NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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August 23, 2019

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Re: *Lynne Celia v. Valerie Appel*, Case No. CL-2018-8735

Dear Counsel,

In this ongoing divorce litigation, the Court held a hearing on July 30-31, 2019, to determine the date that the parties began living separate and apart without cohabitation and without interruption. The Court finds that this occurred on July 24, 2007.[1]

[1] The Court is not ruling that the date of *legal separation* occurred on July 24, 2007. To date, no evidence has been presented to the Court that the parties filed a complaint for dissolution, annulment or legal separation of their Connecticut civil union prior to October 1, 2010, which is when their civil union would have merged into a marriage by operation of Connecticut law. *See* Conn. Gen. Stat. 46b-38rr. The parties should be prepared to argue at the upcoming hearing as to whether October 1, 2010, would be the earliest possible date of legal separation, and whether at least one party had the intent to permanently separate on that date.

**OPINION LETTER**

## I. Procedural History

Plaintiff Lynne Celia ("Plaintiff") and Defendant Valerie Appel ("Defendant") are both seeking a decree of divorce pursuant to Va. Code § 20-91(A)(9)(a) based on a one-year separation period. Plaintiff's Amended Complaint for Divorce alleges that the parties were joined by a civil union on October 30, 2006, which converted to a marriage by operation of Connecticut law on October 1, 2010. (Am. Compl. ¶ 3.) While the Amended Complaint alleges a separation date of August 1, 2016 (Am. Compl. ¶ 4), at the July hearing Plaintiff contended that the separation actually occurred sometime in June of 2012. Defendant's Counterclaim for Divorce alleges a separation date of July 24, 2007. (Countercl. ¶ 3.)

A five-day custody hearing is scheduled to begin on September 23, 2019, and a two-day equitable distribution hearing is scheduled to begin on October 29, 2019. The Court specially docketed a hearing to decide the date of separation to narrow the issues going forward.

## II. Legal Analysis

A divorce from the bond of matrimony may be decreed under Virginia law "[o]n the application of either party if and when the husband and wife have lived separate and apart without any cohabitation and without interruption for one year." Va. Code § 20-91(A)(9)(a). This is commonly referred to as a "no-fault divorce" in Virginia. In contrast, the other grounds for divorce enumerated in Va. Code § 20-91 are considered "fault-based", such as cruelty or desertion.

On its face, Va. Code § 20-91(A)(9)(a) allows a husband and wife to obtain a divorce so long as there is compliance with the separation period requirements. This provision of the statute, however, does not specify whether same-sex married couples also may obtain a divorce based on no-fault grounds.

In a prior version of this litigation, *Valerie Appel v. Lynne Celia*, CL 2017-11789, this Court ruled that Virginia's assisted conception statute, Va. Code § 20-158, was unconstitutional since it conferred parental status to the husband of a gestational mother who conceived through assisted conception, but it did not confer parental status to the wife of a gestational mother. The Court concluded that the appropriate remedy was to expand the benefits of Va. Code § 20-158 to same-sex married couples.[2]

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[2] The Virginia General Assembly subsequently amended Va. Code § 20-158 to use gender-neutral terminology, thus conferring the benefits of Virginia's assisted conception statute to same-sex couples. 2019 Va. Laws ch. 375, 1-2 (H.B. 1979). In contrast, Va. Code § 20-91(A)(9)(a) currently does not contain gender-neutral terminology.

The recent United States Supreme Court decisions that this Court relied upon in ruling on the constitutionality of Virginia's assisted conception statute guide this Court in determining the constitutionality of Va. Code § 20-91(A)(9)(a). *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), involved a challenge to the actions of state officials from several states with laws denying full recognition of same-sex marriages from other states. The Supreme Court struck down those states' laws defining marriage as a union between a man and a woman and ruled that same-sex couples have a fundamental right to marry under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Obergefell*, 135 S. Ct. at 2604-05. The Supreme Court also found that same-sex couples shall be afforded the same marital rights, benefits, and responsibilities as heterosexual couples. *Id.* at 2601-02.

*Pavan v. Smith*, 137 S. Ct. 2075 (2017), addressed whether a state-issued birth certificate of a child conceived through assisted conception could list the name of a gestational mother's female spouse. Arkansas law specified whose names could appear on a child's state-issued birth certificate. *Id.* at 2077. With limited exceptions, the statute indicated that "the mother is deemed to be the woman who gives birth to the child" and "[i]f the mother was married at the time of either conception or birth ... the name of [her] husband shall be entered on the certificate as the father of the child." *Id.*

As with Virginia's no-fault divorce statute, the Arkansas birth certificate statute covered married couples consisting of a husband and wife, not same-sex spouses. The Arkansas Supreme Court found that the statute did not permit the name of a gestational mother's female spouse to be listed on a child's state-issued birth certificate but that the statute did not run afoul of *Obergefell*. *Id.* at 2076-77.

The Supreme Court of the United States disagreed and reversed the Arkansas Supreme Court. The Court ruled that a gestational mother's wife must receive the same recognition as a gestational mother's husband on a child's state-issued birth certificate. *Id.* at 2078-79. Relying upon *Obergefell*, the Court reasoned that a refusal to do so amounted to a denial of "access to the constellation of benefits that the Stat[e] ha[s] linked to marriage." *Id.* at 2078 (citation omitted).

