IN THE

Supreme Court of Virginia

RECORD NO. 120159

BEVERLEY MASON,

Appellant/Cross-Appellee,

v.

WILLIAM D. BREIT, *et al.,*

Appellees/Cross-Appellants.

REPLY BRIEF OF APPELLANT

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I. Donor's Statutory Analysis Is Based Upon Several Fatally Flawed Premises.

A. The Assisted Conception Statutes Plainly Apply to Both Married and Unmarried Persons and This is Not an "Unintended Result."

There are numerous analytical flaws in the statutory analysis advanced by Donor. The most glaring is the oft-repeated assertion that the Assisted Conception Statute is "silent as to the status of children born to unmarried parents," and "has no application to an unmarried woman using the sperm of an unmarried man." (Appellee Br. at 11, 14, *see also*, Br. at 15, claiming statute "simply fails to address unmarried intended parents" and at 46, claiming statute "applies to married couples using a surrogate only." *See also* Br. at 21, 26.) These erroneous claims are integral to Donor's legal theory – but are *contradicted* by the statutory language.

Virginia Code § 20-156 *et seq.* clearly applies to married and unmarried individuals. A "Donor" is defined as "an individual" – not a *married* individual – "who contributes the sperm or egg." Va. Code § 20-156. "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). This language contemplates there will be "donors" who are not married to the gestational mother and there is no requirement that the mother be married to anyone.

Donor's mistaken assertion that the Assisted Conception Statutes do not apply to unmarried persons is his basis for arguing there is a need to "harmonize" statutes. Donor's foundation for the statutory "conflict" is flawed – and his brief is silent as to Va. Code § 20-157, which states: "The provisions of this Chapter [Chapter 9] shall control, *without exception*, in any action . . . to enforce or adjudicate any rights or responsibilities arising under this chapter." (Emphasis and brackets supplied.)

In fact, the General Assembly's decision to prevent unmarried donors from becoming legal parents is consistent with its treatment of unmarried persons in other contexts. In adoption, the legislature has specifically required that only "a married couple or an unmarried *individual* shall be eligible to receive placement of a child for purposes of adoption." Va. Code § 63.2-1225 (emphasis added). Similarly, an unmarried couple cannot parent a child born to a surrogate. Va. Code § 20-156 (defining "intended parents"); *see* Va. Constit. Art. I-15A. Donor is mistaken in suggesting that denying unmarried donors legal parentage in cases of assisted conception is some sort of legislative oversight or unintended consequence.[1]

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[1] Donor also suggests that two parents must always be preferred over one. However, whether a would-be parent is an unmarried donor, or part of a same-sex couple, the legislature has enacted law in this arena. Whether one agrees with the legislative policy or not, the plain meaning of *cont'd. to next page . . .*

B. Donor's Claim That Mother is Not a Legal Parent is Flatly Wrong.

Donor also makes a lengthy argument that "Mason's legal standing is no different than Mr. Breit's" (Br. at 24-25) by distorting statutory definitions. In fact, the Assisted Conception Statute expressly provides (with exceptions involving surrogacy, death or divorce):

> 1. The gestational mother of a child is the child's mother.
>
> * * *
>
> 3. 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)(1) and (3). Thus, a gestational mother such as Mason who gives birth to her own biological child is the child's mother. A "donor" (whether male or female) who "contributes a sperm or egg" is not the child's parent ***unless***, in the case of a male donor, he is the husband of the gestational mother. Va. Code §§ 20-158(A)(3); 20-156.

C. Virginia Does Not "Finally Foreclose" Donors From Contact with a Child of Assisted Conception.

Another oft-repeated misconception in Donor's Brief is the claim that Virginia statutes present an "absolute bar," or "fully and finally foreclose"

. . . cont'd. from previous page.
the enactment should be followed. *Cook v. Comm.*, 268 Va. 111, 116 (2004) (not function of courts to pass on the wisdom of legislative policy.)

unmarried donors from contact with children, leaving them with absolutely "no right to visit or communicate." (Appellee's Br. at 38, 11, 42.) To the contrary, Virginia law plainly allows non-parents with a "legitimate interest" in a child an opportunity to petition for visitation and custody. *See* Va. Code §§ 20-124.2(B); 16.1-278.15B; *Florio v. Clark*, 277 Va. 566 (2009).

