breit then filed a petition to determine parentage and establish custody and visitation in the Circuit Court for the City of Virginia Beach under Virginia Code section 20-49.2. [158] Breit filed a motion for summary judgment, in which he argued that the written Acknowledgment of Paternity that he and Mason agreed to under Virginia Code section 20-49.1(B)(2) was binding in establishing his parental rights of the child. [159] The court denied his motion for summary judgment and dismissed by nonsuit the remainder of his petition seeking custody and visitation. [160] Breit appealed. [161] The court of appeals reversed the circuit court's decision. ***1438** [162] The court of appeals held that a sperm donor is not barred from filing a parentage action to establish paternity of a child of assisted conception when the donor donated for the purpose of having a child with the mother and the mother entered into the Acknowledgment of Paternity voluntarily. [163]

An explanation of the court's reasoning requires a brief overview of Virginia Code sections 20-49.1(B)(2) and 20-158(A)(3). Section 20-158(A)(3) states that a sperm donor cannot be the parent of child conceived through assisted conception, unless the

The court stated that although the Assisted Conception Act was written with married couples in mind, its purpose is to protect cohesive family units from third-party donors' potential intrusion. [187] Breit is not the third-party intruder that the Act was meant to exclude, because Breit was the person whom Mason originally intended to be the child's father, she treated Breit as the child's father for a length of time, and she voluntarily acknowledged Breit as the legal father in the Acknowledgment of *1441 Paternity. [188] Breit also had a relationship with the child, and provided for her financially, until Mason cut him out of the child's life. [189] The court determined that Mason, Breit, and the child were a "family unit" protected by the statute. [190] Thus, the court applied Virginia Code section 20-49.1(B)(2). [191]

2. Equal Protection and Due Process

The court next addressed Breit's argument regarding a violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. The court held that the Assisted Conception Act does not violate the Equal Protection Clause but, if not harmonized with a statute that allows an unmarried father parentage rights, would violate the Due Process Clause. [192] Breit argued, and the court agreed, that if the Assisted Conception Act was applied as Mason wished, without being in harmony with Virginia Code section 20-49.1, the Act would have violated his constitutionally protected right to make decisions concerning the "care, custody, and control of his child." [193]

The parent-child relationship is protected under the Due Process Clause. [194] Both married and unmarried fathers enjoy this right by showing "a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child." [195] Thus, since Breit showed a commitment to raising and having a relationship with the child, the court held that Breit had the fundamental right to make decisions concerning the child's "care, custody and control, despite his status as an unmarried donor." [196] The court stated that, "[s]imply put, there is no compelling reason why a responsible, involved, unmarried, biological parent should never be allowed to establish legal parentage of her or his child *1442 born as a result of assisted conception." [197] The court concluded that "[d]ue process requires that unmarried parents such as Breit, who have demonstrated a full commitment to the responsibilities of parenthood, be allowed to enter into voluntary agreements regarding the custody and care of their children." [198] The court stated that

> it is incumbent on courts to see that the best interests of a child prevail, particularly when one parent intends to deprive the child of a relationship with the other parent. "The preservation of the family, and in particular the parent-child relationship, is an important goal for not only the parents but also government itself . . . ." [199]

The court also noted that preventing Breit's name from appearing on the birth certificate violated the Due Process Clause. [200] The court noted that the purpose of the birth certificate is to show an intended parent-child relationship and under Virginia Code section 32.1-257(D), Breit was entitled to have his name listed on the child's birth certificate. [201]

In conclusion, the Supreme Court of Virginia upheld the court of appeals' decision that Breit was entitled to parental rights over the child, despite the fact that Breit was not married to the child's mother. [202] In doing so, the court took a big step in family law by putting the value of a child having two parents above the state's motive in promoting and preserving traditional marriage. In response to L.F. v. Breit, the Virginia General Assembly codified the opinion in Virginia Code section 1-240.1, the Rights of Parents Act. [203] Section 1-240.1 states, "A parent has a fundamental right to make decisions concerning the upbringing, education, and care of the parent's child." [204]

