IN THE

Supreme Court of Virginia

RECORD NO. 120159

BEVERLEY MASON,

Appellant/Cross-Appellee,

V.

WILLIAM D. BREIT, *et al.,*

Appellees/Cross-Appellants.

OPENING BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

I. The Court of Appeals Erred in Rejecting the Circuit Court's Decision that a Sperm Donor Who is Unmarried to the Mother of a Child Conceived by "Assisted Conception" is Not the Child's Father Under Va. Code §§ 20-158(A)(3) and 32.1-257(D), and in Overturning the Circuit Court's Ruling Sustaining the Pleas in Bar. (Preserved at CAV Appellee Br. at 6-13; JA 66-70.)

   A. The Court of Appeals Erred by Failing to Recognize that Va. Code § 20-49.1 *et seq.* Identifies Parents, but Does not Create Paternity – Particularly Where an Unwed Donor is "not the parent of a child conceived through assisted conception" Under Va. Code §§ 20-158(A)(3) and 32.1-257(D). (Preserved at CAV Appellee Br. at 7-10.)

   B. The Court of Appeals Erred by Misconstruing the Governing Statutes 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. (Preserved at CAV Appellee Br. at 7-13 and Responding to "Actions taken by" Court of Appeals.)

   C. The Court of Appeals Erred in Ruling that Literal Adherence to Va. Code § 20-158(A)(3) Results in "Manifest Absurdity" in this Case, and In Reaching this Conclusion through Reliance on Immaterial Facts, Where the Relevant Facts Under the Controlling Statute are that Donor Has Never Been Married to Mother and the Child was Born Through "Assisted Conception." (Responding to "Actions taken by" Court of Appeals.)

II. The Court of Appeals Erred in Failing to Rule that Donor's Acknowledgment of Paternity was Void *Ab Initio* and Ineffective and that Donor Lacked Any Proper Basis for Asserting Parentage. (Preserved at CAV Appellee Br. at 15-18; JA 52-53, 70.)

STATEMENT OF SUBSTANTIAL CONSTITUTIONAL QUESTION AND MATTERS OF SIGNIFICANT PRECEDENTIAL VALUE

This appeal raises "a matter of first impression" (JA 299) involving conception by use of medical technology under Va. Code § 20-156 *et seq.*, "Status of Children of Assisted Conception." The case involves the efforts of a sperm donor to assert parentage over a child born through "assisted conception" utilizing his donated sperm, where the mother of the resulting child is ***not*** the donor's wife.

The General Assembly pronounced clearly that an unwed donor is not the legal parent of a child of assisted conception: "A donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother." Va. Code § 20-158(A)(3). The legislators further stated that: "Donors of sperm or ova shall not have ***any*** parental rights or duties for ***any*** such child" where the donor is not married to the child's parent. Va. Code § 32.1-257(D) (Emphasis added.)

The Court of Appeals "looked behind" the plain language of the governing statutes to reach a result ***directly contrary*** to the language dictated by the General Assembly. The Court sought to "harmonize" the clear language of the governing chapter ("Status of Children of Assisted Conception") with other statutory language – most notably Va. Code § 20-49.1 – by relying on a series of "factors" regarding the donor's relationship

to the mother. (JA 301-02, 303, 305.) These factors, however, appear nowhere in the governing statutes and are wholly irrelevant. Indeed, the Court of Appeals' opinion repeatedly references a purportedly critical distinction between "anonymous donors" and "known donors" (JA 301, 304, 305) – a distinction never mentioned in the statutory language. Instead, the governing statute flatly and unambiguously denies ***any*** parental rights to *unmarried* donors, whether "known" or "anonymous."[1]

The Court of Appeals' ruling, nonetheless, allows an unmarried donor to override the legislature's intent where certain previously unidentified factors exist. In essence, the decision invites individuals to barter between themselves for the parentage of a child, even where the legislature has affirmatively extinguished parental rights. This manipulation of Va. Code § 20-49.1 will result in broader, unintended consequences.[2] The Court of

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[1] In fact, the words "anonymous" or "unknown" do not appear anywhere in Chapter 9, Title 20.

[2] For example, under Donor's view, Va. Code § 20-49.1 becomes a back-door adoption statute allowing for the creation of parental rights outside of the statutorily defined adoption process. An abusive father whose parental rights have been terminated could promptly recover them by simply signing an Acknowledgment with the mother and re-acquiring parental rights under Code § 20-49.1. Actually, under Donor's construction, any person(s) may obtain parentage merely by signing an Acknowledgment, regardless of their relationship.

Appeals' decision usurps the legislative function and introduces "factors" which, if affirmed, will render parentage in future assisted conceptions highly uncertain.

This appeal involves a legal parent's interest in the care, custody and control of her child – a matter of clear Constitutional import. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Copeland v. Todd*, 282 Va. 183, 198 (2011), *cert. denied*, 132 S.Ct. 1918 (2012); see also Virginia Constitution, Article 1, § 15-A. The Court of Appeals' ruling below should be reversed.