D. Donor Erroneously Relies on "Surrogacy" Terms and Misreads Other Statutory Provisions.

Donor and his *Amicus* frequently misuse statutorily defined "surrogacy" terms such as "intended parents" in their briefs. Although aspects of the Assisted Conception Statutes address surrogacy, and "donors" may be involved in surrogacy, this case does not involve surrogacy and Donor is not an "intended parent."[2]

Donor also claims that Va. Code § 20-164 applies only to children of married parents and that Mother fails to explain this statute's reference to the genetic testing statute – Chapter 3.1. (Appellee's Br. at 14-15.)[3] Donor

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[2] A "Surrogate" is "any adult woman who agrees to bear a child carried for intended parents." Va. Code § 20-156. "Intended parents" are "a man and a woman, ***married to each other***, who . . . will be the parents of any child born to the surrogate through assisted conception regardless of genetic relationships . . ." *Id.* (Emphasis added.)

[3] In its opening sentence, Va. Code § 20-164 makes clear that it does not apply only to married parents as Donor claims – the statute specifically says a child may be the child of his parent (singular) or parents (plural).

is mistaken on both counts. Mother discussed this statute in her Opening Brief at 21, fn. 10. There are instances even under assisted conception provisions where genetic tests may be necessary to resolve *factual* disputes. Such disputes might arise (and testing is permitted) where a surrogate produces a child who looks like her boyfriend rather than the couple who donated a sperm and egg. In rare instances, resort to genetic testing under Chapter 3.1 is permitted to resolve such biological disputes. In the event of conflict, however, between the Assisted Conception Statutes and Chapter 3.1 (genetic testing), the Assisted Conception Statutes (Chapter 9) prevail by operation of Va. Code § 20-157.[4]

II. Virginia Code § 32.1-257(D) Unambiguously States That Donor Does Not Have "Any Parental Rights."

A review of Va. Code § 32.1-257 confirms that Donor's reliance on this provision is misplaced. The statute has *specific* language dealing with children of assisted conception that flatly contradicts Donor's claims:

> For the purpose of birth registration in the case of a child resulting from assisted conception, pursuant to Chapter 9 (§ 20-156 *et seq.*) of Title 20, the birth certificate of such child shall contain full information concerning the mother's husband as the father of the child and the gestational

[4] Mother's Opening Brief describes the proper application of Va. Code § 20-49.10 and explains why that provision is irrelevant unless a party is seeking the "exclusion of the individual named as Father" through genetic testing. (*See* Appellant's Br. at 26-30.) Donor misreads the statute.

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

Va. Code § 32.1-257(D) (emphasis supplied.) While Donor identified himself as having "parental rights" on a form, his claim is flatly contradicted by the statute governing that form. (JA 18.) Donor's knowledge of this statutory problem explains his failure to mention "assisted conception" in his request for biological testing, and his subsequent challenges to Mother's evidence of assisted conception. (JA 10-14, 133-56, 90.) Donor should not be permitted to stand the General Assembly's clear mandate on its head by claiming to be a parent under Va. Code § 32.1-257, when this very statute explicitly says he is not one.[5]

III. On Cross-Error: Virginia Code §§ 20-158(A)(3) and 32.1-257(D) are Constitutional.

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[5] Donor's "law of the case" argument concerning Va. Code § 32.1-257(D) is also mistaken. The Circuit Court ruled for Mother, finding Donor was not a legal parent under the Assisted Conception Statutes. (JA 210.) At the same time, the Circuit Court simply declined to address making changes to the existing birth certificate. The Court of Appeals never reached the issue of changes to the birth certificate. Mother plainly, however, did assign error to the Court of Appeals' rulings concerning Va. Code § 32.1-257(D). (Opening Br. at 1.) The gist of the rulings below is that no court actually has dealt with the ministerial issue of changing a birth certificate to coincide with its rulings on parentage. But changes plainly can be made and mistakes resolved on subsequent birth certificates when errors are detected. *See Davenport v. Little-Bowser*, 269 Va. 546 (2005).

