NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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February 8, 2018

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Lynne Celia
[redacted]
Pro Se Defendant

Re: *Valerie Appel v. Lynne Celia*
Case No. CL-2017-0011789

Dear Ms. Stinson & Ms. Celia,

The current dispute among the parties to this litigation is whether their divorce decree should state that there are two children born of the parties. The Court concludes that such language is appropriate.

In reaching this decision, the Court must address two matters of first impression in Virginia. First, should a child born through assisted conception to a woman in a same-sex marriage be considered a child "born of the parties" for purposes of a final decree of divorce? Second, should a child born through assisted conception to the other woman in the same-sex marriage be considered a child "born of the parties" for purposes of a final decree of divorce if the child was born while

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the couple was joined by a civil union? The Court answers both questions in the affirmative.

I. Factual Background

The Court relies upon facts set forth in the pleadings and information provided at the hearings on December 8, 2017, and February 7, 2018. Plaintiff Valerie Appel ("Ms. Appel") and Defendant Lynne Celia ("Ms. Celia") were joined by a civil union in Connecticut on October 30, 2006. As explained more fully below, their civil union was converted to a marriage by operation of Connecticut law in 2010. Their relationship, however, subsequently deteriorated to the point that Ms. Appel now seeks a no-fault divorce. The Complaint for Divorce indicates that Ms. Appel has been a resident and domiciliary of Virginia for at least six months immediately prior to filing the Complaint for Divorce, which confers jurisdiction upon this Court.

On December 1, 2017, counsel for Ms. Appel filed a Motion for Entry of the Final Decree of Divorce and set the matter for hearing on December 8, 2017. Ms. Appel's counsel submitted a proposed Final Decree of Divorce, which states that there were no children born or adopted of the marriage. Ms. Celia appeared *pro se* at the hearing to contest entry of the proposed decree because she contends that there were two children born of the marriage.

Ms. Appel is the biological mother of two children born through assisted conception: Minor Child [redacted][1] and Minor Child [redacted], who was born in Virginia in 2012. Ms. Celia is the biological mother of one child born through assisted conception: Minor Child [redacted], who was born in Virginia in 2008. Both women conceived through assisted conception using sperm from the same sample purchased from a sperm bank in 2004. Thus, all three children are biologically related. None of the children were adopted by their biological mother's spouse.

Ms. Celia contends that Minor Child [redacted] and Minor Child [redacted] should be acknowledged as children born of the marriage in the divorce decree because they were born after the couple was joined by a civil union, which later became a marriage by operation of law. Ms. Appel's position is that such recognition of the children in a divorce decree lacks a basis under Virginia law.

[1] The status of Minor Child [redacted], who was born prior to the civil union, is not at issue in this dispute.

II. Analysis

In Virginia, a final divorce decree must state whether there are any minor children born of the parties or adopted by the parties so as to ensure that the stated grounds for divorce are proper. *See* Va. Code § 20-91(A)(9)(a). If the stated grounds are improper, a final decree may be rendered a nullity.

The reason for stating whether there are minor children born of the parties or adopted by the parties relates to the timing requirements for filing a Complaint for Divorce. Under Va. Code § 20-91(A)(9)(a), a no-fault divorce may be decreed if the parties have lived separate and apart without cohabitation and without interruption for six months "[i]n any case where the parties have entered into a separation agreement and there are no minor children either born of the parties, born of either party and adopted by the other or adopted by both parties ...." Va. Code § 20-91(A)(9)(a). Otherwise, a no-fault divorce may be decreed if and when the parties have lived separate and apart without any cohabitation and without interruption for one year. *Id.*

A final decree of divorce does not require a declaration as to whether any minor children were born of the marriage. Rather, Va. Code § 20-91(A)(9)(a) requires a declaration as to whether any minor children were born of the parties, born of either party and adopted by the other or adopted by both parties. The phrase "born of the marriage" appears in Virginia's affidavit statute, Va. Code § 20-106(B)(7), not in Virginia's divorce decree statute. Accordingly, the Court's analysis will focus on whether Minor Child [redacted] and Minor Child [redacted] should be listed in the final decree of divorce as children born of the parties, rather than children born of the marriage.

To determine whether there are minor children born of the parties in this case, the Court first must analyze Virginia's assisted conception statute, which is Va. Code § 20-158. This statute provides substantive and procedural rights to the husband of a gestational mother who conceives a child through assisted conception. Under the statute, the husband is deemed to be the child's parent, along with the gestational mother, unless he files a lawsuit within two years of when he should have known of the child's birth and proves that he did not consent to the assisted conception. *Id.* In the context of a final decree of divorce, therefore, the child would be considered born of the parties because the biological mother and her husband are both deemed to be the child's parents. In contrast, the sperm donor is not considered to be the child's parent unless he is the husband of the gestational mother. *Id.*

While Virginia's assisted conception statute provides rights to a husband of the gestational mother, it is silent as to the rights of a wife of a gestational mother in a same-sex marriage.