*1443 VI. Application of L.F. v. Breit to Gay Couples

The decision in L.F. v. Breit regarding unmarried parents' parental rights and the subsequent Rights of Parents Act should open the door not only to unmarried heterosexual parents, but also to homosexual parents who seek to have a child through assisted conception. Both parents should be allowed to enter into binding surrogacy agreements and both parent's names should be allowed to be placed on birth certificates, granting them parental rights. The Due Process Clause should require that a gay man,

Although equal protection jurisprudence does not prohibit the states from treating various classes and groups of people differently, those classifications must be reasonable. [219] Even though the United States Supreme Court has not recognized sexual orientation ***1446** as a suspect class, homosexuals have been the victims of hate crimes and have been publicly ostracized for decades, qualifying them as a politically unpopular group. [220] In United States v. Windsor, the Court held "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." [221] To bar a father who is fully committed to raising his child created through assisted conception from due process protection of his parent-child relationship simply because of his sexual orientation would be to harm him based on his sexual orientation. The Equal Protection Clause should allow gay fathers of children conceived through ARTs the due process protection provided in Virginia Code section 1-240.1. [222]

The Windsor Court additionally stated that responsibilities and rights enhance the dignity of people, and to deprive people of their rights and responsibilities unequally creates instability. [223] As the Court wrote, the federal Defense of Marriage Act ("DOMA") demeaned same-sex couples and humiliated the tens of thousands of children being raised by these couples in not recognizing their legal marriages. [224] "The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." [225]

This reasoning should be applied to parental rights as well. To bar children from having two legal parents even though they are being raised and cared for by two parents is a state-imposed form of humiliation and discrimination. Restricting children to only one legal parent also makes it more difficult for children to understand the integrity of the family. They may not understand why they are prevented from having two legal parents simply because their parents are homosexual, while other children with heterosexual parents are allowed two legal parents. Similar to ***1447** DOMA creating second-tier marriages, the Assisted Conception Act creates second-tier families. [226] To bar a child from two legal parents simply because of his or her parents' sexual orientation is discrimination and should be seen as causing humiliation for children being raised by these parents in the eyes of the state.

In the recent case of Bostic v. Rainey, the United States District Court for the Eastern District of Virginia held that Virginia's laws banning same-sex marriage are unconstitutional. [227] The court rejected the Commonwealth's argument that parenting is a legitimate reason for banning same-sex couples from marrying. [228] In defending Virginia's marriage laws, proponents argued that "responsible procreation" and "optimal childrearing" are sufficient state interests to allow Virginia to prohibit same-sex couples from marrying. [229] The Commonwealth contended that natural parents should also be the legal parents. [230] In disagreeing with this argument the court stated:

> [T]he welfare of our children is a legitimate state interest. However, limiting marriage to opposite-sex couples fails to further this interest. Instead, needlessly stigmatizing and humiliating children who are being raised by the loving couples targeted by Virginia's Marriage Laws betrays that interest. . . . [T]housands of children being raised by same-sex couples, [are] needlessly deprived of the protection, the stability, the recognition and the legitimacy that marriage conveys. [231]

The court noted that homosexual couples are just as capable of raising children as heterosexual couples, and to hold otherwise is "unconstitutional, hurtful and unfounded." [232] The court further opined that, "state-sanctioned preference for one model of parenting that uses two adults over another model of parenting that uses two adults is constitutionally infirm." [233]

This rationale regarding parenting and marriage laws should apply to the Assisted Conception Act. Similar to limiting marriage to only between a man and woman, narrowly defining intended ***1448** parents in Virginia Code section 20-156 to only a married man and woman is unconstitutional because it essentially asserts that homosexual couples cannot be good parents. [234] As the Eastern District Court of Virginia stated, homosexual couples are just as capable of being good parents as heterosexual couples. [235] Denying children the ability to have two legal parents under the Assisted Conception Act deprives them of the protection, stability, and legitimacy that having two legally-recognized parents provides. [236] Children deserve to have the

Another potential solution is to allow second-parent adoption in Virginia. Senator Janet D. Howell sponsored Senate Bill 336, which would allow for a second-parent adoption. [249] This bill came before the Virginia General Assembly in January 2014. [250] The bill states:

> [a] person other than the parent of a child may adopt a child if (i) . . . the child had only one parent or the child is the result of surrogacy and the surrogate or carrier consents to the adoption, (ii) the petition does not seek to terminate the parental rights of the parent of the ***1451** child, and (iii) the parent of the child joins the petition for the purpose indicating consent. [251]

The purpose of this bill is to provide security to children of both straight and gay couples living in two-parent families with only one legal parent. [252] This bill would create an option for a gay dad, who is not genetically related to his child, to gain parental rights alongside his partner. [253] On January 24, 2014, the bill was deadlocked in the Senate and thus killed during the 2014 legislative session. [254]

If Virginia values a child's right to have two parents over its interest in promoting traditional marriage, the Commonwealth must redefine the Assisted Conception Act or approve second-parent adoption. Virginia should allow for a child to have two fully committed gay fathers rather than restricting a child to only one legal gay parent. [255]

Footnotes

1 Virginia Fitness Club to Allow Gay Parents to Join After Lawsuit, FoxNews.com (July 5, 2012), http://www.foxnews.com/us/2012/07/05/virginia-fitness-club-to-allow-gay-parents-to-join-after-lawsuit/.

2 Id.

3 Id.

4 Id.

5 Id.

6 Id.; Charlene Gomes,Partners as Parents: Challenges Faced by Gays Denied Marriage, 63Humanist14, 14-15 (2003).

7 Va. Code Ann. § 20-156 (2008); id. § 63.2-1225 (2012) (limiting adoption to married couples and unmarried individuals).

8 Press Release, Williams Inst., As Overall Percentage of Same-Sex Couples Raising Children Declines, Those Adopting Almost Doubles--Significant Diversity Among Lesbian and Gay Families (Jan. 25, 2012), available at http:// williamsinstitute.law.ucla.edu/press/press-releases/as-overall-percentage-of-same-sex-couples-raising-children-declines-those-adopting-almost-doubles-significant-diversity-among-lesbian-and-gay-families/.

9 Tiffany L. Palmer, The Winding Road to the Two-Dad Family: Issues Arising in Interstate Surrogacy for Gay Couples, 8 Rutgers J.L. & Pub. Pol'y 895, 895 (2011).

C. Inhorn & Frank van Balen eds., 2002); Judith F. Daar, Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms, 23 Berkeley J. Gender L. & Just. 18, 23-24 (2008)); Infertility: Symptoms, Treatment, Diagnosis, UCLA Health, http://obgyn.ucla.edu/body.cfm?id=326 (last visited Apr. 14, 2014).

27 Dana, supra note 15, at 359.

28 Id.

29 Douglas E. Abrams et al., Contemporary Family Law 1063 (2d ed. 2009) (quoting Bruce Lord Wilder, Current Status of Assisted Reproduction Technology 2005: An Overview and Glance at the Future, 39 Fam. L.Q. 573, 573 (2005)) (internal quotation marks omitted).

30 Dana, supra note 15, at 360.

31 Bridget M. Fuselier, The Trouble With Putting All of Your Eggs in One Basket: Using a Property Rights Model to Resolve Disputes Over Cryopreserved Pre-Embryos, 14 Tex. J. C.L. & C.R. 143, 144 (2009).

32 Id.

33 Artificial insemination means sperm is injected into the female by some unnatural means. Black's Law Dictionary 128-29 (9th ed. 2009).

34 Dana, supra note 15, at 360 (citing Jessica Arons, Ctr. for Am. Progress, Future Choices: Assisted Reproductive Technologies and the Law 5 (2007), available at http://www.americanprogress.org/issues/2007/12pdf/arond-art.pdf).

35 See id.

36 Id. (citing Arons, supra note 34, at 6).

37 Id.

38 See id.

39 Id.

40 Traditional Surrogacy: A Summary of the Traditional Surrogacy Process, All About Surrogacy, http://www.allaboutsurrogacy.com/traditionalsurrogacy.htm (last visited Apr. 14, 2014).