STATEMENT OF THE CASE

William D. Breit ("Donor") filed a "Petition to Determine Parentage." (JA 10-14.) Donor alleged, *inter alia*, he was the biological father of L.F. ("the child") and requested entry of an order affirming him as the father and "otherwise determining parentage." (JA 13.) He sought to utilize genetic testing to establish his claim. (JA 11, 27-28) Donor's Petition to Determine Parentage was consolidated with his appeal of the ruling of the Juvenile and Domestic Relations District Court regarding his request for custody of and visitation with the child. (JA 35-36.)

All of Donor's pleadings failed to mention that L.F. had been conceived through "assisted conception." In response, the child and Beverley Mason ("Mother") filed Pleas in Bar requesting that the Court deny

Donor's Petition to Determine Parentage on the ground he is a sperm donor who has never been married to Mother. (JA 64-71, 95-96.)[3] Mother and child asserted the child was conceived through assisted conception and, consequently, pursuant to Va. Code §§ 20-158(A)(3) and 32.1-257(D), Donor was not the legal father of the child.

The trial court held a hearing on the Pleas in Bar and other various motions (JA 104-263) and ultimately ruled that L.F. was born through assisted conception. (JA 138-56.) Thereafter, following extensive argument of counsel, the Court sustained the Pleas in Bar. (JA 210, 266-70.) The Circuit Court correctly observed that under Donor's argument, the governing statutes:

> would be trumped and could be made to be fairly meaningless, and I don't think that's a proper way to construe statutes.

(JA 210.)

On appeal the Court of Appeals overturned the Circuit Court's granting of the Mother and L.F.'s Pleas in Bar. (JA 304.) This appeal followed.

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[3] This appeal has been "paired" with the appeal of L.F., Record No. 120158. (JA 317.)

STATEMENT OF FACTS

Mother sought to bear a child over the course of many years. (JA 142.) The child, L.F., was conceived through "assisted conception," as defined in Va. Code § 20-156, using sperm donated by Donor. (JA 155-56.) Mother and Donor have never been married to each other. (JA 193, 18.)

Facts Under the Plea in Bar Standard

This case was decided in the Circuit Court on a Plea in Bar. Donor ultimately conceded the only factual issue in dispute: the child was conceived by "assisted conception." (JA 155-56.) The facts as stated in Donor's pleading are taken as true for purposes of resolving the special plea. *Lostrangio v. Laingford*, 261 Va. 495, 497 (2001). Facts presented *ore tenus* are viewed in best light to the prevailing party at trial. *Hawthorne v. VanMarter*, 279 Va. 566, 577 (2010).

Donor asserts that Mother and Donor signed a document titled "Acknowledgment of Paternity" pursuant to Va. Code § 20-49.1. (JA 18-19.) Donor's pleading also raises various claims about Donor's relationship with Mother and L.F. Under the governing statutory framework, however, the controlling facts are that Mother and Donor are not married to each other and L.F.'s birth occurred by assisted conception. (JA 155-56.)

Standard of Review

Issues regarding statutory construction are pure questions of law which are reviewed *de novo*. *Addison v. Jurgelsky*, 281 Va. 205, 208 (2011).

ARGUMENTS AND AUTHORITIES

I. Under Virginia's Statutory Framework, a Sperm Donor Who is Unmarried to the Mother of a Child Conceived By Assisted Conception is Not the Parent of the Child. (Relating to Assignment 1.)

The statutory framework crafted by the General Assembly for dealing with parentage under "assisted conception" is clear and well-defined. Both the language employed, and the context in which Va. Code § 20-156 *et seq.*, "Status of Children of Assisted Conception," was enacted, establish that unmarried sperm donors possess *no* parental rights with respect to children conceived by assisted conception.

A. Under Plain Statutory Language, in Virginia, an Unmarried Donor "is not the parent of a child conceived through assisted conception."

Under Va. Code § 20-156 *et seq.*, the term "assisted conception":

> means a pregnancy resulting from any intervening medical technology, whether in vivo or in vitro, which completely or partially replaces sexual intercourse as the means of conception . . . .

"Donor":

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

Va. Code § 20-156. Under these definitions, Breit unquestionably is a "Donor" in an "assisted conception."

Virginia Code § 20-158(A)(3) pronounces:

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

And Va. Code § 32.1-257(D) echoes:

> Donors of sperm or ova shall not have any parental rights or duties for any such child.

In short, the statutory framework cuts off any *legal* rights or responsibilities flowing from an unmarried donor's *biological* relationship with the child. Va. Code § 20-158(A)(3). The sperm donor in assisted conception thus lacks any *legal* paternal ties to the child (unless he is married to the gestational mother) notwithstanding his *biological* ties. *Id.*

Here, Donor and Mother are not and have never been married to each other. (JA 77, 18, 193.) As such, Donor "is not the parent," Va. Code

§ 20-158(A)(3), of the child and "shall not have ***any*** parental rights or duties for ***any*** such child." Va. Code § 32.1-257(D) (emphasis added).[4] It is hard to imagine how the statutory language governing "assisted conception" could be any more forceful or clear.