Donor argues that Virginia Code §§ 20-158(A)(3) and 32.1-257(D), as applied by the trial court in this case, violate the Due Process Clause and Equal Protection Clause by impermissibly infringing upon an alleged "fundamental" liberty interest in his relationship with L.F.[6] Donor lacks the expansive constitutional protections he claims.

A. Virginia Code §§ 20-158(A)(3) and 32.1-257(D) do not Violate the Due Process Clause.

Donor's due process claim must fail because he has not asserted interference with a fundamental right and the challenged statutes serve a legitimate governmental interest. *Michael H. v. Gerald D.*, 491 U.S. 110, 121-22, 124 (1989) (plurality). The statutes notably can pass higher scrutiny, as they referee competing claims that might arise in the situation of assisted conception, while also promoting marriage and fostering certainty in descent and distribution and related lineage issues.

The Supreme Court of the United States has addressed the extent of due process protections to unmarried biological fathers in a series of decisions. In *Lehr v. Robertson*, 463 U.S. 248 (1983), the Supreme Court

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[6] In the Court of *Appeals*, Donor's only Assignment of Error dealing with constitutional claims failed to mention Va. Code § 32.1-257(D) at all. (CAV, Br. of Appellant at 3.) Having failed to raise the issue below, it is not preserved. Rule 5:25. *See Magco of Maryland v. Barr*, 262 Va. 1, 1 (2001) (when appeal involves independent grounds and one ground is not challenged, assigned error not preserved.)

held that the mere existence of a biological link between a father and a child does not entitle the biological father to a constitutionally protected relationship with the child. 463 U.S. at 261. If the law were otherwise, *every* sperm donor would be entitled to enter the life of a child conceived through assisted conception.

Subsequent to *Lehr*, the Supreme Court decided *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality), which further refined the manner in which a parent-child relationship is identified. There, a biological father who spent much time as the mother's live-in boyfriend sought visitation after the mother reconciled with her husband. The Court specifically rejected the biological father's claim – the same claim raised here – that "biological fatherhood plus an established parental relationship" creates a constitutionally protected parental right. *Id.* at 123-124. The Court stated:

> [Biological father] reads the landmark case of *Stanley v. Illinois*, 405 U.S. 645 (1972), and the subsequent cases of *Quilloin v. Walcott*, 434 U.S. 246 (1978), *Caban v. Mohammed*, 441 U.S. 380 (1979), and *Lehr v. Robertson*, 463 U.S. 248 (1983), as establishing that a liberty interest is created by biological fatherhood plus an established parental relationship -- factors that exist in the present case as well. **We think that distorts the rationale of those cases.**

Id. at 123 (emphasis and brackets added, citations omitted).

1. Donor's Brief Largely Ignores *Michael H.*

In *Michael H.*, a plurality decision, Justice Scalia explained that the existence of constitutionally protected parental rights turns not on the depth of the parent-child relationship, but on whether the type of relationship between the claimant and child has traditionally or historically been afforded special protection. *Id.* at 124.[7]

The case authority relied upon by Donor does not speak to the fundamental issue of *who* is a parent with a protected liberty interest. Rather, Donor's cases address when the rights of those already recognized as parents may be *terminated*. *See, e.g., Copeland v. Todd*, 282 Va. 183, 191, 197 (2011) (addressing application of standard for terminating birth mother's rights at adoption). Donor's other cases address *interference* in an *existing parent's* judgment in raising a child – again, not the crucial question of who is a parent. *See Williams v. Williams*, 256 Va. 19, 22 (1998) (grandparent visitation); *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

Virginia Code §§ 20-158(A)(3) and 32.1-257(D) do not terminate *developed* parent-child relationships, and neither *Lehr* nor *Michael H.* prohibit such an approach. In *Michael H.*, as in this case, despite the

