In The

Supreme Court of Virginia

RECORD NO. 120158

L.F., A MINOR,

Appellant,

v.

WILLIAM D. BREIT, *et al.*,

Appellees.

RECORD NO. 120159

BEVERLEY MASON,

Appellant,

v.

WILLIAM D. BREIT, *et al.*,

Appellees.

BRIEF OF *AMICUS CURIAE* OF
CENTER FOR GLOBAL JUSTICE, HUMAN RIGHTS AND THE RULE OF LAW AT REGENT UNIVERSITY SCHOOL OF LAW

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TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

The Center for Global Justice, Human Rights, and the Rule of Law, located at Regent University School of Law, 1000 Regent University Drive, Virginia Beach, VA 23464, by Professor Lynne Marie Kohm, respectfully presents the following *amicus* brief in the above referenced cases.

Request to be Considered *Amicus Curiae*

Consistent with the Rules of the Supreme Court of Virginia in accepting *amicus* briefs, having included with this brief a Motion for Leave to Consolidate Amicus Briefs, and a Motion for Leave to File, having obtained the written consent of a party and noting the objections of the other parties, according to Rule 5:30(b)(2), the Center for Global Justice, Human Rights, and the Rule of Law, by Professor Lynne Marie Kohm, requests that the Court admit this *Amicus Curiae* in support of the best interests of the child involved in this case, and on behalf of all children who may become the subject of assisted conception parentage or custody litigation in the future.

Interest of the *Amicus Curiae*

The Center for Global Justice, Human Rights, and the Rule of Law [hereafter the Center for Global Justice] located in Virginia Beach, Virginia, is a public interest law center dedicated to advocating for those who cannot

defend themselves, particularly children, and to promoting the rule of law and seeking justice for the incapacitated and vulnerable. Professor Lynne Marie Kohm is the John Brown McCarty Professor of Family Law at Regent University, in Virginia Beach, Virginia, U.S.A., and is a recognized scholar in the area of the best interests of the child in both American and international law. As a non-governmental academic entity dedicated to the promotion and protection of human rights in matters regarding children, the Center for Global Justice, by Professor Kohm, has closely followed the legal proceedings and discussion of this case. Based on the matters at issue, the case is poised to set precedent on the commitment of the Commonwealth of Virginia to protecting the children of assisted conception in the dispute of their consenting, intended, unmarried parents.

We approach this Honorable Court in the status of *Amicus Curiae* in an effort to encourage a judicial role that protects the best interests of defenseless children of assisted conception when parents are unmarried.

Preliminary Statement

The fundamental issues addressed in this brief are the protection of the constitutional liberty interests of a child of assisted conception, and the duty of the Commonwealth to protect children of assisted conception of unmarried, consenting, intended parents. With the anticipation that this

contribution might assist the Court to reach a just decision for the child in this case the Center for Global Justice and Professor Kohm respectfully request this Honorable Court to:

1) admit the Center for Global Justice, Human Rights, and the Rule of Law as *Amicus Curiae* for this case;

2) attach this *Amicus* brief to the case file; and,

3) adopt the views set forth in this brief.

Assignments of Error

This amicus considers only the issues arising on behalf of the child, L.H., and any child of assisted conception of unmarried, consenting, intended parents, from the second Assignment of Cross Error which states:

> 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 constitutionality protected liberty rights of equal protection and due process;

and from the second Assignment of Error which states:

> 1.B. The Court of Appeals erred by misconstruing the governing statues and by erroneously "harmonizing" the statutes to permit Va. Code § 20-49.1 to override Va. Code § 20-158(A)(3) and related statutes that specifically address assisted conception.

Statement of Facts

This amicus adopts the Statement of Facts submitted in the original petition of Petitioner/Appellee William D. Breit.

Standard of Review

The Center for Global Justice adopts the statement setting forth the appropriate Standard of Review submitted by the Appellee in his brief.

Summary of the Argument

In analyzing this case we focus on the child's interests only, anchoring our observations and views in constitutional protections of a child's liberty interests in knowing her parents, and the standards and rules applicable to the best interests of a child.