When statutory language is unambiguous, the plain meaning and intent of the enactment should be given to it. *Virginia Transit Co. v. Tidd*, 194 Va. 418, 425 (1952); *Carter v. Nelms*, 204 Va. 338, 346 (1963); *Brown v. Lukhard*, 229 Va. 316, 321 (1985). Moreover, the legislature is presumed to choose its words with care and to mean what it says. *Industrial Dev. Auth. of the City of Roanoke v. Board of Supvsrs.*, 263 Va. 349, 353 (2002). "When the legislature has used words of a plain and definite meaning, courts cannot accord those words a meaning that amounts to holding that the legislature did not mean what it actually expressed." *Shelor Motor Co., Inc. v. Miller*, 261 Va. 473, 479 (2001); *Haislip v. Southern Heritage Ins. Co.*, 254 Va. 265, 268 (1997).

The Court of Appeals erred in permitting this plain and unequivocal language to be overcome through Donor's reliance on Va. Code § 20-49.1,

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[4] As this Court has noted on various occasions, "any" is read expansively and means "all" unless restricted. *Loudoun v. Parker*, 205 Va. 357, 362 (1964); *Harward v. Comm.*, 229 Va. 363, 366 (1985); *Sussex Comm. Servs. Ass'n v. Va. Soc. for Mentally Retarded Children, Inc.*, 251 Va. 240, 244 (1996).

a statute which does not create parental rights, but merely establishes procedural mechanisms for determining such rights. As is discussed *infra* at Section II.A.2., the General Assembly intended that the provisions of the Assisted Conception statute – Title 20, Chapter 9 (Va. Code §§ 20-156 through 20-165) – "***shall control, without exception***" on issues involving assisted conception. Va. Code § 20-157 (emphasis added). Donor cannot manufacture legal parentage under Va. Code § 20-49.1 by establishing his biological link to L.F. where the Assisted Conception statute mandates that a donor "is not the parent of a child conceived through assisted conception, ***unless the donor is the husband*** of the gestational mother." Va. Code § 20-158(A)(3) (emphasis added).

B. The Legislative History of Va. Code § 20-156 *et seq.*, "Status of Children of Assisted Conception," Confirms that Unmarried Donors Have no Legal Rights to Parentage Based on Their Biological Connection to the Child.

The governing statutory language confirms the General Assembly's decision that sperm donors have *no* parental rights in a child conceived as a result of their donation, unless the donor is married to the child's mother. The General Assembly's intent in these provisions is further evidenced by the circumstances under which Va. Code §§ 32.1-257(D) and 20-158(A)(3) were enacted. In July of 1990, the Court of Appeals issued an opinion

holding the only sure way to terminate the parental rights of a sperm donor was for the husband of the gestational mother to adopt the child. *Welborn v. Doe*, 10 Va. App. 631 (1990). In its opinion, the Court specifically noted the General Assembly's failure to enact legislation terminating the rights of a sperm donor, stating: "Until such time as the Code is amended to terminate possible parental rights of a sperm donor, only through adoption may the rights of the sperm donor be divested." *Id.* at 635.[5]

In 1991, at the very next legislative session following *Welborn*, the General Assembly responded by adding the provision to Va. Code § 32.1-257(D) stating that sperm donors do "not have any parental rights or duties for any such child" and enacting Va. Code § 20-158(A)(3). Where "the legislative intent can be discovered" from the "facts and circumstances surrounding [a law's] enactment . . . effect will be given to it." *Western Assurance Co. v. Stone*, 145 Va. 776, 786 (1926).

Here, the legislature's swift and decisive response to *Welborn* demonstrates the General Assembly's clear intent "to terminate possible

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[5] In other words, if a married woman used a donor's sperm rather than her husband's in assisted conception (perhaps to avoid husband's genetic defect, due to husband's impotence, etc.) the paternity of the child was subject to uncertainty absent legislative action. Prior to the statutory change, the husband had to adopt the child to assure parentage.

parental rights of a sperm donor" who is not married to the gestational mother. 10 Va. App. at 635.

C. There Are Legitimate and Logical Reasons for the General Assembly's Enactment of Legislation Dealing with Assisted Conception.

Notably, Virginia's law-makers did not craft Va. Code § 20-156 *et seq.* in a vacuum. Prior to the enactment of Virginia's assisted conception law, a number of other states had passed legislation involving births utilizing medical technology. As the *Welborn* decision itself explained, some jurisdictions provided statutory authorization enabling unmarried donors to acquire paternity by written agreement. 10 Va. App. at 635. Other jurisdictions strictly require that only a sperm donor married to the gestational mother can obtain paternity; the same is still true today. *See e.g.*, Wisconsin, W.S.A. § 891.40 (unmarried donor is not father); Utah, U.C.A. § 78B-15-702 (unmarried donor is not father); Wyoming, W.S. § 14-2-902 (same); North Dakota, N.D.C.C. § 14-20-60 (same); Idaho, I.C. § 39-5405 (same); New Mexico, N.M.S.A. § 40-11A-702 (same); compare Kansas, *K.S.A.* § 38-1114(F) (unwed donor may be father only with proper written consent); *Cal. Fam. Code* § 7613 (unwed donor may be father only with proper written consent).

Virginia's General Assembly unequivocally, and *knowingly*, followed the jurisdictions that refused to allow unmarried donors to claim parentage through written consent. To the contrary, Virginia's Assisted Conception statute mandates that an unmarried sperm donor "is not the parent of a child conceived through assisted conception unless the donor is the husband of the gestational mother." Va. Code § 20-158(A)(3).

