In The

Supreme Court of Virginia

RECORD NO. 120159

BEVERLEY MASON,

Appellant,

v.

WILLIAM D. BREIT, *et al.*,

Appellees.

BRIEF OF APPELLEE WILLIAM D. BREIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 4

ASSIGNMENTS OF CROSS-ERROR 8

STANDARD OF REVIEW 9

ARGUMENT 9

1. THE COURT OF APPEALS DID NOT ERR IN REJECTING AND REVERSING 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) 9

   A. THE COURT OF APPEALS DID NOT ERR IN REJECTING MASON'S ARGUMENT THAT CODE § 20-49.1 *ET SEQ*. IDENTIFIES PARENTS, BUT DOES NOT CREATE PATERNITY 11

      APPLICATION OF CODE § 32.1-257(D) 18

   B. THE COURT OF APPEALS DID NOT ERR BY "HARMONIZING" THE STATUTES TO PERMIT VA. CODE § 20-49.1 AND VA. CODE § 20-158(A)(3) AND RELATED STATUTUES TO BE CONSTRUED TOGETHER 19

C. THE COURT OF APPEALS DID NOT ERR IN RULING THAT LITERAL ADHERENCE TO VA. CODE § 20-158(A)(3) RESULTS IN "MANIFEST ABSURDITY" IN THIS CASE 23

2. THE COURT OF APPEALS DID NOT ERR IN DECLINING TO RULE THAT DONOR'S ACKNOWLEDGEMENT OF PATERNITY WAS VOID *AB INITIO* 26

ASSIGNMENTS OF CROSS ERROR 32

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 "ACKNOWLEDGMENT OF PATERNITY" UNDER OATH ACKNOWLEDGING THE BIOLOGICAL FATHER TO BE THE LEGAL FATHER OF THE CHILD..... 32

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 POTENTIAL RIGHTS OF A SPERM DONOR VIOLATES THE CONSTITUTIONALLY PROTECTED LIBERTY RIGHTS OF EQUAL PROTECTION AND DUE PROCESS 34

DUE PROCESS 37

EQUAL PROTECTION..... 41

RELIEF SOUGHT 46

CERTIFICATE OF SERVICE..... 48

TABLE OF AUTHORITIES

Page

CASES

Acordia v. Glenn,
263 Va. 337, 560 S.E.2d 246 (2002) 18

Addington v. Texas,
441 U.S. 418, 99 S. Ct. 1804 (1979)..... 38

Addison v. Jurgelsky,
281 Va. 205, 704 S.E.2d 402 (2011) 9

Ainslie v. Inman,
265 Va. 347, 577 S.E.2d 246 (2003) 20

Antisedel v. Ashby,
279, Va. 42, 688 S.E.2d 163 (2010) 19-20

Bank of the Commonwealth v. Hudspeth,
282 Va. 216, 741 S.E.2d 566 (2011) 9

Bearden v. Georgia,
461 U.S. 660, 103 S. Ct. 2064 (1983)..... 43

Berry v. Klinger,
225 Va. 201, 300 S.E.2d 792 (1983) 24

Bloxom v. Rose,
151 Va. 590, 144 S.E. 642 (1928) 18

Boddie v. Connecticut,
401 U.S. 371, 91 S. Ct. 780 (1971)..... 43

Bowman v. Concepcion,
283 Va. 552, 722 S.E.2d 260 (2012) 21

Boyton v. Kilgore,
271 Va. 220, 623 S.E.2d 922 (2006) 23, 24

Breit v. Mason,
59 Va. App. 322, 718 S.E.2d 482 (2011) .....*passim*

Brown v. Brown,
183 Va. 353, 32 S.E.2d 79 (1944) 12

Brown v. Lukhard,
229 Va. 316, 330 S.E.2d 84 (1985) 24

Burch v. Grace Street Building Corp.,
168 Va. 329, 191 S.E. 672 (1937) 31

Burrell v. Commonwealth,
283 Va. 474, 722 S.E.2d 272 (2012) 27

Burruss v. Hines,
94 Va. 413, 26 S.E. 875 (1897) 28

C.M. v. C.C.,
152 N.J. Super. 160, 377 A.2d 821 (1977) 41

C.O. v. W.S.,
64 Ohio Misc. 2d 9, 639 N.E.2d 523 (1994)..... 40

Caban v. Mohammed,
441 U.S. 380, 99 S. Ct. 1760 (1979)..... 35, 44, 45, 46

Cain v. Rea,
159 Va. 446, 166 S.E. 478 (1932) 20

Carter v. Carter,
215 Va. 475, 211 S.E.2d 253 (1975) 28

Carwile v. Richmond Newspapers,
196 Va. 1, 82 S.E.2d 588 (1954) 33

City of Lynchburg v. English Construction Co.,
277 Va. 574, 675 S.E.2d 197 (2009) 20, 21, 23

Collins v. Shepherd,
274 Va. 390, 649 S.E.2d 672 (2007) 27

Commonwealth ex rel. Gray v. Johnson,
7 Va. App. 614, 376 S.E.2d 787 (1989) 11, 16

Commonwealth v. Doe,
278 Va. 223, 682 S.E.2d 906 (2009) 22

Commonwealth of Virginia Dept. of Special Services v. Flaneary,
22 Va. App. 293, 469 S.E.2d 79 (1996) 33

Conyers v. Martial Arts World of Richmond, Inc.,
273 Va. 96, 639 S.E.2d 174 (2007) 9, 14, 23

Cook v. Commonwealth,
268 Va. 111, 597 S.E.2d 84 (2004) 23

Copeland v. Todd,
282 Va. 183, 715 S.E.2d 11 (2011) 22, 34

Covel v. Town of Vienna,
280 Va. 151, 694 S.E.2d 609 (2010) 23

Craig v. Boren,
429 U.S. 190, 97 S. Ct. 451 (1976)..... 44

Davis v. Tazewell Place Assoc.,
254 Va. 257, 492 S.E.2d 162 (1997) 14

Dominick v. Vassor,
235 Va. 295, 367 S.E.2d 487 (1988) 30

Dunbar v. Hogan,
16 Va. App. 653, 432 S.E.2d 16 (1993) 33

Eisenstadt v. Baird,
405 U.S. 438, 92 S. Ct. 1029 (1972).....44

Evans v. Evans,
280 Va. 76, 695 S.E.2d 173 (2010) 9, 20

Featherstone v. Brooks,
220 Va. 443, 258 S.E.2d 513 (1979) 28

Florence v. Roberts,
233 Va. 297, 355 S.E.2d 316 (1987) 12

Gomez v. Perez,
409 U.S. 535, 93 S. Ct. 872 (1973).....17

Griffin v. Illinois,
351 U.S. 12, 76 S. Ct. 585 (1956).....38

Harvey v. Hoffman,
108 Va. 626, 69 S.E. 371 (1908) 24

Hawthorne v. VanMarter,
279 Va. 566, 692 S.E.2d 226 (2010) 9

In Interest of R.C.,
775 P.2d 27 (Colo. 1989).....39, 40

In Re: K.M.H.,
285 Kan. 53, 169 P.3d 1025 (2007).....38, 39

Jackson v. Hartig,
274 Va. 219, 645 S.E.2d 303 (2007) 33

Johnson v. Zerbst,
304 U.S. 458, 58 S. Ct.1019 (1938).....39

Jones v. Robinson,
229 Va. 276, 329 S.E.2d 794 (1985) 11, 17

Kelley v. Kelley,
248 Va. 295, 449 S.E.2d 55 (1994) 27

Kopalchick v. Catholic Diocese of Richmond,
274 Va. 332, 645 S.E.2d 439 (2007) 22

Lassiter v. Department of Social Services of Durham,
452 U.S. 18, 101 S. Ct. 2153 (1981)..... 42

Lawrence v. Texas,
539 U.S. 558, 123 S. Ct. 2472 (2003)..... 43

Lawton v. Steele,
152 U.S. 133, 14 S. Ct. 499 (1894)..... 37

Lee v. City of Norfolk,
281 Va. 423, 706 S.E.2d 330 (2011) 4

Lehr v. Robertson,
463 U.S. 248, 103 S. Ct. 2985 (1983)..... 35, 36, 39

Leonard v. Courts,
221 Va. 582, 272 S.E.2d 190 (1980) 18

Lostrangio v. Laingford,
261 Va. 495, 544 S.E.2d 357 (2001) 4

Lynchburg Social Services v. Cook,
276 Va. 465, 666 S.E.2d 361 (2008) 20

Martin v. Ziherl,
269 Va. 35, 607 S.E.2d 367 (2005) 43

M.L.B. v. S.L.J.,
519 U.S. 102, 117 S. Ct. 555 (1996)..... 35, 38, 42, 43

McIntyre v. Crouch,
98 Or. App. 462, 780 P.2d 239 (1989), *cert. denied*,
495 U.S. 905, 110 S. Ct. 1924 (1990)..... 40