Structure of the *Amicus*

I. A child has a fundamental liberty interest in her own parentage based on constitutional claims of free association under the First Amendment, and due process liberty interests under the Fifth Amendment applied to the states under the Fourteenth Amendment, and those claims are part of Virginia's duty to protect and provide for the best interests of a child of assisted conception.

II. The best interest of a child of assisted conception of unmarried, consenting, intended parents is fostered by promoting parentage of both a mother and a father.

We urge this court to consider the constitutional protections of liberty, due process, and free association of a child's intimate family relations with her father and her mother as part of the Commonwealth's duty to protect the best interests of a child when a family fragments, and that those best interests cannot be surmounted to intentionally deny a child of a parent.

Introduction

This case is about the welfare of a child of assisted conception caught in the middle of her unmarried parents' parentage dispute and ensuing custody and visitation battle. This brief proffers that a legislatively unintended application of Virginia's assisted conception laws enabling one parent to intentionally exclude the other parent from the child's life when those consenting, intended parents are unmarried is not best for the child. The Code's marriage priority is not inconsistent with Virginia's public policy endorsing marriage in child bearing to foster strong families, but that policy does not exclude a child's constitutionally protected liberty interests in knowing her parents simply because they are unmarried. Application of the constitutional protections of the best interest of a child in assisted conception contexts involving consenting, intended parents allow Virginia's courts to protect the liberty interests of the child of unmarried parents.

Argument

I. A child has a fundamental liberty interest in her own parentage based on constitutional claims of free association under the First Amendment, and due process liberty interests under the Fifth Amendment applied to the states under the Fourteenth Amendment, and those claims are part of Virginia's duty to protect and provide for the best interests of a child of assisted conception.

Nearly all constitutional cases about children and their families have dealt with the rights of parents. Troxel v. Granville, 530 U.S. 57 (2000), is the principal case on constitutional protections for parental rights, ruling that the state may not interfere with a fit parent's decision-making regarding visitation between her children and a third party because the Constitution guarantees parents the right to make decisions regarding the care, custody and upbringing of their children (citing throughout Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925)). Although the Troxel Court did not have "the occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds" (citing Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) where the Supreme Court ruled that a father's biological parenthood and established relationship with a young child was not sufficient to overcome the marital presumption applied to the child's mother and her husband at the time of conception where the intact family unit based in marriage

protected the child's best interests), Justice Stevens, in his dissent in Troxel, recognized that children are constitutionally protected actors, noting,

> [t]he constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.

Id. at 89 (Stevens, J. dissenting).

Fit parents are presumed to act in the best interests of their children, and have the duty to protect their child's liberty interests as part of those parental rights (Parham v. J.R., 442 U.S. 584 (1979)). In fact, In re Gault, 387 U.S. 1 (1967) determined that a minor child should be provided constitutional procedural safeguards, based on the notion of *parens patriae*; that minors have no rights to be protected, but do possess an interest which the State shall protect with procedural safeguards. There the Court addressed whether various constitutional guarantees should apply to minors, finding that those guarantees did apply to minors facing a loss of liberty.

Here, the child L.H. faces a loss of liberty in the form of deprivation of a father, and loss of that critical intimate family bond. That loss is a denial of free association with her known and acknowledged father. The child is

deprived of an essential familial bond without consideration of her due process liberty interests when the most basic procedural safeguards have not adequately afforded protection of her best interests. The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The Supreme Court of the United States has long recognized that the Fifth Amendment counterpart "guarantees more than fair process," Washington v. Glucksberg, 521 U.S. 702, 719 (1997), but also "provides heightened protection against government interference with certain fundamental rights and liberty interests." Id. at 720 (citations omitted).

This is not to suggest that a child's liberty interest in knowing or having a relationship with a parent is to be treated as a right, or as on par or contrary to a parent's rights or interests, but that it is incumbent upon parents to not deprive their children of a known fit intended parent. Furthermore, it is incumbent upon a trial court to assess that the best interests of the child are incorporated into those parental rights and presumptions, particularly when one parent intends to deprive the child of the other parent.