While Donor invites this Court to substitute its judgment for that of the General Assembly, it is clear that policy decisions involving parentage in a technological age are issues appropriately reserved for the legislature. In prior generations, disputes involving frozen sperm and posthumous conception,[6] surrogate motherhood,[7] same-sex marriage and parentage,[8] and unmarried sperm donors' rights might have seemed obscure or futuristic. Today, however, none of these issues are strangers to the public eye, and these developments raise significant policy questions in areas such as descent and distribution, privacy rights and support obligations. The General Assembly, applying its best judgment, dealt with many of these gray areas by imposing bright line tests. In the context of assisted

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[6] *See e.g.*, Va. Code §§ 20-158(B); 20-164.

[7] *See e.g.*, Va. Code §§ 20-158(D); 20-158(E).

[8] *See e.g.*, Va. Code § 20-45.2.

conception, the legislature clearly and unequivocally negated an unmarried donor's potential parental rights.

There is security and certainty in well-defined, bright line rules where parentage is concerned. In the context of assisted conception, the statutory scheme is unambiguous: "A donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother." Va. Code §§ 20-158(A)(3); 32.1-257(D). This clearly stated policy should be followed. The Court of Appeals erred in substituting its judgment for that of the General Assembly, and in overturning the lawmakers' unequivocal and legitimate policy decision.

II. The Court of Appeals Erred in Finding That a Literal Reading of Va. Code §§ 20-158(A)(3) and 32.1-257(D) Leads to Manifest Absurdity in This Case, and by Misconstruing the Statutory Framework Regarding Parentage in Assisted Conceptions. (Relating to Assignments I, IA, IB and IC.)

Given that Virginia Code §§ 20-158(A)(3) and 32.1-257(D) unmistakably extinguish unwed donors' potential parental rights with respect to children of assisted conception, how did the Court of Appeals reach the opposite conclusion here?

First, the Court of Appeals misinterpreted Va. Code § 20-49.1 *et seq.*, applying it as an instrument that manufactures parental rights rather than as a procedural means for identifying parents. Then, the Court strayed

from Va. Code § 20-158(A)(3)'s directive that marriage to the Mother is the controlling factor in determining a donor's paternity. Disregarding this critical factor, the Court elevated other, inapplicable facts regarding the alleged relationship between Donor and Mother, including whether Breit was a "known" donor versus an "anonymous" one. (JA 301-05.) Placing much weight on these extraneous facts, the Court of Appeals then found a purported conflict between Va. Code §§ 20-158(A)(3) and 20-49.1, and incorrectly sought to harmonize the statutes by letting the ***general*** statute (Va. Code § 20-49.1) control the ***specific*** ones dealing with "assisted conception."

The Court of Appeals erred in each layer of its analysis, ultimately rejecting as "absurd" the General Assembly's decision that "a donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother." Va. Code § 20-158(A)(3). (JA 303.)

A. Virginia Code § 20-49.1, *et seq.* Cannot Create Parenthood in Contravention of Virginia Code § 32.1-257(D) and Virginia Code § 20-158(A)(3). (Relating to Assignment I, IA, IB.)

1. Va. Code § 20-49.1 is a Procedural Statute That Identifies Parents, But Does Not Create Parentage. (Relating to Assignment IA.)

Donor contends that an Acknowledgment of Paternity (JA 18-19), under Va. Code § 20-49.1, "creates" a parent-child relationship between Donor and child, notwithstanding the clear pronouncements of Va. Code §§ 32.1-257(D) and 20-158(A)(3) to the contrary. Donor misreads the scope and breadth of Va. Code § 20-49.1 which is merely a procedural vehicle by which *existing* parent-child relationships may be recognized. Put another way, Va. Code § 20-49.1 is a means of identifying an existing parent – but it cannot be used to manufacture parentage (particularly where paternity is *specifically extinguished* by statute).

The relevant provisions of Va. Code § 20-49.1(B) permit identification of a father as follows: "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.) Both Donor and the Court of Appeals ignored that the

purpose of this feature of Va. Code § 20-49.1 is to identify biological parents, not create them.[9]

For example, Va. Code § 20-49.1 identifies adoptive parents, it is not a substitute for the adoption process. Thus, Va. Code § 20-49.1(C) provides: "The parent and child relationship between a child and an adoptive parent may be established by proof of lawful adoption." "[P]roof of lawful adoption" does not "create" the relationship between a child and an adoptive parent. That relationship was created by order of the Circuit Court in an adoption proceeding pursuant to Va. Code § 63.2-1300 *et seq.* The "proof of lawful adoption" required by Va. Code § 20-49.1(C) only proves or settles the existence of that relationship for the purpose of a proceeding to establish parentage. One cannot merely sign an acknowledgment form and skip the adoption process.