Meyer v. Nebraska,
262 U.S. 390, 43 S. Ct. 625 (1923).....37

Michael H. v. Gerald D.,
491 U.S. 110, 109 S. Ct. 2333 (1989).....36

Miller-Jenkins v. Miller-Jenkins,
276 Va. 19, 661 S.E.2d 822 (2008) 18

Morris v. Morris,
216 Va. 457, 219 S.E.2d 864 (1975) 16

Moses v. Cooper,
211 Va. 480, 178 S.E.2d 514 (1977) 18

Ott v. Monroe,
282 Va. 403, 719 S.E.2d 309 (2011) 21

Quilloin v. Walcott,
434 U.S. 246, 98 S. Ct. 549 (1978).....34, 35

Reed v. Reed,
404 U.S. 71, 92 S. Ct. 251 (1971).....44, 45

Riggins v. O'Brien,
263 Va. 444, 559 S.E.2d 673 (2002) 28

Roenke v. Virginia Farm Bureau,
209 Va. 128, 161 S.E.2d 704 (1968) 29

Rohanna v. Vazzana,
196 Va. 549, 84 S.E.2d 440 (1954) 31

Santosky v. Kramer,
455 U.S. 745, 102 S. Ct. 1388 (1982).....35, 38, 42

Schepers GmbH & Co. v. Whitaker,
280 Va. 507, 702 S.E.2d 573 (2010) 30

Shoup v. Shoup,
37 Va. App. 240, 556 S.E.2d 783 (2001) 16

Stanley v. Georgia,
394 U.S. 557, 89 S. Ct. 1243 (1969)..... 44

Stanley v. Illinois,
505 U.S. 645, 92 S. Ct. 1208 (1972)..... 35, 38, 42

Station #2, LLC v. Lynch,
280 Va. 166, 695 S.E.2d 537 (2010) 9

Steinman v. Clinchfield Coal Corp.,
121 Va. 611, 93 S.E. 684 (1917) 18-19

Stockbridge v. Gemini Air Cargo, Inc.,
269 Va. 609, 611 S.E.2d 600 (2005) 29

Swann v. Housman,
90 Va. 816, 20 S.E. 830 (1894) 18

T v. T,
216 Va. 867, 224 S.E.2d 148 (1976) 28, 30, 31

Troxel v. Granville,
530 U.S. 57, 120 S. Ct. 2054 (2000)..... 34-35

Tuomala v. Regent University,
258 Va. 368, 477 S.E.2d 501 (1996) 30

Virginia Cellular, LLC v. Virginia Department of Taxation,
276 Va. 486, 666 S.E.2d 374 (2008) 20

Virginia Power v. Board of Supervisors,
226 Va. 382, 309 S.E.2d 308 (1983) 24

Virginia Tech v. Interactive Return Service, Inc.,
267 Va. 642, 595 S.E.2d 1 (2004) 29

Ware v. United States,
71 U.S. 617 (1866) 18

Washington v. Glucksberg,
521 U.S. 702, 117 S. Ct. 2258 (1997)..... 37

Wayneboro Village v. BMC Properties,
255 Va. 75, 496 S.E.2d 64 (1998) 24, 30

Weaver v. Weaver,
220 Va. 921, 265 S.E.2d 692 (1980) 16

Weidman v. Babcock,
241 Va. 40, 400 S.E.2d 164 (1991) 30

Wertz v. Grubbs,
245 Va. 67, 425 S.E.2d 500 (1993) 24

Williams v. Williams,
256 Va. 19, 501 S.E.2d 417 (1998) 37

Wisconsin v. Yoder,
406 U.S. 205, 92 S. Ct. 1526 (1972)..... 37

Wyatt v. McDermott,
283 Va. 685, 725 S.E.2d 555 (2012) 34

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XIV .....*passim*

U.S. CONST. art. 1, § 8 17

VA. CONST. art. VIII 17

STATUTES

Ark. Code Ann. § 9-10-201 39

Fla. Stat. § 742.14..... 39

N.H. Rev. Stat. Ann. § 168-B:3(I)(e) 39

N.J. Stat. Ann. § 9:17-44(b) 39

N.M. Stat. § 40-11-6(B) 39

N.Y Comp. Codes R. & Regs. tit 1, § 111 45

Ore. Rev. Stat. § 109.239 40

Va. Code §§ 20-49.1 *et seq*. ..... *passim*

Va. Code § 20-49.1 ..... 13, 19, 21, 33

Va. Code § 20-49.1(B) 12, 21, 23

Va. Code § 20-49.1(B)(2) ..... *passim*

Va. Code § 20-49.2 ..... 1, 2, 10, 15

Va. Code § 20-49.8 ..... *passim*

Va. Code § 20-49.8(C) 18

Va. Code § 20-49.10 ..... *passim*

Va. Code § 20-61.1 12

Va. Code § 20-61.2 12

Va. Code § 20-88.32 12

Va. Code §§ 20-156 *et seq*. 15, 37

Va. Code § 20-156 ..... 19, 24, 25

Va. Code §§ 20-158 *et seq.* 21

Va. Code § 20-158(A)(3) ..... *passim*

Va. Code § 20-158(E)(2) 25

Va. Code § 20-164 ..... 14, 22

Va. Code § 32.1-257(D) ..... *passim*

RULE

Va. Sup. Ct. R. 3.20 32

OTHER AUTHORITIES

1990 General Assembly, Summary of Legislative Proposal Priority 1, Department of Social Services, Legislative Draft File, House Bill 961 (1990) 33

Black's Law Dictionary (9th Ed. 2010) 17, 27

Kansas Parentage Act 38-1114(F) 39

Webster's Collegiate Dictionary (10th Ed. 1993) 17

Webster's Collegiate Dictionary (11th Ed. 2003) 17

STATEMENT OF THE CASE

Beverley Mason ("mother" or "Mason") and William D. Breit ("father or "Breit") are the biological mother and father of a daughter, L.F. ("child"), born on July 13, 2009. (JA 295) The child was conceived through assisted conception. (JA 145) Breit initially appealed an order of the Circuit Court of the City of Virginia Beach ("trial court") sustaining Beverley Mason's and L.F.'s Pleas in Bar to Breit's Petition to Determine Parentage of L.F. to the Court of Appeals of Virginia. (JA 284) On December 28, 2011 the Court of Appeals of Virginia issued a published decision reversing the decision of the trial court and deciding that when the biological mother and father execute an uncontested Acknowledgment of Paternity, under oath, pursuant to Code § 20-49.1(B)(2), the father is not barred from filing a parentage action pursuant to Code § 20-49.2. *Breit v. Mason*, 59 Va. App. 322 (2011). (JA 292-308) It is from the judgment rendered by the Court of Appeals that Mason and L.F. (Record Nos. 120158-9) have been awarded appeals. (JA 315-321)

On August 23, 2010, when L.F. was just over one year old, Mason unilaterally terminated all visitation and contact between L.F. and her father, Breit. (JA 12) Breit had enjoyed regular visitation with his daughter until that time. (JA 12, 295) On August 24, 2012, Breit filed a petition for

custody and visitation in the Virginia Beach Juvenile and Domestic Relations District Court ("JDR district court"). (JA 1-3) Mason filed a motion to dismiss, asserting that, pursuant to Code §§ 20-158(A)(3) and 32.1-257(D), Breit was not the legal father of L.F.