As applied to Va. Code § 20-91, among the constellation of benefits that Virginia links to marriage is the ability to obtain a divorce. Virginia Code § 20-91(A)(9)(a) creates a recognized ground for divorce when a husband and wife live separate and apart without cohabitation and without interruption for one year. The statute does not recognize this ground for divorce for same-sex couples. The reasoning in *Obergefell* and *Pavan* made clear that this disparity violates constitutional due process and equal protection rights afforded to same-sex married couples. Therefore, Virginia Code § 20-91(A)(9)(a) is unconstitutional as currently written.

One remedial option is to declare Va. Code § 20-91(A)(9)(a) a nullity, thus denying all married couples of the ability to obtain a no-fault divorce under Virginia law. Another option is to extend the benefits of Va. Code § 20-91(A)(9)(a) to all married couples, including same-sex couples.

The generally preferred judicial remedy is to extend benefits rather than to nullify a statute. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017) (citation omitted). The determination of an appropriate remedy primarily should be guided by a statute's legislative intent. *Toghill v. Commonwealth*, 289 Va. 220, 233 (2015). Courts should "measure the intensity of commitment of the residual policy and consider the potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Heckler v. Mathews*, 465 U.S. 728, 739 n. 5 (1984) (citation omitted).

In 1960, the Virginia General Assembly enacted its no-fault divorce statute. 1960 Va. Acts ch. 108 (amending Va. Code § 20-91). The no-fault divorce statute "'embodies the legislative recognition ... that for various reasons parties determine to terminate their marriage.' Implicit in that recognition is the further fact of human experience that the concept of marital fault is often inappropriate, difficult to quantify, and artificially imposed ...." *Reid v. Reid*, 7 Va. App. 553, 561 (1989) (citation omitted).

While permitting a same-sex couple to obtain a no-fault divorce would be consistent with the legislative purpose for enacting Va. Code § 20-91(A)(9)(a), abolishing no-fault divorces under Virginia law would cause further harm to the family unit by forcing spouses to publicly assign fault to one another in order to terminate their marriage. On balance, the Court finds that extending the grounds of divorce for same-sex couples to include having lived separate and apart without cohabitation and without interruption for one year is a more appropriate judicial remedy.

In addition to a constitutional analysis of Va. Code § 20-91(A)(9)(a), a brief statutory analysis is needed before applying the law to the facts of this case. Although Va. Code § 20-91(A)(9)(a) requires parties to live separate and apart without any cohabitation and without interruption for one year, this does not prohibit spouses from interacting with one another altogether. Instead, the parties must refrain from matrimonial cohabitation, which "imports that continuing condition of living together and carrying out the mutual responsibilities of the martial relationship." *Petachenko v. Petachenko*, 232 Va. 296, 299 (1986). *See also Roberts v. Pace*, 193 Va. 156, 159 (1951) ("Mere casual cohabitation between the parties, after the separation, unaccompanied by resumption of normal married life, or reasonable explanation for their failure to do so, is not sufficient to show a reconciliation or an agreement to live and cohabit together again on a permanent basis as husband and wife.")

## III. Findings of Fact

During the two-day hearing, the Court fully considered the testimony of witnesses and the exhibits introduced into evidence. The Court makes the following findings of fact.

On July 24, 2007, Ms. Appel and her minor daughter moved out of the parties' marital residence in Delaware with little notice given to Ms. Celia. Thereafter, Ms. Celia moved to Virginia but did not move in with Ms. Appel. Instead, she resided with a long-time friend, who also had been a romantic partner. Around September of 2008, Ms. Appel discussed with Ms. Celia the possibility of reconciliation. Ms. Celia did not agree to reconcile. There was never a subsequent attempt at reconciliation. The parties never resumed marital duties or responsibilities after Ms. Appel moved out of the marital residence on July 24, 2007. Around April and December of 2011, Ms. Appel and her daughter moved into Ms. Celia's residence for a few weeks each time. The parties did not share the same bedroom, nor did they engage in any marital duties or responsibilities. Neither party financially supported the other one in any meaningful way after July 24, 2007. The parties have not shared any physical intimacy with one another since July 24, 2007. The interactions between the parties since July 24, 2007, have almost exclusively centered on fostering the relationship between the three minor children currently at issue in this litigation. The parties have lived separate and apart, continuously and without cohabitation since July 24, 2007.

## IV. Conclusion

Based on the Court's findings of fact and the law applicable to this case, this Court finds by a preponderance of the evidence that the parties have lived separate and apart without any interruption and without cohabitation since July 24, 2007. There has been no marital cohabitation since that time. While the parties discussed a possible reconciliation in 2008, it never occurred.

Please see the enclosed Order for your respective signatures regarding the date of physical separation. Within the Order is also a denial of Defendant's motion to strike, which the Court took under advisement during the July hearing.

Sincerely,

[redacted]

Stephen C. Shannon
Circuit Court Judge

Enclosure

**OPINION LETTER**

VIRGINIA

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

| | | |
|---|---|---|
| **Lynne Celia** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **CL-2018-8735** |
| | ) | |
| **Valerie Appel** | ) | |
| | ) | |
| **Defendant.** | ) | |

**ORDER**

This cause came on to be heard on July 30-31, 2019, to determine the date that the parties began living separate and apart without cohabitation and without interruption.

The Court rules that the parties have standing to seek a divorce pursuant to the grounds of divorce set forth in Va. Code § 20-91(A)(9)(a).

The Court finds by a preponderance of the evidence that the parties have lived separate and apart without any interruption and without cohabitation since July 24, 2007.

In addition, the Court denies Defendant's Motion to Strike Plaintiff's case, which the Court took under advisement during the July hearing.

Entered this _____ day of _____, 2019.

_____
Judge Stephen C. Shannon

SEEN:

_____
Counsel for Plaintiff(s)

_____
Counsel for Defendant(s)