At the outset, it is important to note that the form utilized in Va. Code § 20.49.1 identifies the child's *biological* father. (JA 18-19.) In the vast majority of cases, the biological father of a child will also be the *legal* father;

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[9] Virginia Code § 20-49.1, providing for "[h]ow a parent and child relationship may be established," is found in Chapter 3.1: "Proceedings to Determine Parentage." *Webster's* defines "determine" to mean "to settle or decide by choice of alternatives or possibilities" and "to find out or come to a decision about by investigation." *Merriam Webster's Collegiate Dictionary* 315 (10th ed. 1993).

under the assisted conception statute, however, an unmarried donor is *not* the child's legal father because the legislature has extinguished any legal connection between the child and unmarried donor based upon the biological tie. Va. Code § 20-158(A)(3).

Because the identification procedures of Va. Code § 20-49.1 *et seq.* are geared toward identifying biological fathers, applying this provision to unmarried sperm donors would cause obvious problems. For example, one critical portion of the identification statute, Va. Code § 20-49.2, permits a potential father to demand genetic testing to prove his biological parentage. Donor sought to apply it here. (JA 11, 27-28.)

If Donor's construction is correct, *any sperm donor could manufacture parental rights over the objection of the gestational mother by simply filing a petition under Va. Code § 20-49.2.* In parentage proceedings under Va. Code § 20-49.1 *et seq.* in which support is sought, the Court is *required* to "order that the alleged parents and the child submit to scientifically reliable genetic tests including blood tests." Va. Code § 20-49.3(A). If the testing affirms "at least a ninety-eight percent probability of paternity," – which would ***always*** happen in the case of sperm donors – a parent-child relationship would be established between the donor and child. Va. Code

§ 20-49.1(B)(2). Because an unmarried donor has had the traditional legal rights/responsibilities flowing from a biological relationship with the child eliminated by Va. Code § 20-158(A)(3), it is illogical and inappropriate to permit him to use Va. Code § 20-49.1(B) – a method for proving biological parenthood – to "trump" the dictates of Va. Code § 20-158(A)(3).

Likewise, under Donor's logic, a gestational mother who becomes impregnated by the sperm of a donor could identify the donor (after he inherited a large sum of money) and force parental responsibilities upon him under this biological identification provision, including the obligation of support. The General Assembly plainly intended to foreclose such scenarios when it enacted Va. Code §§ 32.1-257(D) and 20-158(A)(3). The General Assembly intended for the statutes governing assisted conception to mean what they clearly say: unwed donors have no rights as fathers to children of assisted conception. This bright line rule offers protection and certainty to donors as well as mothers and children.

2. To the Extent the Court of Appeals Found Conflict Between the Various Statutes, the Specific Provisions Relating to Assisted Conception Should Have Prevailed. (Relating to Assignment IB.)

While the Court of Appeals misread the scope of Va. Code § 20-49.1 in the first place, it also erroneously sought to harmonize §§ 20-49.1 and

20-158(A)(3) after finding them to be "like statutes" "clearly relating to the same subject matter." (JA 302.) The Court of Appeals failed to recognize that any perceived conflict between these statutes should have been resolved in favor of the provisions ***specifically*** constructed to address the scientific advancement of "assisted conception." In fact, Va. Code § 20-156 *et seq.*, Chapter 9, expressly states that its specific provisions with respect to "assisted conception" control over *any* other general statutes *without exception*:

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

Va. Code § 20-157 (brackets and emphasis supplied).

The language in Va. Code § 20-49.1, relied upon by Donor appears in Chapter 3.1, not Chapter 9. Thus, if the Court of Appeals found that Va. Code §§ 20-158 and 20-49.1 are in conflict (or require "harmonizing") on a matter of parentage involving "assisted conception," the specific statute (Va. Code § 20-158(A)(3)) should have prevailed over the general one. *Lynchburg Div. Soc. Servs. v. Cook*, 276 Va. 465, 481 (2008) (specific statutes override general statutes); *Alliance to Save the Mattaponi v. Comm.*, 270 Va. 423, 439-40 (2005), *cert. denied*, 547 U.S. 1192 (2006)

(same). In truth, however, the statutes are not in conflict, they merely serve separate and distinct functions which are consistent as long as Va. Code § 20-49.1 *et seq.* is properly viewed as a procedural means for identifying parents, rather than as a back-door avenue for creating parentage.[10]

The Court of Appeals erred in allowing Donor to use Va. Code § 20-49.1 to "trump" (JA 210) the General Assembly's clear intent regarding assisted conception. If harmonizing was required, the specific "assisted conception" statute should have prevailed. Va. Code § 20-157.

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[10] Notably, there are rare instances under Va. Code § 20-156 *et seq.* where fact-finding or biological identification under Va. Code § 20-49.1 can be relevant. For example, Va. Code § 20-158 does not contain a procedure for resolving factual disputes should they arise. For such disputes, Va. Code § 20-164 directs parents and potential parents to utilize the proceedings made available in Va. Code § 20-49.1 *et seq.* For example, § 20-49.1 would apply to those seeking to rebut the presumption of assisted conception found in Va. Code § 20-163. That section provides: "A child born to a surrogate within 300 days after assisted conception . . . is presumed to result from the assisted conception." Parties seeking to challenge the presumption may file a petition to determine parentage and litigate this factual issue in the proceedings available in Va. Code § 20-49.1. This might occur if a surrogate gave birth to a child who bore a strong resemblance to her boyfriend rather than the parents who supplied a fertilized egg. Similarly, if a married couple initiated assisted conception, but the resulting child strongly resembled the mother's former boyfriend, the husband could seek a factual inquiry to verify he is the biological father. Thus, Chapter 9, Va. Code § 20-156 *et seq.*, controls assisted conception "without exception," Va. Code § 20-157, but the genetic testing provisions of Chapter 3.1 may be utilized, when applicable, to resolve factual disputes arising from use of scientific technology.