Parents' constitutional rights do not preclude a child's liberty interests in knowing those parents, particularly when a state is charged with

protecting her best interests. To avoid the harm to the child caused by depriving her of a parent, a state is not outside its bound to employ a best interest standard when protecting the liberty interests of a child of assisted conception caught in her unmarried parents' parentage, custody and visitation battle. This Court has held that the best interest of the child must be a primary concern (Bailes v. Sours, 231 Va. 96, 340 S.E.2d 824 (1986); Wilkerson v. Wilkerson, 214 Va. 395, 200 S.E.2d 581 (1973); Copeland v. Todd, 282 Va. 183, 715 S.E.2d 11 (2011)). The harm of being deprived of a fit, intended parent cannot be in a child's best interests. Children of assisted conception need particular safeguards when their parents are unmarried, consenting and intentional in achieving parenthood but a dispute arises to deprive the children of the other parent, against their liberty interests and contrary to their best interests.

Here, L.H.'s due process liberty and her best interests seem to have been overlooked, effectively depriving her of a father. Though unmarried, Mason and Breit acted in concert to conceive L.H., to care for her prenatally and postnatally, legally agreed to parentage, and provided a home for her where at one time all three cohabited together. Unmarried and fragmented, L.H.'s family is now before the courts in this litigation

because Virginia's assisted conception code was being improperly applied to deprive her of a fit, known, and intended father.

A child has a fundamental liberty interest in knowing her own consenting and intended parents based on constitutional claims of free association under the First Amendment, even if her parents are unmarried. A child's due process liberty interests under the Fifth and Fourteenth amendments require at least procedural safeguards when being deprived of a father. Here, L.H.'s interests have not been adequately considered. Those claims are part of Virginia's duty to protect and provide for the best interests of a child when parents request state intervention into their intimate familial concerns.

II. The best interest of a child of assisted conception of unmarried, consenting, intended parents is fostered by promoting parentage of both a mother and a father.

Because a child has a due process liberty interest in having a mother and a father, and a free association interest in a bond with both, a parent or a court cannot work to deprive the child of the other fit, intended parent. These facts are reflected in public policy,[1] and in case law. The Courts of

[1] Virginia's public policy on families is apparent in its *Strengthening Families* initiative, which recognizes the best setting for a child to be raised in is an intact, two-parent home with a mother and father. This notion recognizes that the family structure itself has a significant and direct impact on the well-being of children. Virginia Department of Social Services,

Virginia recognize basic principles regarding the best interest of children in situations where there has been a breakdown of the family. In Kelley v. Kelley, 248 Va. 295 449 S.E.2d 55 (1994) this Court held that parents cannot contract away the interests of their children to support during or after divorce proceedings (and neither may a court be precluded by agreement from exercising its power to decree child support, under Va. Code § 63.2-1205). Similarly, one parent cannot arbitrarily deprive the child of her other parent's identity, a relationship with that parent, nor of that parent's emotional and financial support. In Wilkerson, 214 Va. at 397, 200

Strengthening Virginia's Families: Reducing Poverty and Improving the Well-being of Mothers, *Fathers*, *and Children in Virginia* (2011). (*Strengthening Virginia's Families* is a statewide strategy to reduce the negative impact of single parent homes for children, noting the financial cost to the State and the social cost to Virginia's children when they are raised without contact and support from an absent parent.)

The Commonwealth's emphasis on the importance of an intact, two-parent home is consistent with and reflects the national understanding of its value in the role of a child's upbringing. Unfortunately, the ideal nuclear family structure that Virginia recognizes as important to the best interests of the child is becoming increasingly rare in America. Indeed, the United States is responding to the specific need throughout the country to reintegrate fathers into the lives of their children. This realization of the importance of a two-parent home is the impetus behind the President's Responsible Fatherhood Initiative. National Responsible Fatherhood Clearinghouse, *President's Responsible Fatherhood Initiative*, Jul. 28, 2012, www.fatherhood.gov (a national plan providing services to encourage fathers to engage with their children in homes that are no longer intact.) According to the Virginia Department of Social Services, Virginia's public policy is to encourage intact family structure by connecting and reconnecting fathers with their children and encouraging the formation and maintenance of safe, stable, intact two-parent families. Id.