On October 28, 2010, "in the interest of judicial expediency," the JDR district court dismissed, without prejudice, Breit's petitions for custody and visitation. (JA 4-5) On November 1, 2010, Breit appealed the dismissal from JDR district court to the circuit court. (JA 6-7) On November 15, 2010, pursuant to Code § 20-49.2, Breit also filed a Petition to Determine Parentage in the circuit court, naming the mother and L.F. as co-party defendants. (JA 10-14) Breit asserted that the "Acknowledgment of Paternity" signed by the parties on July 14, 2009, the day after L.F. was born, "created a final and binding parent and child relationship between Breit and L.F." (JA 12) Breit also filed a Motion for Summary Judgment and various procedural motions." (JA 15-20) Breit's Motion for Summary Judgment relied upon the signed "Acknowledgment of Paternity" establishing the parent and child relationship. (JA 15-17) On December 6, 2010, the trial court entered an order consolidating the appeal from the JDR district court with Breit's Petition to Determine Parentage. (JA 35-36)

On December 13, 2010, L.F., by her attorney, Jerrold Weinberg, filed a Plea in Bar to Breit's Petition to Determine Parentage." (JA 95-96) Mr. Weinberg had been retained by the mother to represent the child. (JA 110) The trial court, over Breit's objection, thereafter appointed Mr. Weinberg, the attorney retained for L.F. by the mother, to be L.F.'s guardian *ad litem*. (JA 119)

Mason filed a Plea in Bar to Breit's Petition to Determine Parentage. Mason and L.F. asserted that, pursuant to Code §§ 20-158(A)(3) and 32.1-257(D), Breit was barred from being L.F.'s legal parent because Breit and Mason had never been married and L.F. was conceived through assisted conception. (JA 64-71) On December 20, 2010, the trial court sustained the pleas in bar to Breit's Petition to Determine Parentage. (JA 210) Breit's Petitions for Visitation and Custody were non-suited. (JA 264)

On January 28, 2011, the trial court entered a final order sustaining L.F.'s and Mason's Plea in Bar to Breit's Petition to Determine Parentage, and denied Breit's Motion for Summary Judgment. (JA 266-269) Breit timely filed a notice of appeal with the Court of Appeals seeking review of the trial court's order. (JA 284)

The Court of Appeals of Virginia, in a published opinion, reversed the decision of the trial court sustaining Mason and L.F.'s Pleas in Bar. (JA

292-308) The Court of Appeals also found that the trial court abused its discretion in appointing Weinberg as L.F.'s guardian *ad litem*. *Breit v. Mason*, 59 Va. App. at 340. (JA 305-307)

Mason filed this appeal, and the petition was granted limited to the assignments of error and assignments of cross error in the order of June 11, 2012. (JA 318-321)

STATEMENT OF FACTS

The facts stated in the Appellee's pleadings are taken as true for purposes of resolving the issues presented. *Lee v. City of Norfolk*, 281 Va. 423 (2011); *Lostrangio v. Laingford*, 261 Va. 495, 497 (2001). The uncontroverted facts are detailed in the Petition to Determine Parentage filed under oath pursuant to affidavit by Mr. Breit. (JA 10-14) The facts are also set forth in the Plaintiff's Brief in Opposition to the Defendant's Motion to Dismiss filed by Breit in the Circuit Court. (JA 77-80)

On the 13th day of July, 2009 L.F. was born to Mason and Breit, her unmarried biological parents. (JA 10) On July 14, 2009, Mason and Breit executed an "Acknowledgment of Paternity", under oath, in accordance with § 20-49.1(B)(2). (JA 18-19) A birth certificate was issued naming Breit as the legal father of the child. (JA 20)

Mason and Breit were in a long-term romantic relationship and lived together as an unmarried couple for several years. (JA 11-13) Mason and Breit desired to have a child, and during the course of their relationship Mason and Breit engaged in sexual intercourse for the purpose of conceiving a child. (JA 77) In April 2008, Mason and Breit sought reproductive assistance from Dr. Jill T. Flood, a board-certified physician in obstetrics, gynecology, and reproductive endocrinology. (JA 139-140) Dr. Flood interviewed Mason and Breit and collected their medical, social, and family histories. (JA 148-149) Dr. Flood counseled both parties about various fertility treatment options, costs, and risks of treatment, and collected blood and semen specimens from Breit to aid in the *in vitro* fertilization of Mason's ova. (JA 149) In June 2008, Dr. Flood retrieved eggs from Mason's ovaries, fertilized those eggs outside her body using the sperm donated by Breit, and transferred the resulting embryos into Mason's uterus. (JA 141) The June 2008 transfer was unsuccessful, and Mason did not become pregnant. (JA 141) Dr. Flood repeated the transfer process in October, 2008, again using sperm donated by Breit. (JA 143) Breit was present for both egg retrieval procedures, fertilization, and transfer of the embryos into Mason's uterus. (JA 149) The second transfer was successful, and Dr. Flood confirmed in October 2008 that Mason was

pregnant. (JA 144) Mason and Breit continued to cohabitate throughout the pregnancy. (JA 11) Dr. Flood testified that in her opinion, within a reasonable degree of medical certainty, this pregnancy was a ninety-nine percent likely to have resulted from the implantation of the embryos into Ms. Mason. (JA 145-147)

Dr. Flood testified that Breit's sperm was used to fertilize the eggs to make the embryos (JA 146). She testified there was a ninety-nine percent chance that Breit's sperm fertilized Ms. Mason's egg in a dish and that the embryo transferred to Mason produced the child, L.F. (JA 147)

It was Dr. Flood's impression and understanding that Mr. Breit was going to be the father of this child. (JA 150) Dr. Flood did not treat Mr. Breit and Ms. Mason any differently than she would have treated a married couple that had fertility problems. (JA 151)

Dr. Flood testified there are very different procedures and different protocols when you have anonymous sperm donors. (JA 150) There are consent forms, special consent forms if you are using donors, whether known or unknown. (JA 150) There are consent forms for both the sperm donor and the patient in consenting to use the sperm of a donor, so the donors have anonymity, if they so choose. If the donor is not anonymous, he should have some kind of contractual idea about his role in the

participation of developing the child. (JA 151) There were no donor consent forms signed by either Mason or Breit. (JA 151)

On June 8, 2009, prior to the child's birth, Mason and Breit entered into a written Custody and Visitation Agreement, prepared by Mason's attorney, setting forth the intention of the parties, providing that not only would Breit be entitled to reasonable visitation, but also acknowledging that visitation and custody would serve the best interests of the child.[1] (JA 57-58) Mason and Breit agreed to give L.F. a hyphenated surname comprised of both Mason's and Breit's surnames. (JA 11, 20) Mason and Breit were named as L.F.'s mother and father on L.F.'s birth certificate, in accordance with Code § 32.1-257(D). (JA 20) Mason and Breit continued to cohabitate for months after L.F.'s birth and represented to friends and family that Breit was L.F.'s legal and biological father. (JA 11) Breit maintained L.F. on his health insurance, cared for L.F., and established a committed relationship with her. (JA 11)

Breit is the acknowledged genetic and biological father of the child. (JA 11)

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1. On May 10, 2012 Mason filed a Complaint against her attorney and the law firm Kaufman and Canoles in the Circuit Court of the City of Norfolk, CL12-3620 alleging legal malpractice in preparation of the agreement signed on June 8, 2009.

From the birth of the child and until the mother unilaterally cut off all contact, Breit maintained an actual relationship with the child, including caring for and nurturing the child. (JA 12)

On August 23, 2010 the mother unilaterally ceased to allow Breit all access to or visitation with L.F., including all contact, despite repeated and continuing requests by the father for reasonable visitation. (JA 12, 79-80, 295-98).

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 "ACKNOWLEDGMENT OF PATERNITY" UNDER OATH ACKNOWLEDGING THE BIOLOGICAL FATHER TO BE THE LEGAL FATHER OF THE CHILD. (JA 15-20, 268-69, 315-316, 319)

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 POTENTIAL RIGHTS OF A SPERM DONOR VIOLATES THE CONSTITUTIONALLY PROTECTED LIBERTY RIGHTS OF EQUAL PROTECTION AND DUE PROCESS. (JA 85-90, 194-96, 268-69, 316, 319-320)

STANDARD OF REVIEW

Statutory construction is a question of law which is reviewed *de novo* on appeal. *Bank of the Commonwealth v. Hudspeth*, 282 Va. 216, 221 (2011); *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007). *Addison v. Jurgelsky*, 281 Va. 205, 208 (2011). A Plea in Bar admits the truth of the facts contained in the pleading, as well as any facts that may be reasonably and fairly implied and inferred from the allegations. *Station #2, LLC v. Lynch*, 280 Va. 166, 175 (2010); *Evans v. Evans*, 280 Va. 76, 81 (2010). *Hawthorne v. VanMarter*, 279 Va. 566, 577 (2010). The standard of review considers the pleadings in a light most favorable to Breit, but will review the sufficiency of the legal conclusions ascribed to those facts *de novo*. *Evans*, 280 Va. at 82.

ARGUMENT

1. THE COURT OF APPEALS DID NOT ERR IN REJECTING AND REVERSING 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).

On July 14, 2009, the day after L.F. was born, the parties executed, under oath, an "Acknowledgment of Paternity" in full compliance with Code § 20-49.1(B)(2). The statute, in pertinent part, reads:

> "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".