In 2015, the Supreme Court of the United States decided the case of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *Obergefell* involved fourteen same-sex couples and two men whose same sex-partners were deceased. *Id.* at 2593. The litigants challenged the actions of state officials from four states that had laws denying same-sex marriages or denying full recognition of same-sex marriages from other states. *Id.* In *Obergefell*, 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. *Id.* 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.

Following *Obergefell*, the Supreme Court decided *Pavan v. Smith*, 137 S. Ct. 2075 (2017). The issue in *Pavan* was whether the birth certificate of a child conceived through assisted conception could list the name of a same-sex spouse of the child's mother. *Id.* at 2076-77. At the time of the child's birth, 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.*

Under Arkansas law, if a woman gave birth to a child conceived through assisted conception and the woman was married to a man, then the name of the woman's husband had to appear on the child's birth certificate. Similar to Virginia's assisted conception statute, however, the Arkansas birth certificate statute did not address a scenario in which a child is born through assisted conception to a same-sex couple. The highest state court of Arkansas concluded that the name of a gestational mother's same-sex spouse should not appear on a child's state-issued birth certificate. *Id.* at 2076-77.

Relying upon *Obergefell*, the Supreme Court of the United States reversed the Arkansas Supreme Court's decision and ruled that a gestational mother's same-sex spouse is entitled to the same recognition on a birth certificate that the Arkansas statute provides to a husband of a gestational mother. *Id.* at 2078-79. The 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).

The constitutionality of Virginia's assisted conception statute, which has not been amended since 1997, must be considered in the context of the Supreme Court's recent *Obergefell* and *Pavan* decisions. The statute confers upon the husband of a gestational mother who conceives a child through assisted conception the right of parentage. The reasoning in *Obergefell* and *Pavan* make clear that Virginia's statute in its current form does not comply with constitutional requirements. Indeed, Va. Code § 20-158 discriminates in conferring a statutory benefit of marriage solely on the basis of whether a spouse of a gestational mother is a husband or a wife. Quite simply, a husband of a gestational mother becomes a parent. A wife of a gestational mother does not.

One remedial option is to declare Virginia's assisted conception statute a nullity, thus denying all married couples and children conceived through assisted conception the familial benefits afforded to them under Va. Code § 20-158. Alternatively, the Court can extend those benefits to same-sex marriages. The determination of an appropriate remedy should be primarily guided by the legislative intent of a statute. *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). Generally, the 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).

Virginia Code § 20-158 is part of Chapter 9 of Title 20, which addresses the status of children born through assisted conception. The primary purpose of this Chapter is to "ensur[e] that infertile married couples will not be threatened by parentage claims from anonymous sperm and egg donors ...." *Breit v. Mason*, 59 Va. App. 322, 337 (2011).

While extending the benefits of Virginia's assisted conception statute to same-sex marriages would not undermine the legislative goal of preventing anonymous donors from asserting parental claims, nullifying the statute would have the opposite result. Namely, current parent-child relationships protected by Virginia's assisted conception statute could become subject to legal challenge. Moreover, it is not difficult to envision other types of litigation that may arise if the statute was nullified, such as challenges to child support orders by non-biological fathers whose responsibilities are borne out of Virginia's assisted conception statute.

The Court finds that the appropriate remedy is to extend the benefits of Va. Code § 20-158 to same-sex spouses of gestational mothers. Other state courts that

have considered similar issues related to their respective assisted conception statutes have reached the same conclusion. *See, e.g., McLaughlin v. Jones*, 401 P.3d 492 (Ariz. 2017); *Barse v. Pasternak*, 2015 Conn. Super. LEXIS 142 (2015).

A. Application to Minor Child [redacted]'s Status

As previously stated, Ms. Appel and Ms. Celia were joined by a civil union in Connecticut in 2006. In 2008, the Supreme Court of Connecticut ruled that the State's statutory ban on same-sex marriage violated Connecticut's constitution. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (2008). In response, effective October 1, 2010, Connecticut merged existing civil unions into marriage by operation of law. Conn. Gen. Stat. § 46b-33rr. As a result, Ms. Appel's and Ms. Celia's civil union became a marriage on October 1, 2010.

In 2012, Minor Child [redacted] was born through assisted conception to Ms. Appel. This was during the time of the marriage. Consistent with the marital benefits bestowed upon the spouse of a gestational mother who conceives a child during the marriage, Ms. Celia is considered a parent. Therefore, Minor Child [redacted] shall be recognized as a child born of the parties in the Final Decree of Divorce.