S.E.2d at 583 this Court ruled that the presumption for custody of children belongs to natural parents and those resisting the presumption must rebut it by clear, cogent and convincing evidence that the parent(s) are unfit, or when parental rights have been terminated due to abuse, neglect or even extreme poverty. Here, one parent apparently seeks to deprive the child of the known and fit other parent.

And finally, in Cartwright v. Cartwright, 49 Va. App. 25, 635 S.E.2d 691 the court noted the importance of the parent-child bond. "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 parent and child should be interpreted consistently with the governmental objective of preserving, when possible, the parent-child relationship." Id. (quoting Weaver v. Roanoke Dep't of Human Res., 220 Va. 921, 926, 265 S.E.2d 692, 695 (1980)). Virginia's desire to protect the child's relationship with both parents has led the Commonwealth to require that any party wishing to sever a relationship between a parent and a child must show not only that it is in the best interest of the child to have that relationship severed, but that further contact with the parent would, in fact, cause "actual harm to the child's health or welfare." Todd v. Copeland, 55 Va. App. 773 (2010);

Szemler v. Clements, 214 Va. 639 (1974). No such facts have been alleged in this case. Taken as a whole, this body of case law suggests that it is in the best interests of the child to have the support of both a mother and a father even in family breakdown.

In addition, the importance of promoting parentage of a mother and a father is reflected in the Virginia Code. Va. Code § 20-158 and § 64.1-7.1 contemplates parentage situations involving married parents, in furtherance of the Commonwealth's strong public policy favoring marriage. "These acts, however, do not address the legal status of children born by artificial insemination to unmarried mothers." Peter Nash Swisher, Lawrence D. Diehl, and James R. Cottrell, Virginia Practice Family Law: Theory, Practice and Forms 154, § 5:14, fn 3 (West 2012). The statutory construction is silent as to unmarried parents using assisted conception. This silence, however, seems to implore a court to consider an application of the best interest of the child as it has been applied by courts throughout the Commonwealth to preserve those mother and father relationships which best protect and nurture the child, even when parents are unmarried and use assisted conception.

Va. Code Ann. § 20-158 (2012) details that when a child is conceived through assisted conception and the recipients of the child are a man and a

woman who consent and intend to be the parents of the child, the public policy of this state is clear: the child's best interests lie squarely in knowing and receiving emotional, physical and financial support from both parents. Beginning with the presumptive and preferred family form consisting of a married couple, the narrow scope of § 20-158 illustrates the intent of the legislature to protect the existing family into which the couple wishes to bring a child created by assisted conception from the claims of a third party interloper who served as a "mere" donor. Id. Here, however, there is a known, acknowledged father, whom the mother apparently intended to be a parent that the child is now being deprived of. The marital presumption protects an intact family from intervention, but was never intended to be used to deprive a child of a parent due to non-marriage of those parents.

Virginia's Assisted Conception Code § 20-158 provides parentage first to the married intended mother. It then provides parentage for a genetic, intended mother. Id. Finally, § 20-158(E)(2) states that parentage is provided for either genetic, intended parent. Id. The language of the statute allows for a determination of parentage when a man and a woman intend to create a child together, using the sperm or ova of one or both parties and they are the intended parents, as in this case.

Moreover, scholars also recognize the importance of mother-father two-parent families based on a variety of factors such as economic support, parental attention, and parental involvement in the child's life. Well known family law Professor June Carbone emphasizes this.