41 See Dana, supra note 15, at 360-61.

42 Weldon E. Havins & James J. Dalessio, Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating "Non-Traditional" Gestational Surrogacy Contracts, 31 McGeorge L. Rev. 673, 675 (2000).

43 Dana, supra note 15, at 361.

62 Traditional Adoption, Adoption.com, http:// encyclopedia.adoption.com/entry/traditional-adoption/359/1.html (last visited Apr. 14, 2014).

63 Family Formation, supra note 61.

64 Id.

65 Id.

66 Va. Code. Ann. § 63.2-1225 (2012); see also Family Equality Council, Adoption and Foster Care, available at http:// www.familyequality.org/_ asset/0rq050/Adoption-and-Foster-Care-FINAL.pdf (last visited Apr. 14, 2014).

67 Id.

68 Id.

69 Va. Code Ann. § 20.124.3 (2008).

70 Id.; Alison M. Schmieder, Best Interest and Parental Presumptions: Bringing Same-Sex Custody Agreements Beyond Preclusion by the Federal Defense of Marriage Act, 17 Wm. & Mary Bill Rts. J. 293, 308-10 (2008); Family Formation, supra note 61.

71 Id.

72 Second Parent Adoption, Family Equality Council, http:// www.familyequality.org/get_informed/equality_maps/ second-parent_adoption_laws/ (last visited Apr. 14, 2014).

73 Id.

74 Id.

75 See Va. Code Ann. § 63.2-1200 (2012); Leslie M. Fenton & Ann Fenton, The Changing Landscape of Second-Parent Adoptions, American Bar Association (Oct. 25, 2011), http:// apps.americanbar.org/litigation/committees/childrights/ content/articles/fall2011-changing-landscape-second-parent-adoptions.html; see also Family Formation, supra note 61.

76 L.F. v. Breit, 736 S.E.2d 711, 717 (Va. 2013).

77 Act of Apr. 3, 1952, ch. 584, 1952 Va. Acts 611 (codified as amended at Va. Code Ann. § 20-61.1 (1958)).

78 Act of Apr. 6, 1954, ch. 577, 1954 Va. Acts 350 (codified as amended at Va. Code Ann. § 20-61.1 (1958)).

79 Act of Apr. 20, 1988, ch. 866, 1988 Va. Acts 1025 (codified as amended at Va. Code Ann. §§ 20-49.1 to -49.8 (1988)).

97 Id. at 496.

98 "Assisted conception" is defined as "a pregnancy resulting from any intervening medical technology, whether in vivo or in vitro, which completely or partially replaces sexual intercourse as the means of conception." Va. Code Ann. § 20-156 (2008). Medical technologies the state considers to be "assisted conception" include "artificial insemination by donor, cryopreservation of gametes and embryos, in vitro fertilization, uterine embryo lavage, embryo transfer, gamete intrafallopian tube transfer, and low tubal ovum transfer." Id. Additionally, the statute restricts the definition of "compensation" to medical and ancillary expenses and requires the surrogate to wait three days to release her parental rights. Id.; see id. § 20-162(A)(3) (Cum. Supp. 2013).

99 Id. § 20-156 (2008).

100 Id.

101 Id. § 20-160(A) (Cum. Supp. 2013).

102 Id. § 20-160(B) (Cum. Supp. 2013).

103 Id. § 20-160(B)(7) (Cum. Supp. 2013).

104 Id. § 20-160(B)(9) (Cum. Supp. 2013).

105 Id. §§ 20-160, -162 (Cum. Supp. 2013).

106 Id. § 20-162(A)(3) (Cum. Supp. 2013); see id. § 20-158(D) (2008).

107 Id. § 20-158(E)(2) (2008).

108 Id.

109 Id.

110 Rodgers-Miller, supra note 17, at 297.

111 Va. Code Ann. § 32.1-261 (2011).

112 Id. But cf. Davenport v. Little-Bowser, 611 S.E.2d 366, 371 (Va. 2005) ("[T]here is nothing in the statutory scheme that precludes recognition of same-sex couples as 'adoptive parents.'").