B. Application to Minor Child [redacted]'s Status

The analysis of Minor Child [redacted]'s status is different from the above analysis related to Minor Child [redacted] due to the timing of when the parties' civil union merged into a marriage. The parties were joined by a civil union in 2006. Minor Child [redacted] was born in 2008. Connecticut merged the civil union of the parties into a marriage in 2010. Interestingly, if Connecticut had declared that marriage would be recognized retroactively as of the date of the civil union, the analysis related to Minor Child [redacted] and Minor Child [redacted] would be the same. Namely, both children would have been born during the marriage, and the benefits of Virginia's assisted conception statute would also apply to Minor Child [redacted] By setting the date of marriage prospectively at October 1, 2010, however, Minor Child [redacted] was born during the civil union, not during the marriage.

As previously stated, the Court is required to determine if Minor Child [redacted] was born of the parties, not born of the marriage. This is a meaningful distinction in this case. If the Court were to analyze whether Minor Child [redacted] was born of the marriage, the Court would need to rule on whether *Obergefell* is retroactive in its application and, if so, whether Virginia would be required to treat civil unions as akin to marriage in this circumstance. Courts across the nation appear split as to *Obergefell*'s retroactivity. *See, e.g., Ranolls v. Dewling*, 223 F. Supp. 3d 613 (E.D. Tex. 2016) (retroactive as applied); *Lake v. Putnam*, 894 N.W.2d 62 (Mich. Ct. App.

2016) (not retroactive as applied). Instead, this Court must determine whether Minor Child [redacted] was born of the parties, which is a more limited inquiry and can be resolved without a constitutional analysis.

The phrase "born of the parties" is not defined in the Code of Virginia. It could be argued that the phrase is synonymous with "born of the marriage", which is found in Virginia's affidavit statute and is also undefined. The argument would be that treating the terms as synonymous would harmonize what is required in an affidavit offered in support of a divorce and what is required and must be stated in a divorce decree when granting a no-fault divorce. Moreover, whether proper or improper, divorce decrees in Virginia occasionally state the number of children born of the marriage, instead of born of the parties.

Yet, it could also be argued that the phrase "born of the parties" is not interchangeable with "born of the marriage", but rather is broader in scope. For example, in another context, Virginia recognizes the legitimacy of children born to a couple before the couple is actually married. Va. Code § 20-31.1. If the couple was to later divorce, the plain meaning of these two terms would suggest that the child was born of the parties but not born of the marriage, since the child was born before the bond of matrimony.

Likewise, we also know from the above analysis of Virginia's assisted conception statute that a child "born of the parties" or "born of the marriage" does not require a biological relationship between the child and both parties to the relationship.

Due to the uncertainty as to the definition of "born of the parties", a brief discussion of Virginia's no-fault divorce statute is warranted. Virginia's no-fault divorce statute was enacted in 1960, and initially required the parties to remain separate and apart, without cohabitation or interruption ("waiting period") for three years prior to the entry of a divorce decree. Va. Code § 20-91(9) (1960), *amended by* Va. Code § 20-91(A)(9) (1997). The purpose of a waiting period is to provide the parties with a window of time in which to reflect upon their decision and potentially reconcile. *Coe v. Coe*, 225 Va. 616, 620 (1983).

The waiting period has been reduced by the Virginia General Assembly on several occasions. In 1982, the Virginia General Assembly reduced the waiting period from one year to six months, but only when there is a separation agreement and no minor children born of the parties or adopted by the parties. Va. Code § 20-91(9)(a) (1982), *amended by* Va. Code § 20-91(A)(9) (1997). Virginia is one of the only states in the country that creates a distinction in the required waiting period for a no-fault divorce when minor children are involved. *Grounds for Divorce and*

Residency Requirements, 45 Fam. L.Q. 500 (Winter 2012) (identifying Virginia and Louisiana as mandating a longer waiting period for no-fault divorces due to minor children). The Court infers that the Virginia General Assembly considered the impact of divorce on young children when distinguishing litigants with minor children from litigants without any children or litigants with only adult children.

In the absence of a clear definition of the phrase "born of the parties" and in recognition of the importance that the Virginia General Assembly places on minor children in its no-fault divorce statute, the Court concludes that Minor Child [redacted] is born of the parties for the purpose of Va. Code § 20-91(A)(9)(a). In reaching this conclusion, the Court's ruling is a narrow one. The Court is not making a determination as to the parental rights of the parties, and the scenario is limited to a child of a gestational mother in a civil union, which later becomes a marriage by operation of law.

III. Conclusion

For the reasons stated above, the divorce decree shall indicate that there are two children born of the parties: Minor Child [redacted], who was born of the marriage, and Minor Child [redacted], who was born of the civil union.

If any further issues remain that have not been previously docketed, the parties are directed to set a hearing on an available date on my docket through Calendar Control. Otherwise, the parties shall submit a proposed final decree of divorce to my attention in Chambers no later than March 2, 2018.

Sincerely,

[redacted]

Stephen C. Shannon
Circuit Court Judge

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