> Studies overwhelmingly show that children raised in intact families do better on a variety of measures than children raised in single parent families and that a substantial portion of the difference can be attributed to differences in income, supervision and parental attention … to counter these effects, the law already mandates that children have a right of support from both biological parents irrespective of the understandings the parents had with each other and it recognizes children's interests in the continuing involvement of both parents in the child's life.

June Carbone, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Uncertainty*, 11 Wm. & Mary Bill of Rts. J. 1011, 1023 (2003) (discussing the questions surrounding whether biological ties or nurturing ties should take precedence in custody and parenting arrangements for children).[2]

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[2] A brief review of additional scholarly literature on the doctrine of the best interests of the child that relate to this case may include Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. FAM. STUD. 337(2008)(explaining the standard and proper application of the doctrine by judicial discretion focused on the child's protection); Erin Y. Hisano, *Gestational Surrogacy Maternity Disputes: Refocusing on the Child*, 15 LEWIS & CLARK L. REV. 517 (2011)(arguing for a child focus in surrogacy); Dana E. Prescott, *The AAML and a New Paradigm for "Thinking About" Child Custody Litigation: The*

In contemporary society children are often born into situations where there is no intact, two-parent family or the family breaks down after the child's birth, and when there is a breakdown in the family or an intact family never existed, the courts of Virginia have consistently upheld the best interests of the child. Jurisprudence to the contrary that eliminates a father seems antithetical to the State's strong public policy,[3] and is not reflected in Virginia's assisted conception code.

Virginia has a duty to protect the best interests of a child whether her parents are married or unmarried, based on case law, statutory language, and scholarly observations. A child of assisted conception needs that protection all the more because of those unique circumstances. Therefore, Virginia courts have a duty to protect the best interests of a child of

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Next Half Century, 24 J. Am. ACAD. MATRIMONIAL LAW. 107 (2011) (arguing for a child focus in custody litigation).).

[3] The public policy of the Commonwealth is to increase the percentage of biological fathers in co-parenting arrangements with mothers, increase the percentage of noncustodial fathers who provide financial support and increase the engagement of fathers with their children in foster care. *Strengthening Families*, Virginia Department of Social Services, *supra*, note 1. This best interests of the child include contact and support from the child's biological father. This interest is illustrated not only in the stated public policies, but in legislation and case law, which all reflect the intent of the legislature that courts protect and promote the ability of children to know both their parents. [yes, needs case law here….. this can be completely eliminated]

assisted conception, not allowing her to be intentionally deprived of either her father or her mother.

Conclusion

Children have a constitutional liberty interest in knowing their parents. This interest should be protected first by parents. When one parent, however, acts to deprive a child of the other fit parent, and those parents then request state intervention into their intimate family relationships, the state must act to protect that fundamental liberty interest to foster what is in the best interest of the child.

Virginia's assisted conception code was designed to promote sound public policy fostering strong families based on marriage. It was not designed to deprive a child resulting from assisted conception of her intended consenting parent(s) because those parents are unmarried. Harmonizing the Code with Virginia case law, other aspects of the domestic relations code, and scholarly work, leads one to the necessary conclusion that the best interest of a child is served by a relationship with both her mother and her father.

Particularly because Virginia's assisted conception code is silent on consenting intended fit unmarried parents of a child of assisted conception it is incumbent upon the Commonwealth of Virginia to protect the best

interest of a child of assisted conception by ensuring that she is not deprived of a mother or a father.

Therefore, we urge this Court to consider the constitutional protections of liberty, due process, and free association of a child's intimate family relations with her mother and her father as part of the state's duty to protect the best interests of a child. Though Virginia recognizes that those parents could better provide for the child with their marriage, their non-marriage should not deprive a child of a known parent.

Respectfully Submitted,

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Certificate Of Service

Pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, I certify that this 14th day of August, 2012, one electronic copy on CD and fifteen copies of the foregoing Brief of *Amicus Curiae* were hand-filed with the Clerk of the Supreme Court of Virginia, and that three copies, with one electronic copy on CD of the same, were served, via UPS Ground Transportation, to counsel for the Appellant/Cross Appellee:

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