B. The Court of Appeals Improperly Usurped the General Assembly's Legislative Function By Rejecting the Clear Dictates of Va. Code § 20-158(A)(3) and By Injecting Facts, Immaterial Under the Statute, Into its Analysis. (Relating to Assignment I, IC.)

While still in the hospital, shortly after L.F.'s birth by C-section, and at the urging of Donor who is a lawyer (JA 290), Mother executed an acknowledgment that Donor was the biological father of L.F. (JA 18-19.) The Court of Appeals repeatedly referenced this document, as well as numerous facts regarding the alleged relationship between Donor and Mother as indicia of paternity. (JA 301-05.) None of the factors relied upon – *i.e.* the parties' statements to friends, their living arrangements, the sending of birth announcements, *etc.* – are relevant under Va. Code § 20-158(A)(3). The General Assembly decided that the controlling factor under that statute is whether the donor is married to the Mother giving birth via assisted conception.

The Court of Appeals' decision also offers an extended discussion of why a "known" donor under the statute should be in a more privileged position than an "anonymous" donor with respect to parentage. (JA 301, 304, 305.) Again, this distinction appears nowhere in the governing statutes; for purposes of assisted conception, the General Assembly instead chose to apply an unvarnished line between married donors and

unmarried ones. Unmarried donors are *not* parents under the statutory scheme. Va. Code §§ 20-158(A)(3); 32.1-257(D).[11]

Nonetheless, after a discussion of Donor's "relationship factors," the Court of Appeals concluded that it was a "manifest absurdity" to deny parental rights in an assisted conception to a "known" donor who purported to be a "live in" boyfriend, and who openly acknowledged his paternity under Va. Code § 20-49.1. (JA 303).

In reality, there is nothing absurd about restricting a sperm donor's parental rights and obligations unless he is married to the mother. *See Cook v. Comm.*, 268 Va. 111, 116 (2004) ("absurd result" analysis relates to situations where conflicting laws are inconsistent or incapable of operation.) In fact, the *Welborn* decision illustrates that absent such statutory protections, a donor might find himself subject to future support obligations, and a mother might find herself in an unexpected custody dispute based on a mere donation of sperm. The absolute terms of the Act *protect both the mother and donor.* It was not illogical – and certainly not

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[11] If "known" donors enjoy special parental consideration, what happens when a married mother utilizes a "known" donor's sperm because her husband has a genetic defect or is impotent? Can the "known" donor, as biological father, then demand and obtain paternal rights? *See* Va. Code § 20-158(A)(2) and (3). Policy determinations on such issues are properly the function of the legislature.

absurd – for the General Assembly to invoke these statutory protections to foreclose potential parentage claims of sperm donors.

The General Assembly may have also sought to foster marriage by the language it chose. Indeed, because the General Assembly expressly stated that a sperm donor lacks rights as a parent "unless the donor is the husband of the gestational mother" (Va. Code § 20-158(A)(3)), permitting the sperm donor to bypass this requirement would also run afoul of Article 1, § 15-A of the Virginia Constitution (stating that the Commonwealth shall not "recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage").[12] It is logical that married persons will have more stable relationships than unmarried couples – and allowing haphazard donor claims of parentage whenever certain factors may be present (as the Court of Appeals' opinion would permit) could lead to grave uncertainty in various legal settings.

For example, the legislature likely recognized that, in the realm of assisted conception, allowing unmarried donors to subsequently claim parentage might wreak havoc in the application of descent and distribution

[12] Consistent with Virginia's regard for the institution of marriage, the Commonwealth has never recognized "common law" marriage or "palimony."

laws. Further, to the extent an unmarried mother conceives through assisted conception, the "Status of Children of Assisted Conception" statutes guarantee her privacy to raise her child without potential donor intervention or related legal pressures. (*See e.g.* JA 33, 25-26.)

In an age of increasing scientific ingenuity, the legislature decided that bright line tests for parentage serve as effective guidance for resolving and anticipating such potential disputes. By contrast, the Court of Appeals ruled that Virginia Code § 20-158(A)(3) leads to "manifest absurdity" (JA 302-03) in this case. The Court of Appeals' preference for a new "factors" test rather than the General Assembly's bright-line rules constitutes a value judgment that improperly usurps the legislative function.[13]

Finally, contrary to Donor's claims, the legislature's method of regulating parentage in assisted conception – and its focus on marriage – is not a fringe position, but is consistent with the law of numerous other

[13] Donor may disagree with the General Assembly's policy decision on assisted conception, but there is a logical basis for the challenged provisions, and they should be given effect. *See Cook v. Comm.*, 268 Va. 111, 116 (2004); *City of Portsmouth v. City of Chesapeake*, 232 Va. 158, 163 (1986) (it is not the function of the courts to pass on the wisdom of legislative policy.)

jurisdictions.[14] The Court of Appeals erred in "looking behind" the plain meaning of Va. Code §§ 20-158(A)(3) and 32.1-257(D), and in substituting its own judgment for that of the General Assembly with respect to assisted conception.