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[7] Notably, the biological father in *Michael H.* had signed an agreement with the mother naming him the child's father and had resided with the mother and the child for months. Despite those facts, the Supreme Court held the biological father in *Michael H.* had no parental rights.

genetic link, the biological father was *not* a legal "parent" by operation of state law. Moreover, applying Justice Scalia's analysis, the sperm donor-child relationship did not exist until very recently and has never been protected historically. In fact, legislatures across the country have specifically cut off donor rights by statute as a means of avoiding confusion and chaos in donor parentage under common law rules. *See Welborn v. Doe*, 10 Va. App. 631 (1990).

In *Michael H.*, Justice Stevens, concurring, found that Due Process was satisfied despite the fact that the controlling California statute flatly barred the paramour's status as the legal parent of the child. *Michael H.*, 491 U.S. at 133-34 (J. Stevens, concurring). Justice Stevens observed that California – like Virginia – offered the putative father an opportunity under state law to have visitation and a possible relationship with the child and, as a result, he held the statutory scheme passed constitutional muster. It did not matter that obtaining visitation was difficult under state procedures. *Id.* Virginia law similarly allows non-parents with a "legitimate interest" in a child to seek visitation, custody and contact. (*Supra* at 3-4.)

In the context of assisted conception, there are many individuals who could claim to be "parents," including donors, the gestational carrier, the spouse of the gestational carrier and so on. These claims to a child are

novel historically. Virginia crafted a statute that makes clear at the outset who is a parent. A state has a strong and legitimate interest in determining who is a "parent" on the front end; it is also in the best interest of sperm and egg donors to know prospectively what will be required of them. Our General Assembly did not deny Donor Due Process by making marriage a defining characteristic of who is a parent. *Michael H.*, 491 U.S. at 127 n.6. (J. Scalia, noting that a state may select a specific tradition to provide clear rules in defining parental rights.)

2. Donor's Out-of-State Cases Are Inapposite.

Donor's out of state authority is inapplicable to Virginia.[8] More importantly, all of the out-of-state cases cited by Donor except for the Kansas case (decided under a different statutory structure) had been decided at the time that the Virginia legislature last revisited Va. Code

[8] *In Re: K.M.H.*, 285 Kan. 53, 169 P.3d 1025 (2007), *cert. denied*, 555 U.S. 937 (2008), arose in a different statutory framework where parties could contract to permit donor parentage. *In Interest of R.C.*, 775 P.2d 27, 35 (Colo. 1989) and was decided under state law without reaching constitutional issues. The other cases cited by Donor are *not* from the states' highest courts and they fail to use the Supreme Court's test for parenthood as set out in *Michael H.* while following policy rationales at the expense of statutory construction. *Compare Steven S. v. Deborah D.*, 127 Cal. App. 4th 319 (2005) (finding California's statute – which, *like Virginia's*, provided that a sperm donor is not a legal parent unless he is married to the mother – must be applied even in a situation where "the mother was in an intimate relationship with a known donor." *Id.* at 325.)

§§ 20-158, 2000 Va. Acts 1747, yet the Virginia General Assembly still chose to retain language that does not distinguish between known and unknown donors and does not create an option for unmarried donors to become legal "parents" by consent.

B. Virginia Code §§ 20-158(A)(3) and 32.1-257 do not Violate the Equal Protection Clause.

Legislatures may classify individuals based on gender, so long as that treatment has a substantial relationship to an important state purpose. *Lehr*, 463 U.S. at 265-66.[9] Contrary to Donor's arguments, Va. Code §§ 20-158(A)(3) and 32.1-257(D) do not distinguish him because he is male; they distinguish him because he is a "donor." Va. Code § 20-158(A)(3) provides: "A donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother." A woman who is not a gestational mother also can be a donor. "Donor" is defined as "an individual, other than a surrogate, who contributes the sperm **or egg** used in assisted conception." Va. Code § 20-156 (emphasis added). Likewise, Va. Code § 32.1-257(D) provides that unmarried donors

[9] Donor claims for the first time that the statute discriminates between *children* of married individuals and those conceived outside of wedlock. Donor did not raise this argument in the lower Courts or assign error to it. (JA 85-90, Donor's CAV Br. at 14, 18-22, Reply at 3-5.)

of either gender are not parents: "Donors of sperm **or ova** shall not have any parental rights or duties for any such child." (Emphasis added). The relevant statutes apply equally to men and women.