The statute also provides that the acknowledgment may be rescinded by either party within sixty (60) days. The acknowledgment signed by Mason and Breit, the biological parents, was not rescinded within 60 days, nor has it been alleged that the "Acknowledgement of Paternity" was procured as a result of fraud, duress, or a material mistake of fact.

The Court of Appeals decided "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, executed 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 § 20-49.2 to establish paternity of the child resulting from assisted conception". *Breit v. Mason*, 59 Va. App. 322, 337 (2010). (JA 304)

In reaching this conclusion, the Court of Appeals decided that Code § 20-49.1(B)(2) and § 20-158(A)(3) should be considered together to be consistent with the overall statutory scheme to ensure that all children born

in the Commonwealth have a known legal mother and legal father. *Breit* at 337, *See*, *e.g.*, *Commonwealth ex rel. Gray v. Johnson*, 7 Va. App. 614, 622 (1989). The Court of Appeals concluded that the General Assembly did not intend to enact a "manifest absurdity" by interpreting § 20-158(A)(3) to fully and finally 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 immutable status as a "donor". *Breit* at 336.

A. THE COURT OF APPEALS DID NOT ERR IN REJECTING MASON'S ARGUMENT THAT CODE § 20-49.1 *ET SEQ*. IDENTIFIES PARENTS, BUT DOES NOT CREATE PATERNITY.

Code § 20-49.1 *et seq*. is the only statutory scheme to establish legal parentage of children born to unwed parents. The intent of the legislature was to control the determination of paternity in all cases concerning a child of unwed parents. *Jones v. Robinson*, 229 Va. 276, 284 (1985). The "assisted conception" statute is silent as to the status of children born to unmarried parents, and by definition only applies to married couples using a surrogate and has no application to an unmarried woman using the sperm of an unmarried man.

Chapter 3.1 of Title 20 is titled "Proceedings to Determine Parentage". Code § 20-49.1(B) specifically states:

> "The parent and child relationship between a child and a man may be established by a voluntary written statement of the father and mother made under oath acknowledging paternity…" (emphasis added)

Mason attempts to avoid the plain language of Code § 20-49.1(B) by distinguishing the words "determine" and "establish" in order to avoid the primary purpose of the statute, which is to provide support and maintenance to children born to unmarried parents.

At common law, a putative father was under no obligation to support his illegitimate child, and this rule prevailed in Virginia until it was modified by statute. *Florence v. Roberts*, 233 Va. 297, 299 (1987). *Brown v. Brown*, 183 Va. 353, 355 (1944). The first statutory modification of the common-law rule occurred in 1952 when the General Assembly permitted proof of paternity but limited the evidence to a father's admission of paternity before a court. Acts 1952, c. 584 (codified as § 20-88.32, Code 1950). In 1954 the Section was amended to allow the use of a father's admission of paternity in writing under oath. Acts 1954, c. 577. Code §§ 20-61.1 and 61.2 were repealed effective July 1, 1988. 1988 Va. Acts, Chs. 866, 878. The General Assembly amended and recodified the subject matter previously under these Code Sections at Title 20, Chapter 3.1,

"Proceedings to Determine Parentage", Code §§ 20-49.1 to 49.8, now through § 20-49.10.

Code § 20-49.10, also a part of Chapter 3.1, specifically acknowledges the parent and child relationship of children conceived by assisted conception, stating in pertinent part:

> "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) adopts the child, or (iii) knew that the child was conceived through artificial insemination" (emphasis added).

A simple example demonstrates the fatal flaw in Mason's argument. Assume that Mason filed a petition seeking child support from Breit. Breit, who signed an "Acknowledgment of Paternity", invokes § 20-158(A)(3) and § 32.1-257(D) and claims, as Mason does now, that he has no parental rights or duties for the child. Because Breit knew at the time he signed the "Acknowledgment of Paternity" that "the child was conceived through artificial insemination", he would be required to provide support. The "Acknowledgment of Paternity" establishes an obligation of support, notwithstanding the provisions of § 20-158(A)(3) and § 32.1-257(D). If Breit has a statutory obligation to support L.F., conceived by artificial insemination, certainly he should also have the benefit of a parent and child relationship. The court must presume the General Assembly did not intend

to enact a "manifest absurdity", and the court should interpret statutes to give meaning to the language of the statute. *Breit v. Mason*, 59 Va. App. at 335; citing *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007). *See also Davis v. Tazewell Place Assoc.*, 254 Va. 257, 260-62 (1997).

Mason's argument also ignores Code § 20-164, a part of Chapter 9, which states:

> "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 64.1, and, when applicable, Chapter 3.1 (§ 20-49.1 *et seq.*). (emphasis added)

The statute specifically cross references Chapter 3.1 (§ 20-49.1 *et seq*.) when the status of a child is negated by the "assisted conception" statute. The language of Code § 20-164 could not be more clear. The intent of the General Assembly is that these statutes be read in conjunction with each other when a child's status is negated by this chapter. This is necessary because the specific language of § 20-164 applies only to children of married parents, whereas Code § 20-49.1 *et seq.* applies to the children of unmarried parents. Title 64.1 is a specific reference to "Evidence of Paternity" used to establish parentage pursuant to Code

§ 20-49.2. Mason offers no explanation why this language does not resolve the assignments of error in favor of Mr. Breit.

Mason argues that Code § 20-49.1 *et seq*. does not "create" legal parentage, because an unwed donor cannot be the parent of a child conceived through assisted conception" under Code § 20-158(A)(3). Breit does not claim parental rights pursuant to Code § 20-158(A)(3), because Mason is not married and has no husband who may claim parentage. Breit's parental rights are established by § 20-49.1(B)(2). Nothing in Code § 20-158(A)(3) restricts or prohibits Breit and/or the mother from executing an "Acknowledgment of Paternity" pursuant to Code § 20-49.1(B)(2). This is because the "assisted conception" statute was never intended to apply to unmarried persons and is silent as to the status of children born to unmarried parents. The statutory language of Code § 20-156 *et seq*. simply fails to address unmarried intended parents and their offspring.

Code § 20-49.10 creates an obligation of a father to support a child conceived through artificial insemination upon executing an "Acknowledgment of Paternity". Once Breit, as a donor, took the step to waive his "donor" status by acknowledging paternity under oath, Code § 20-158(A)(3) was no longer applicable, if it ever was. There is no conflict in the statutes. A father, with the consent of the mother, may agree to have

a legal judgment entered against him for the purpose of being obligated for support and maintenance of a child born to unwed parents, and nothing in the law prohibits the unmarried man and unmarried woman from entering into such an agreement. *Breit v. Mason*, 59 Va. App. at 337

This conclusion is also consistent with public policy. The courts of the Commonwealth have a long history of protecting the interests of minor children and have expressed that priority by ensuring that the rights and interests of minors are safeguarded. *Commonwealth of Virginia ex rel. Gray v. Johnson*, 7 Va. App. at 623. "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." *Weaver v. Weaver*, 220 Va. 921, 926 (1980). Parents are also encouraged to reach agreement respecting the care and support of their minor children. *Morris v. Morris*, 216 Va. 457, 459 (1975). *Commonwealth ex rel. Gray v. Johnson*, 7 Va. App. 614, 622 (1989); *Shoup v. Shoup*, 37 Va. App. 240, 248 (2001). This interpretation also promotes the intent of the legislature to ensure that all children born in the Commonwealth have a known legal mother and legal father. Legislative intent includes ensuring that all children born in the Commonwealth have an equal right to support from both married and

unmarried parents. *Gomez v. Perez*, 409 U.S. 535 (1973); *Jones v. Robinson*, 229 Va. 276 (1985).

Mason relies upon *Webster's Collegiate Dictionary* (10th Ed. 1993) definition of the word "determine" to support the argument that Code § 20-49.1 *et seq*. does not "create" paternity. *Webster's Collegiate Dictionary 340* (11th Ed. 2003) defines "determine" "to fix conclusively or authoritatively", "to decide by judicial sentence". *Black's Law Dictionary* 491 (9th Ed. 2010) defines "establish" as follows: "to make or form, to bring about or into existence (emphasis added). (For example, Congress has the power to "establish" Article III courts).