* * *

In sum, an intended purpose of Va. Code § 20-158(A)(3) and Va. Code § 32.1-257(D) is to terminate the potential rights and obligations of unmarried sperm donors. The Court of Appeals erred in rejecting the General Assembly's plain statutory intent. In so doing it impermissibly disregarded numerous rules of statutory construction:

- when the General Assembly's language is clear, it must be given its plain meaning;[15]
- when statutory language is clear, Courts should not look behind it or create conflicts requiring "harmonization";[16]

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[14] *See e.g.* Utah, U.C.A. § 78B-15-702; Wyo., W.S. § 14-2-902; North Dakota, N.D.C.C. § 14-20-60; Idaho, I.C. § 39-5405; New Mexico, N.M.S.A. § 40-11A-702; Wisconsin, W.S.A. § 891.40.

[15] *Grillo v. Montebello Condominium Unit Owners Association*, 243 Va. 475, 477 (1992); *Turner v. Wexler*, 244 Va. 124, 127 (1992).

[16] *City of Winchester v. American Woodmark*, 250 Va. 451, 457 (1995) ("When the General Assembly 'has spoken plainly' on a subject, we must not 'change or amend its enactments under the guise of construing them.'")

- if there is a genuine conflict between provisions, specific statutes prevail over general ones (particularly where Va. Code § 20-157 specifically requires this where "assisted conception" is concerned);[17]

- a statute does not lead to an "absurd result" merely because the Court disagrees with the Legislature's view of the issue;[18] and

- where the legislative intent can be discovered from the circumstances surrounding the enactment, effect should be given to it.[19]

The language of the controlling statutes should have been followed.

C. Va. Code § 20-49.10 Does Not Apply in this Case. (Relating to Assignment IB, IC.)

Donor's new-found reliance on Va. Code § 20-49.10 is misplaced. (Br. in Opposition at 8-9.) The purpose behind Va. Code § 20-49.10 is to provide relief to wrongly-named fathers seeking to disprove their parentage through the use of a "scientifically reliable genetic test" which "establishes the exclusion of the individual named as father." In essence, the statute is

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[17] *Cook*, 276 Va. at 481; *Alliance to Save the Mattaponi*, 270 Va. at 439-40.

[18] *See Cook*, 268 Va. at 116; *Va. Dept. of Health v. NRV Real Estate, LLC*, 278 Va. 181, 188 fn.2 (2009) (absurd result means internally inconsistent or otherwise incapable of operation.)

[19] *Stone*, 145 Va. at 786.

a means of extricating a parent from support obligations. Here, neither party is seeking such relief and the statute, accordingly, is inapplicable.

Even so, the statute does not support Donor's position. The first paragraph of Va. Code § 20-49.10 provides a mechanism – genetic testing – that permits a father to obtain relief from a determination of parentage/support payments if he can prove he is not the biological father. The second paragraph allows three exceptions to the first paragraph, all prohibiting those whose paternity does not hinge on a biological connection to the child from using genetic testing to evade support obligations.

Donor notes that the exceptions listed in Va. Code § 20-49.10 prohibit one seeking to avoid support obligations from utilizing the genetic testing procedures available under this section where the parent "knew the child was conceived through artificial insemination." (Br. in Opposition at 8-9.) Donor then argues that this statute must mean that he, hypothetically, would be barred from avoiding support obligations because he knew the child was born by assisted conception. (*Id.*) To the contrary, the statute has no application to an unmarried donor, because, at the outset, such a donor is not the parent of the child by operation of law. Va. Code §§ 20-158(A)(3); 32.1-257(D).

Instead, the exception touted by donor in § 20-49.10 applies to the *husband* of a gestational mother when another man's (donor's) sperm is utilized to conceive the child. The husband of the gestational mother is the child's legal father by statute. Va. Code § 20-158(A)(2). This legal father cannot, thereafter, shirk his parental support obligations through reliance on a genetic test to prove he is not really the *biological* father of the child. He became the legal father by *operation of law* despite the lack of a biological tie, thus reliance on a genetic test to disprove paternity is inappropriate.

The same is true in the case of an adoptive parent, another exception under Va. Code § 20-49.10. One who legally adopts a child cannot, thereafter, shirk support obligations by proving the lack of a biological tie to the child.

Here, in any event, the statute simply does not apply. Neither party is seeking the "exclusion of the individual named as a father" through the use of "scientifically reliable genetic testing." Because the relief provided for in the first paragraph of Virginia Code § 20-49.1 is not being sought, the exceptions relating to who may seek that relief are wholly irrelevant.

* * *

Donor repeatedly tries to write Va. Code § 20-158(A)(3) out of the Code through "absurdity" or "harmonization" arguments. Mother has provided a reasonable, legitimate and harmonious explanation for each statutory "conflict" Donor has attempted to put forward.[20] Virginia's comprehensive statutory framework for assisted conception is sound, and the Court of Appeals' conclusion that it is "absurd" in this context should be rejected. If Donor believes the General assembly should eliminate the mandate of Virginia Code § 20-158(A)(3), it is for the legislature – not the judiciary – to enact this statutory change.