113 Va. Code Ann. § 20-158 (2008); id. § 20-160 (Cum. Supp. 2013); Va. Code Ann. § 32.1-261 (2011).

114 Id. § 32.1-261 (2011); see Davenport, 611 S.E.2d at 371, 372.

134 Id.

135 Id.

136 Id. Based on the author's research, there is no record of a successful Non-Parentage order as of 2014.

137 See ARTs for Same-Sex Parents, supra note 125.

138 Id.

139 Id.; Fenton & Fenton, supra note 75.

140 ARTs for Same-Sex Parents, supra note 125.

141 Id.

142 See generally 736 S.E.2d 711 (Va. 2013).

143 Id. at 722; Andrew Vorzimier, Unmarried Sperm Provider Has Constitutional Right to Assert Parental Rights, The Spin Doctor (Jan. 14, 2013, 10:20 AM), http://www.eggdonor.com/blog/2013/01/14/unmarried-sperm-provider-constitutional-assert-parental-rights/.

144 Breit, 736 S.E.2d at 715.

145 Id.

146 Id. A written custody agreement, such as the one Breit and Mason entered into, is the same as what attorneys in Virginia are recommending to gay couples as their best outcome for joint parental rights in the state. See Assisted Reproductive Technology Options, supra note 125.

147 Breit, 736 S.E.2d at 715.

148 Id.

149 Id.

150 Id.

151 Id.

152 Id.

174 Id. at 718 (quoting Va. Code Ann. § 20-164 (Cum. Supp. 2013)).

175 Id. at 718, 720.

176 Va. Code Ann. § 20-49.1(B) (2008).

177 Breit, 736 S.E.2d at 715.

178 Id. at 718.

179 Id.

180 Id.

181 See id. at 719.

182 Id.

183 Id.

184 Id.

185 Id.

186 Id.

187 Id. at 720.

188 Id.

189 Id.

190 Id.

191 Id.

192 Id. at 721-22.

193 Id. at 721.

194 Id. at 721 (citing Troxel v. Granville, 530 U.S. 57, 65 (2000); Wyatt v. McDermott, 725 S.E.2d 555, 558 (Va. 2012); Copeland v. Todd, 715 S.E.2d 11, 19 (Va. 2011)).

214 L.F. v. Breit, 736 S.E.2d 711, 722 (Va. 2013).

215 Cf. V.C. v. M.J.B., 748 A.2d 539, 550-51 (N.J. 2000) (laying out standards to become a psychological parent).

216 Breit, 736 S.E.2d at 723 (citing Commonwealth ex rel. Gray v. Johnson, 376 S.E.2d 787, 791 (Va. Ct. App. 1989)).

217 Id. at 721.

218 Id. at 722.

219 See Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)) (internal quotation marks omitted); Rodgers-Miller, supra note 17, at 298.

220 See Cook v. Gates, 528 F.3d 42, 61 (1st Cir. 2008) ("Romer nowhere suggested that the Court recognized [homosexuals as] a new suspect class."); Rodgers-Miller, supra note 17, at 299-300.

221 United States v. Windsor, 570 U.S. ___, ___, 133 S. Ct. 2675, 2693 (2013) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

222 Va. Code Ann. § 20-156 (2008); id. §§ 20-160, -162 (Cum. Supp. 2013).

223 Windsor, 570 U.S. at ___, 133 S. Ct. at 2694.

224 Id. at ___, 133 S. Ct. at 2694.

225 Id. at ___, 133 S. Ct. at 2694.

226 See id. at ___, 133 S. Ct. at 2694.

227 Bostic v. Rainey, No. 2:13cv395, 2014 WL 561978, at *23 (E.D. Va. Feb. 13, 2014).

228 Id. at *17-18.

229 Id. at *17 (internal quotation marks omitted).

230 Id. at *18.

231 Id. at *18.

232 Id. at *18-19.

233 Id. at *19.

254 John Riley, Virginia Senate Kills Second-Parent Adoption Bill, MetroWeekly (D.C.), (Jan. 24, 2014), http://www.metroweekly.com/poliglot/2014/01/virginia-senate-slaughters-second-parent-adoption.html.

255 L.F. v. Breit, 736 S.E.2d 711, 721 (Va. 2013).

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