The legal phrase "establish" has long been used to create courts and laws throughout our history. Indeed, the United States Constitution, in its preamble states "we the people…do ordain and establish this constitution." (emphasis added) The Constitution of Virginia, Article VIII, provides for public schools "and shall seek to ensure that an educational program of high quality is established and continually maintained" (emphasis added). (*See*, *also*, Constitution of the United States; Article 1, Section 8; Congress

shall have the power to establish post offices and roads; *Ware v. United States*, 71 U.S. 617 (4 *Wall*, 617) (1866).[2]

APPLICATION OF CODE § 32.1-257(D)

The Court of Appeals found that Code § 32.1-257(D) did not impose an absolute bar to Breit's ability to assert parentage of L.F., and Breit's name on the birth certificate accurately reflects the intended parent-child relationship. *Breit v. Mason*, 59 Va. App. at 338. Mason appealed this judgment in Assignment of Error V, arguing that Code § 20-49.8(C) requires a certified copy of an order or judgment of parentage be transmitted to the State Registrar of Vital Records. When the trial court sustained the Plea in Bar it refused to enter an order removing Breit's name from the birth certificate. (JA 268) No objection was made by Mason to the entry of the Order. (JA 268) This Court denied the Petition for Appeal related to this assignment of error.

This aspect of the decision in *Breit v. Mason*, 59 Va. App. 322 (2011) is now the law of the case. *Miller-Jenkins v. Miller-Jenkins*, 276 Va. 19, 26 (2008), (quoting *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 620

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2. *See*, also, *Swann v. Housman*, 90 Va. 816 (1894) (evidence to establish a contract); *Acordia v. Glenn*, 263 Va. 337 (2002), (evidence to establish privity of contract); *Leonard v. Courts*, 221 Va. 582 (1980) (evidence to establish a constructive trust), *Moses v. Cooper*, 211 Va. 480 (1977), (evidence to establish an implied tenancy); *Bloxom v. Rose*, 151 Va. 590, (1928) (evidence to establish agency).

(1917). The filing of L.F.'s birth certificate with the State Registrar naming Breit as the legal father of the child is final. The procedure relating to the Certificate of Birth for L.F. pursuant to Code § 32.1-257(D) is no longer an issue in this appeal. Breit is properly on L.F.'s birth certificate with the consent of the mother, and is the legal father of L.F.

Code § 32.1-257(D) requires that the name of the father "shall … be entered on the certificate of birth" upon execution of an "Acknowledgment of Paternity" subsequent to the birth of the child. When the mother and the person to be named as the father, in this case Mason and Breit, executed an "Acknowledgment of Paternity", the statute required that Breit be placed on the birth certificate.[3]

B. THE COURT OF APPEALS DID NOT ERR BY "HARMONIZING" THE STATUTES TO PERMIT VA. CODE § 20-49.1 AND VA. CODE § 20-158(A)(3) AND RELATED STATUTUES TO BE CONSTRUED TOGETHER.

The Court of Appeals found that under settled principles of statutory construction, Code §§ 20-49.1(B)(2) and 20-158(A)(3) must be construed together in order to give full meaning, force and effect to each. *Breit v. Mason*, 59 Va. App. 322, 335 (2011); *citing* *Antisedel v. Ashby*, 279 Va. 42,

[3.] Because both Breit and Mason are unmarried "donors", as defined in Code Section 20-156, a literal reading of Section 32.1-257(D) would lead to a chaotic outcome, because neither would have parental rights or duties. Mason "donated" ova; Breit "donated" sperm. As equally "intended" parents, both have equal rights.

48 (2010). The Court held that to permanently bar a parentage action by a sperm donor, when the birth mother voluntarily signed a birth certificate application under oath acknowledging the biological father to be the legal father of the child, results in a "manifest absurdity". *Breit*, 59 Va. App. at 336.

The Court of Appeals further found that to impose a permanent bar to a known biological father whose sperm was donated at the request and with the consent of the birth mother, who voluntarily signed a birth certificate application under oath acknowledging the biological father to be the legal father of the child, results in a manifest absurdity because the intended, biological father could never establish parentage of the child. *Id*.

Statutory construction is a pure question of law which the Court will review *de novo* on appeal. *Lynchburg Social Services v. Cook*, 276 Va. 465 (2008); *Ainslie v. Inman*, 265 Va. 347 (2003); *Cain v. Rea*, 159 Va. 446, 450 (1932). It is also a settled rule of statutory construction that when the plain language of two or more statutes conflict, they should be read and construed together in order to give full meaning, force and effect to each. *Evans v. Evans*, 280 Va. 76 (2010); *City of Lynchburg v. English*, 277 Va. 574 (2009); *Virginia Cellular, LLC v. Virginia Department of Taxation*, 276 Va. 486 (2008); *Ainslie v. Inman*, 265 Va. 347 (2003).

Statutes that address the same general subject matter will be construed as a consistent and harmonious whole to give effect to the overall statutory scheme. *Bowman v. Concepcion*, 283 Va. 552 (2012); *Ott v. Monroe*, 282 Va. 403, 407 (2011). Clearly, Code §§ 20-158(A)(3) and 20-49.1(B)(2) relate to the same subject matter, that is, establishing legal parentage of children, although Code § 20-49.1(B) relates only to unmarried parents and Code § 20-158(A)(3) relates only to a married couple using a surrogate. Therefore, the Court should construe statutes that address the same general subject matter "so as to avoid repugnance and conflict to them and, if possible, to give full force and effect to both of them. *Bowman v. Concepcion*, 282 Va. at 563. *City of Lynchburg v. English Construction Co.*, 277 Va. 574, 584 (2009).

Appellant's proposed interpretation of Code § 20-158(A)(3) would negate the plain language of Code § 20-49.1. As the Court of Appeals noted, "such a narrow reading of the assisted conception statutes fails to accord harmony with – and indeed all but negates – the ability of a known biological father, chosen by the birth mother, to establish parentage pursuant to Code § 20-49.1(B)(2)". *Breit* at 336. Indeed, the only conflict seems to be trying to apply Code § 20-158 *et seq*. to unmarried parents when the statute is limited to married parents using a surrogate.

The argument also ignores the language of § 20-49.10 and § 20-164. The cross reference in § 20-164 to the statutory procedure for unmarried parents to establish paternity indicates the clear intent of the General Assembly that they be read and construed together.

The Court of Appeals was required to "harmonize" the applicable statutes, if for no other reason than to avoid conflict with the Fourteenth Amendment. Courts have a duty to construe statutes subject to a constitutional challenge in a manner that "avoids any conflict with the constitution". *Copeland v. Todd*, 282 Va. 183 (2011); *Commonwealth v. Doe*, 278 Va. 223, 229 (2009). *Kopalchick v. Catholic Diocese of Richmond*, 274 Va. 332, 340 (2007). Compliance with the Fourteenth Amendment can only be accomplished by concluding that the General Assembly did not intend to permanently bar a parentage action by an unmarried donor when the biological mother and biological father are both unmarried and voluntarily acknowledge parenthood pursuant to statute for that purpose. At a minimum, due process requires that unmarried parents be allowed to enter into agreements regarding the support and maintenance of their illegitimate children.

C. THE COURT OF APPEALS DID NOT ERR IN RULING THAT LITERAL ADHERENCE TO VA. CODE § 20-158(A)(3) RESULTS IN "MANIFEST ABSURDITY" IN THIS CASE.

Courts apply the plain language of a statute unless the terms are ambiguous or applying the plain language would lead to an absurd result. *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007). The Court of Appeals found that Mason's interpretation of § 20-158(A)(3) leads to an absurd result. *Breit*, 59 Va. App. at 336.

The phrase "absurd result" is used to describe situations in which the law would be internally inconsistent or otherwise incapable of operation. *Covel v. Town of Vienna*, 280 Va. 151, 158 (2010); *Boyton v. Kilgore*, 271 Va. 220, 227 (2006); *Cook v. Commonwealth*, 268 Va. 111, 116 (2004). Mason's interpretation of Code § 20-158(A)(3) renders Code § 20-49.1 *et seq*. incapable of operation. Application of the familiar principles of statutory construction require that no part of an act should be treated as meaningless unless absolutely necessary. *Lynchburg v. English Construction*, 277 Va. 574, 584 (2009). Pursuant to this rule, it is necessary to read and construe § 20-158(A)(3) together with § 20-49.1(B) in order to give full meaning, force and effect to each. The Court of Appeals correctly considered both statutes, not just an isolated part of one, in order to avoid a manifest absurdity and give meaning to the entire

statutory scheme. *Wertz v. Grubbs*, 245 Va. 67, 70 (1993); *Virginia Power v. Board of Supervisors*, 226 Va. 382, 387 (1983). To do otherwise would prohibit an unmarried father and an unmarried mother from ever being able to enter into an agreement for the care and support of their child solely because they are not married. One cannot presume the General Assembly intended such a manifest injustice. *See*, *Harvey v. Hoffman*, 108 Va. 626, 629 (1908) (if statutes are open to two constructions, the court will not give it a construction that would result in injustice).