Donor relies on a series of cases for the basic proposition that distinctions between men and women are impermissible; these cases have nothing to do with the facts here. The distinction in this case is that an unmarried woman who is the gestational carrier may be a parent under the statute. Va. Code § 20-158(A)(1). However, neither men nor women who are merely "donors" and unmarried are parents. Va. Code §§ 32.1-257(D); 20-158(A)(3). That a male is unable to be the gestational carrier is not a product of discrimination, but *biology*.

While Virginia Code § 20-158(A)(3) does distinguish between married and unmarried men, marriage is not a suspect class triggering heightened scrutiny under the Equal Protection Clause. *See Irizarry v. Bd. of Educ.*, 251 F.3d 604, 609 (7th Cir. 2001). ("[N]o court has gone so far as to deem marriage a suspect classification because government provides benefits to married persons that it withholds from cohabiting couples.")

IV. On Cross-Error: Donor is Not Entitled to Summary Judgment.

Donor's argument for summary judgment boils down to a claim that he has a right to contract for parentage and that his "acknowledgment of

paternity" serves as such an agreement. First, Donor argues that nothing in Va. Code § 20-158(A)(3) prevents the parties from acknowledging biological parentage. The problem with Donor's analysis is: for purposes of assisted conception, *biological* parenthood does *not* establish *legal* parentage: "a donor is not a parent . . . unless the donor is the husband of the gestational mother." Va. Code § 20-158(A)(3). Where assisted conception is concerned, biological parentage is not controlling.[10]

Second, Donor again seeks to circumvent the unequivocal statutory language that controls assisted conception with respect to "consent." The General Assembly had the option to allow unmarried donors to contract for paternity or not. It knowingly declined to enact such a provision and enacted instead a bright-line test that male donors are not parents unless they are married to the gestational mother. (Opening Br. at 7-12.)

Donor asserts that he should be permitted to "waive" or to "contract around" the terms of Va. Code § 20-158(A)(3). But when the General Assembly wanted courts to have the power to recognize contractual agreements or written consents with regard to the legal parentage of children of assisted conception it specifically said so. *See, e.g.,* Va. Code

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[10] Donor's new-found equitable estoppel claim (Br. at 31) is also meritless. His allegations of "representations" and "reliance" come over a year *after* the sperm was donated. *T- v. T-*, 216 Va. 867, 873 (1976).

§ 20-158(C) (married person who is a party to an action for divorce or annulment can consent in writing to be legal parent of child). Yet the General Assembly did not provide any means for an unmarried "donor" to become a *legal* parent by contract or by consent. Va. Code § 20-158(A)(3).

An unmarried donor, by statute, *is not* the legal father of a child resulting from assisted conception – a legislative judgment entirely consistent with Virginia's policy to afford special protection for legally married couples. Va. Constit. Art. I, § 15-A. Donor made no effort to marry Mason at any time before or after L.F. was born. His invitation to have the Court elevate some other contract or agreement on parental rights to the status of marriage for purposes of the assisted conception statutes finds no support in statutory language, and plainly runs afoul of the Virginia Constitution.

CONCLUSION

The ruling of the Court of Appeals should be reversed.

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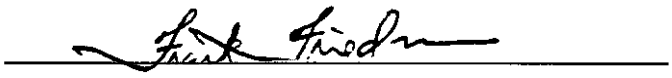
This same day, fifteen copies of the foregoing brief were hand filed with the Clerk's Office of the Supreme Court of Virginia, and an electronic copy was forwarded via email to counsel listed above and to the Supreme Court of Virginia.