III. The Court of Appeals Erred in Failing to Rule That the Acknowledgment of Paternity is Void *Ab Initio* and Unenforceable. (Relating to Assignment II.)

With respect to assisted conception, Virginia Code § 32.1-257(D), which deals with birth registrations, is consistent with Va. Code § 20-158(A)(3), confirming: "Donors of sperm or ova shall not have any parental rights or duties for any such child." In the context of assisted conception,

[20] Under proper analysis, a construction which gives legitimate meaning to all legislative language prevails over any reading (like Donor's) that attempts to strike down portions of legislative language. *Postal Tel.-Cable Co. v. Farmville & P.R. Co.*, 96 Va. 661, 665 (1899) (courts reject statutory language "only in the last resort when it has been found impossible to give effect to all the language used, and reach a rational conclusion.") *Raven Red Ash Coal Corp. v. Absher*, 153 Va. 332, 335 (1929) (courts endeavor to give every portion of act effect, and not to treat portions as ineffective.)

any acknowledgment of a biological connection to the child is irrelevant because the governing statutes declare that any biological tie between a child and an unmarried donor has no bearing on *legal* parenthood.

The Court of Appeals, accordingly, erred in rejecting Mother's position that an Acknowledgment of Paternity from an unwed donor is ineffective in the context of assisted conception.[21] An Acknowledgment of Paternity executed pursuant to Va. Code § 20-49.1 *et seq.* cannot create a legal parent-child relationship between an unwed sperm donor and a child because Va. Code § 20-158(A)(3) prohibits it. Therefore, the Acknowledgment of Paternity at issue here is void *ab initio* and unenforceable to the extent it purports to create legal parentage in Donor.

The acknowledgment provision of Va. Code § 20-49.1 does not bestow upon parties the power to veto the Assisted Conception Chapter. Individuals are not free to barter among themselves for the parentage of a child – particularly where the legislature has foreclosed such parentage. The Court of Appeals' ruling, as applied, gives the acknowledgment form a

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[21] The Court noted Mother's position that the Acknowledgment of Paternity was void (JA 301), but then implicitly rejected it, treating the document as if it were valid throughout its opinion. Even if the Acknowledgment is deemed to be valid, Mother should prevail under the analysis set forth in Sections I and II above.

character beyond the scope of what the parties could validly render. *See Collins v. Shepherd*, 274 Va. 390, 402 (2007).

In *Kelley v. Kelley*, 248 Va. 295 (1994), this Court addressed the void nature of judgments and agreements relating to the rights of children. In that case, a mother entered into a separation agreement relieving the father of his parental duty of support. *Id.* at 297. The agreement was subsequently incorporated into a Final Decree of Divorce and entered by the Circuit Court. The mother did not appeal the Decree. Several years later, the mother sought child support from the father, an action which the father claimed (1) was inconsistent with the mother's previous agreement; and (2) had previously been litigated in the parties' divorce. Despite the mother's agreement that the father would not be responsible for child support and notwithstanding that agreement being incorporated into a Court Order, this Court held the mother was free to seek child support from the father because the agreement and judgment were void.

The Court explained that the rights of children "cannot be impinged by contract, and any contract purporting to do so is facially illegal and void [and] that portion of the decree that relates to the void provision [of the agreement] is, itself, void." *Id.* at 299. The same is true here and the Court

of Appeals erred in finding Donor's Acknowledgment effective.[22] *See also Hughes v. Cole*, 251 Va. 3 (1996) (gamblers cannot come into Court demanding that Court enforce an illegal contract even if parties agreed to it.)[23]

In rare instances by operation of law – *i.e.*, through a court order or statutory provision – parental rights are divested or extinguished. A father who loses his parental rights due to a judicial determination of child abuse cannot merely sign a Va. Code § 20-49.1 acknowledgment with the mother and regain his rights. Likewise, after *Welborn*, the legislature mandated that a donor in assisted conception is not a parent by operation of law (unless married to the mother). A mere acknowledgment of Donor's biological connection to the child cannot invalidate or "trump" (JA 210) the General Assembly's edict.

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[22] The *Kelley* analysis applies to any other alleged agreements reached by Donor and Mother prior to L.F.'s birth.

[23] Moreover, this does not mean Donor cannot petition for custody, visitation or other contact with the child, asserting "a legitimate interest." *See* Va. Code §§ 20-124.2(B); 16.1-278.15B; 16.1-241(A) (last paragraph). *See, e.g. Florio v. Clark*, 277 Va. 566 (2009); *Denise v. Tencer*, 46 Va. App. 372 (2005).

CONCLUSION

The General Assembly crafted a cohesive statutory scheme dealing with assisted conception. The Circuit Court correctly determined that, under the existing statutory mandate, an unmarried Donor is not the parent of a child born through assisted conception. For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify compliance with Rule 5:26 and Rule 5:26(e), including that three copies of the foregoing Brief of Appellant have been mailed to counsel for appellees by first-class mail, along with electronic copies of brief and appendix by CD in PDF format at the following addresses:

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