Code § 20-158(A)(3) is ambiguous. Ambiguity exists if the text can be "understood in more than one way or refers to two or more things simultaneously [or] when the language is difficult to comprehend, is of doubtful import, or lacks clearness or definitiveness." *Boyton v. Kilgore*, 271 Va. 220 (2006); *citing* *Brown v. Lukhard*, 229 Va. 316, 321 (1985). "Ambiguity" has also been defined as "the condition of admitting of two or more meanings, of being understood in more than one way, or referring to two or more things at the same time". *Wayneboro Village v. BMC Properties*, 255 Va. 75 (1998) quoting *Berry v. Klinger*, 225 Va. 201, 207 (1983).

Code § 20-156 defines "Donor":

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

Mason is a “Donor” by definition as is Mr. Breit.

“Intended Parent” and Surrogate are defined in Code § 20-156:

> “Intended Parent” means 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 parents of any child born to the surrogate”.
>
> “Surrogate” means any adult woman who agrees to bear a child carried for “intended parents”.

Mason is not an intended parent or surrogate. Both donors are unmarried. Mason’s legal standing is no different than Mr. Breit’s. The ambiguity is created by the fact Code § 20-158(A)(3) purports to eliminate only a sperm donor’s right to be a parent, “unless the donor is the husband of the gestational mother”. What about the egg donor, such as Ms. Mason? Are her rights as a parent greater than Breit’s, even though she is an unmarried donor? The ambiguity is further compounded by the language in § 20-158(E)(2) wherein it states:

> “If either of the intended parents is a genetic parent of the resulting child, the intended father is the child’s father”.

The “assisted conception” statute was enacted to permit married couples, defined in the statute as “intended parents”, to enter into a “surrogacy contract” with an adult woman to have their child but retain custody and parental rights to the resulting child even though the gestational mother is not the biological mother of the child. A careful

reading of the term “intended parents” includes BOTH a man and woman married to each other AND who enter into an agreement with a surrogate. The statute does not apply to Breit and Mason. The statute’s application is limited to married couples who enter into a surrogacy contract. The statute does not apply to an unmarried woman who engages in assisted conception because there is no husband or other potential parent whose status needs to be defined. The statutory interpretation results from trying to apply a statute for married couples and surrogates to a case involving two unmarried donors. The statute is inapplicable to this situation. The ambiguity is created by attempting to apply the statute to unmarried donors of equal status.

Unfortunately, the problematic language restricts only the parental rights of a sperm “donor” and not the parental rights of the egg “donor”. As a consequence, the statutory scheme allowing unmarried egg donors but not unmarried sperm donors to have parental rights violates both the Equal Protection and Due Process clauses of the Fourteenth Amendment.

2. THE COURT OF APPEALS DID NOT ERR IN DECLINING TO RULE THAT DONOR’S ACKNOWLEDGEMENT OF PATERNITY WAS VOID *AB INITIO*.

Appellant asserts that the parties “Acknowledgment of Paternity” is void *ab initio*, because it is contrary to the General Assembly’s express

intent to divest all sperm donors of any parental rights and responsibilities for children born as a result of assisted conception, even when, as here, the mother and father acknowledge paternity under oath and obtain a birth certificate acknowledging the donor as the legal father of the child. There is no authority for this proposition because that interpretation could never withstand a constitutional challenge on due process grounds. Code § 20-49.10 specifically authorizes legal enforcement of a signed "acknowledgment" when the individual named as the father acknowledged paternity when he "knew the child was conceived through artificial insemination." This fully and finally resolves any question about the legality of the signed "Acknowledgment of Paternity" in favor of Breit.

Void *ab initio* is defined in *Black's Law Dictionary* (9th Ed. 2010) as:

> "Null from the beginning, as from the first moment when a contract is entered into."

At law, the legal principle is firmly established that a void judgment may be attacked and vacated in any court at any time, directly or collaterally. *Burrell v. Commonwealth*, 283 Va. 474, 480 (2012); *Collins v. Shepherd*, 274 Va. 390 (2007).

Kelley v. Kelley, 248 Va. 295 (1994) acknowledges the established rule that an agreement that impinges on the rights of children to receive (emphasis added) support and maintenance is facially illegal and void.

See, Featherstone v. Brooks, 220 Va. 443, 446 (1979); Riggins v. O'Brien, 263 Va. 444, 448 (2002). Parents cannot contract away their children's right to support nor can a court be precluded by agreement from exercising its power to decree child support. Riggins, Id. at 448; Carter v. Carter, 215 Va. 475, 481 (1975). The argument that the agreement entered into by Mason and Breit is void *ab initio* because the agreement impinges on the child's right to receive support is the exact opposite of what the agreement actually provides. The "Acknowledgment of Paternity" does not bargain away L.F.'s right to support or interfere with the court's authority to oversee the best interest of the child. To the contrary, the "Acknowledgment of Paternity" provides L.F. with a right to seek child support from both parents and acknowledges the court's power to decree, support and custody, as specifically stated in the document.

An "acknowledgment of paternity" signed pursuant to statute cannot be void *ab initio*. See, T v. T, 216 Va. 867 (1976); Burruss v. Hines, 94 Va. 413, 419 (1897). Because Code § 20-49.10 authorizes enforcement of an "Acknowledgment of Paternity" signed when the father knew the child was conceived through artificial insemination, this argument fails. An "Acknowledgment of Paternity" enforceable against the father for support

cannot be void *ab initio* when a mother seeks to deny visitation to the father who signed the agreement and is required to provide support.

The acknowledgment of paternity form, promulgated by the Virginia Department of Health, states that instead of signing the form, the mother may seek the advice or representation of legal counsel, request a blood test, or have the matter of paternity determined by the court. (JA 19) By signing the form, Mason waived her right to challenge the agreement, and is equitably estopped from challenging the father's right to request visitation with and custody of L.F.

Waiver is the intentional relinquishment of a known right. *Stockbridge v. Gemini Air Cargo, Inc.*, 269 Va. 609 (2005), *Virginia Tech v. Interactive Return Service, Inc.*, 267 Va. 642, 651-52 (2004). The two elements necessary to establish waiver are knowledge of the facts basic to the exercise of the right and the intent to relinquish the right. *Stockbridge*, 266 Va. at 621, *Virginia Tech*, 267 Va. at 651-52. Waiver applies to any right conferred by both law or contract. The waiver may be express or implied. *Roenke v. Virginia Farm Bureau*, 209 Va. 128, 135 (1968).

Clearly, Mason knew her pregnancy was a result of assisted conception and she expressly intended to relinquish her right to have paternity determined by the court. The acknowledgment specifically

advised Mason of her right to rescind the acknowledgment within sixty days and she expressly waived that right. Mason's express intent to waive the "donor" status of Breit is clear and unmistakable. Her waiver was a voluntary choice and was made in writing, under oath. Mason has waived any right she may have had to challenge the validity of the signed documents. *Schepers GmbH & Co. v. Whitaker*, 280 Va. 507, 515 (2010); *Weidman v. Babcock*, 241 Va. 40, 45 (1991).

Mason's challenge is also barred by the doctrine of equitable estoppel. Elements necessary to establish equitable estoppels are a representation, reliance, a change of position, and detriment. *Tuomala v. Regent University*, 258 Va. 368, 376 (1996); *Dominick v. Vassor*, 235 Va. 295, 298 (1988). The essential element is that one person misled another to his prejudice. *Wayneboro Village v. BMC Properties*, 255 Va. 75, 82 (1998).

T v. T, 216 Va. 867 (1976) illustrates the doctrine of equitable estoppel applied to a husband, who was not the biological father of the wife's child, and who was required to pay child support because of the mother's reliance on the husband's promise to support the child during the marriage. In *T v. T* the husband promised the wife to support the child, and in reliance upon the husband's promise the wife changed her position to

her detriment. The husband was estopped from pleading the statute of frauds based upon the principle of equitable estoppel. *T v. T*, at 873.

Equitable estoppel prohibits Mason from arguing that Breit is without any parental rights. Mason made a written promise, under oath, that Mr. Breit would have visitation and custody of L.F., Breit relied upon that promise by donating "sperm" and Breit performed his obligations and acted to his detriment. Equitable estoppel prohibits a litigant from playing fast and loose with the courts, and with persons dealing *in pais*. *Rohanna v. Vazzana*, 196 Va. 549, 553 (1954).

Appellant should not be "allowed to approbate and reprobate". Where a person an election between several inconsistent courses of action, he or she will be confined to that first adopted. *Burch v. Grace Street Building Corp.*, 168 Va. 329, 340 (1937). Mason first decided that Mr. Breit was the legal father of L.F. and acknowledged his parental rights in writing. The "Acknowledgment of Paternity" is not void *ab initio*. To the contrary, the document is authorized by statute and enforceable against Mason.

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 "ACKNOWLEDGMENT OF PATERNITY" UNDER OATH ACKNOWLEDGING THE BIOLOGICAL FATHER TO BE THE LEGAL FATHER OF THE CHILD.

Code § 20-49.1(B)(2) reads in pertinent part;

> "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."

Breit filed a Motion for Summary Judgment (JA 15-20) relying upon the statutory language of Code § 20-49.1(B)(2). Mason made no effort to rescind the acknowledgment within 60 days, the acknowledgement has never been rescinded, nor has she alleged that the "Acknowledgment of Paternity" was procured as a result of fraud, duress, or a material mistake of fact.

Rule 3.20 of the Rules of the Supreme Court of Virginia requires Summary Judgment when no material fact is genuinely in dispute and it is clear that a party is entitled to relief. The signature of both the biological mother and the biological father of L.F., under oath, on the "Acknowledgment of Paternity" is not in dispute. The sole issue to be

determined is a question of law regarding the validity of the document. Summary judgment is appropriate when there is no material fact genuinely in dispute, and the sole issue to be determined is a pure question of law. *Jackson v. Hartig*, 274 Va. 219, 232 (2007); *Carwile v. Richmond Newspapers*, 196 Va. 1, 5 (1954).

The "Acknowledgment of Paternity" is a valid contract, an enforceable agreement, and Summary Judgment is appropriate pursuant to Code § 20-49.1(B)(2). Code § 20-49.1 was enacted to eliminate the necessity of obtaining a judicial adjudication of paternity in cases where both parents voluntarily acknowledge under oath a child's paternity. *See*, 1990 General Assembly, Summary of Legislative Proposal Priority 1, Department of Social Services, Legislative Draft File, House Bill 961 (1990), *Commonwealth of Virginia Department of Special Services v. Flaneary*, 22 Va. App. 293, 301 (1996).

In *Dunbar v. Hogan*, 16 Va. App. 653 (1993) the Court of Appeals found that although a sworn Declaration of Paternity has the same legal effect as a judgment entered pursuant to Code § 20-49.8, it is not *res judicata* of paternity, nor does it collaterally estop a party from adjudicating the issue of paternity, where no previous determination of paternity has been made. *Id*. at 658-659. The Court of Appeals stated;

> "While the sworn statement… 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."

Breit is entitled to Summary Judgment pursuant to Code § 20-49.1(B)(2). He is seeking visitation and custody and the signed acknowledgment of paternity will serve the purpose for which it was intended *i.e.*, to prevent further protracted litigation on an issue that should be resolved as a matter of law when the acknowledgment is signed voluntarily under oath by both the unmarried mother and 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 POTENTIAL RIGHTS OF A SPERM DONOR VIOLATES THE CONSTITUTIONALLY PROTECTED LIBERTY RIGHTS OF EQUAL PROTECTION AND DUE PROCESS.

The relationship between a parent and child is a constitutionally protected liberty interest protected by the Due Process and Equal Protection clause of the Fourteenth Amendment. *Wyatt v. McDermott*, 283 Va. 685, 692 (2012); *Copeland v. Todd*, 282 Va. 183, 198 (2011) (citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)). 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." *Wyatt v. McDermott*, 283 Va. at 692 (*citing* *Troxel v. Granville*, 530

U.S. 57, 65 (2000)). The interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment. *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (quoting *Santosky v. Kramer*, 455 U.S. 745, 774 (1982)).

In *Lehr v. Robertson*, 463 U.S. 248, 256, 103 (1983), the Supreme Court of the United States described the nature of the interest in liberty:

> "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. Is it self-evident that they are sufficiently vital to merit constitutional protection."

In *Lehr*, the Court examined the extent to which an unmarried father's biological relationship with his child receives protection under the Due Process Clause. The Court recognized that parental rights do not spring full-blown from the biological connection between a parent and child. *See*, *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979). The Court defined 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 requires substantial protection under the Due Process Clause." 463 U.S. at 261 (1983).

Breit, prior to his visitation being terminated, was in a loving relationship with his daughter, L.F., was actively participating in her life, acknowledged paternity under oath, and agreed his name should be on the child's birth certificate. He demonstrated a full commitment to the responsibilities of parenthood. Although Mason characterizes Breit's relationship with his daughter as "new factors" improperly considered by the Court of Appeals (Mason's Brief p. 25), these factors are the very fabric of the relationship between Breit and L.F. that establish the constitutionally protected rights. Under constitutional law, protected liberty interest in a relationship with a child derive from both genetic ties and those reinforced by an established relationship with the child. According to *Lehr*, a biological father must either seek to establish a relationship with the child of an unmarried mother in order to trigger protected parental rights, or follow a statutory procedure for giving notice of his claim to parental rights. The presumption of legitimacy of a child born to a married couple may prevail over evidence of genetic and social fatherhood because "traditions have protected the marital family against the paternity claim of the extramarital paramour." *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). This rule, however, has no application to the situation here because there is no husband of the gestational mother who is making a claim of parentage.

The Supreme Court of the United States has made clear that a state may interfere with a parent's right to raise children only when the state acts in its police power to protect the health or safety of the child. *Williams v. Williams*, 256 Va. 19, 28 (1998). *See*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Any statute which seeks to limit a parent's rights can be justified only by a compelling state interest, and such a statute must be narrowly drawn to express only the legitimate state interest at stake. *Williams* at 29; *Washington v. Glucksberg*, 521 U.S. 702 (1997). Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Lawton v. Steele*, 152 U.S. 133, 137 (1894). Thus, the court must consider whether Code § 20-156 *et seq*., requires a finding of a compelling state interest before a court may interfere with the parents' fundamental rights to raise their child. *Williams* at 29.

DUE PROCESS

Mason's position is that "the statutory framework" of Title 20, Code § 29-156 *et seq*. "cuts off any legal right or responsibilities" of a sperm donor unless he is married to the gestational mother. (Mason's Brief, p. 8). The argument requires a finding that any legal document signed by an

unmarried sperm donor acknowledging paternity is void *ab initio*. The Court of Appeals correctly decided that this interpretation "results in a manifest absurdity because the intended, biological father of the child could never establish parentage of the child." *Breit* at 336. Under Mason's interpretation, the statutory framework of Title 20 violates an unmarried donor's due process rights to ever establish parentage, even when the parents agree.

Parental rights are large, and more substantial than mere loss of money. *Santosky*, 455 U.S. at 756 (quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979)). Consequently, decrees forever terminating parental rights are in the category of cases in which the state may not "bolt the door to equal justice". *M.L.B. v. S.L.J.*, 519 U.S. at 124; *Griffin v. Illinois*, 351 U.S. 12 (1956). Recognizing that parental termination decrees are among the most severe forms of state actions, a statute is deemed unconstitutional if it terminates the rights of an unmarried biological parent in the absence of a determination that the parent whose rights are being terminated is unfit. *Stanley v. Illinois*, 505 U.S. 645 (1972).

Other jurisdictions are unanimous in their opinions that an absolute bar to a sperm donor's right to establish parentage violates Due Process. In *In Re: K.M.H.*, 285 Kan. 53, 169 P.3d 1025 (2007), the Kansas Supreme

Court found that the Kansas Parentage Act was constitutional[4] because the statute barring parentage of a sperm donor permitted an unmarried man and woman to avoid the statutory bar by entering into a written agreement. *K.S.A.* 38-1114(F).[5]

> "While a state may not absolutely bar a biological parent from asserting parental rights - the proposition for which D.H. and the center cite *Lehr* - Kansas has not done so. Even a sperm donor with no relationship to the child's mother can forge and protect his parental rights by insisting on a written agreement". *In Re: K.M.H.* at 76.

In *In Interest of R.C.*, 775 P.2d 27 (Colo. 1989) the Colorado Supreme Court concluded that the statute barring paternity was ambiguous and refused to apply its absolute bar because the known donor had

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4. The dissent correctly observes that "absolute bar" statutes violate due process but K.S.A. 38-1114(F) permitting a donor to "opt out" of the statute's paternity bar still violates due process as applied to the donor. Courts must indulge every reasonable presumption against waiver of fundamental constitutional rights (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

5. Other states provide for agreements in writing between an unmarried woman and a sperm donor. *See* Ark. Code Ann. § 9-10-201 (2002); Fla. Stat. § 742.14 (2005); N.H. Rev. Stat. Ann. § 168-B:3(I)(e) 2002; N.J. Stat. Ann § 9:17-44(b) (2002); N.M. Stat. Ann § 40-11-6(B) 2006.

produced evidence of an oral agreement that he would be treated as father of the child. *R.C.*, 775 P2d at 35.[6]

In *McIntyre v. Crouch*, 98 Or. App. 462, 780 P.2d 239 (1989), *cert*. *denied* 495 U.S. 905, 110 S. Ct. 1924 (1990) the Oregon Supreme Court found the Oregon artificial insemination statute Ore. Rev. Stat. § 109.239 (1977), which states "a child born as a result of the artificial insemination shall have no right, obligation, or interest with respect to the donor," violated the Due Process Clause as applied to the donor if he had an agreement with the mother to share the rights and responsibilities of parenthood. 98 Or. App. at 470-72.

In *C.O. v. W.S.*, 64 Ohio Misc. 2d 9, 639 N.E.2d 523 (1994), the Ohio Supreme Court concluded that a statute purporting to be an absolute bar to paternity of sperm donors, while constitutional in the absence of an agreement to the contrary, could be unconstitutional as applied when the donor can establish that an agreement to share parenting existed between him and the unmarried woman who was the recipient of the sperm. 64 Ohio Misc. 2d at 12.

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6. See also footnote 7 recognizing that "a growing number of legislatures have sought to clear up this confusion by enacting laws that extinguish parental rights of semen donors unless the donor acknowledges his paternity in writing."

In *C.M. v. C.C.*, 152 N.J. Super. 160, 377 A.2d 821 (1977) the New Jersey Supreme Court considered the parental rights of a known sperm donor and an unmarried mother artificially inseminated. The court found that had the mother and the donor been married and conceived the child through artificial insemination the donor would be considered the child's father. Given the evidence that the parties intended to parent the child together, the court believed the same result should follow, despite the absence of wedding vows. 152 N.J. Super. at 165-68

EQUAL PROTECTION

The Virginia "assisted conception" statute violates the Equal Protection Clause of the Fourteenth Amendment by restricting assisted conception to a man and a woman married to each other. The statute violates equal protection by terminating the rights of a sperm donor, unless he is the husband of the gestational mother, while not terminating the rights of an unmarried egg donor. The statute treats a man and a woman differently despite the fact they are similarly situated. The statute also violates equal protection by discriminating against illegitimate children while affording benefits of parentage to the children of married couples born as a result of assisted conception.

Mason argues Code § 20-158(A)(3) flatly and unambiguously denies any parental rights to unmarried sperm donors (Mason's Brief p. 3, 7). Mason says the only controlling facts should be that the mother and donor are not married to each other (*Id*., p. 6, 8). Therefore, equal protection requires that the distinction between unmarried and married parents bear a substantial relation to some important state interest. A parent's right to the companionship, care and custody and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, constitutional protection. *M.L.B. v. S.L.J.,* 519 U.S. 102 (1996) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) *Lassiter v. Department of Social Services of Durham*, 452 U.S. 18, 27 (1981) ("few consequences of judicial action are so grave as the severance of natural family ties.") *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Santosky v. Kramer*, 455 U.S. 745, 787 (1982). Termination of parental rights is both total and irrevocable. Unlike other custody proceedings it leaves the parent with no right to visit or communicate with the child. Consequently, guided by *Lassiter*; *Santosky*, and other decisions acknowledging the primacy of the parent-child relationship, due process requires essential fairness of the state-ordered proceedings anterior to adverse state actions. *M.L.B. v. S.L.J.*, 519 U.S. at 120. A court must inspect the character and intensity of

the individual interest at stake, on the one hand, and the state's justification for its exaction, on the other. *M.L.B. v. S.L.J*, 519 U.S. at 121, *see*, *Bearden v. Georgia*, 461 U.S. 660, 665 (1983).

Marriage has never been a compelling state interest sufficient to interfere with Fourteenth Amendment constitutional rights. *Lawrence v. Texas*, 539 U.S. 558 (2003), *Martin v. Ziherl*, 269 Va. 35 (2005).

In *Martin v. Ziherl*, 269 Va. 35 (2005) this Court found a law prohibiting sex between two unmarried persons unconstitutional because "decisions by married or unmarried persons regarding their intimate physical relationship are elements of their personal relationships that are entitled to due process protection." *Id*. at 41. Quoting Justice Stevens, the Court said:

> "the fact that the governing majority in a state has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice. *Lawrence*, 539 U.S. at 577; *Martin*, 269 Va. at 43."

Choices about marriage, family, life and the upbringing of children are among associational rights this court has ranked as "of basic importance in our society, rights sheltered by the Fourteenth Amendment against a State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S., 102 (1996), *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971). In

Eisenstadt v. Baird, 405 U.S. 438 (1972), the Supreme Court noted that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. *Eisenstadt*, 405 U.S. at 453; *see*, *Stanley v. Georgia*, 394 U.S. 557 (1969):

> "whatever the rights of the individual to access contraceptives may be, the rights must be the same for the unmarried and the married alike." *Id*., 394 U.S. at 453.

The "assisted conception" statute terminates only the rights of a "sperm" donors and fails to address the rights of an "egg donor". In this case Breit and Mason are both similarly situated. They are both unmarried "donors". But the statute allows disparate treatment of men and women and has no substantial relation between the disparity and an important state purpose. *Reed v. Reed*, 404 U.S. 71, 76 (1971), *Craig v. Boren*, 429, U.S. 190, 197-99 (1976). Gender-based distinctions must serve important governmental objectives and must be substantially related to achievement of those objectives in order to withstand judicial scrutiny under the Equal Protection Clause. *Caban v. Mohammed*, 441 U.S. 380 (1979); *Craig v. Boren*, 429 U.S. 190, 197 (1976). In *Reed*, the Chief Justice observed that in using gender to promote an objective, the legislature has made "the very

kind of arbitrary legislative choice forbidden by the equal protection clause." *Id.*, 404 U.S. at 76. By providing dissimilar treatment for male and female donors, the assisted conception statute violates the Equal Protection Clause."

In *Caban* the Supreme Court concluded that undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances [of adoption] does not bear a substantial relationship to the state's asserted interests. A gender based classification need not ring false to work a discrimination that in the individual case might be invidious. *Caban*, 441 U.S. at 398.

> "Gender based statutory classifications deserve careful constitutional examination because they may reflect or operate to perpetuate mythical or stereotyped assumptions about the proper roles and the relative capabilities of men and women that are unrelated to any inherent differences between the sexes."

In *Caban* the Supreme Court held a New York statute granting an unwed mother the authority to block an adoption simply by withholding her consent, but did not give an unwed father a similar right, violated the Equal Protection Clause:

> "In sum, we believe that § 111 is another example of overbroad generalizations in gender-based classifications. The effect of New York's classification is to discriminate against unwed fathers even when their identity is known

> and they have manifested a significant paternal interest in the child." *Id*. at 394.

Where the father has established a substantial relationship with the child and has admitted his paternity, a state should have no difficulty in identifying the father even of a child born out of wedlock. *Id*. at 393.

The Virginia "assisted conception" statute violates the Equal Protection Clause of the Fourteenth Amendment because it treats married and unmarried parents differently, treats children of married and unmarried parents differently, and treats male and female donors differently, and does these things primarily to the detriment of an unmarried intended father.

RELIEF SOUGHT

The Virginia "assisted conception" statute applies to married couples using a surrogate only and was never intended to apply to unmarried persons using assisted conception. This is the primary reason Code § 20-158(A)(3) violates the Due Process and Equal Protection clauses of the Fourteenth Amendment. Breit therefore requests this court enter a judgment granting Summary Judgment in his favor, declare the "assisted conception" statute unconstitutional, and remand this case to the Circuit Court for a determination of visitation and custody of the infant L.F. In the

alternative, the opinion of the Court of Appeals in *Breit v. Mason*, 59 Va. App. 322 (2011) should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify compliance with Rule 5:26 and Rule 5:26(h) fifteen bound copies, and one electronic copy on CD, of the foregoing Brief of Appellee have been hand-filed with the Clerk of the Supreme Court of Virginia, and three bound copies, and one electronic copy on CD, of the same have been served, via UPS Ground Transportation, on Counsel for the Appellant and Guardian *ad litem*, all on this 14th day of August, 2012 at the following addresses:

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