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TWO DADS ARE BETTER THAN ONE: THE SUPREME COURT OF VIRGINIA'S DECISION IN *L.F. V. BREIT* AND WHY VIRGINIA'S ASSISTED CONCEPTION STATUTE SHOULD ALLOW GAY COUPLES TO LEGALLY PARENT A CHILD TOGETHER

I. INTRODUCTION

In May 2012, Roanoke Athletic Club in Virginia revoked a family club membership from two dads and their two-year-old son Oliver, after discovering that the two dads were gay and that they did not qualify for club membership.¹ William Trinkle, Juan Granados, and Oliver applied for membership at the athletic club so that they could enjoy the summer by the pool as a family.² Trinkle purchased a family membership and club officials approved his application, but soon after the family started using the facilities, the operations director contacted the couple.³ The director revoked their membership because they did not qualify under the club's definition of a family.⁴ Thus, Trinkle, Granados, and Oliver were denied a family membership simply because of Trinkle's and Granados' sexual orientations. In addition, Oliver was denied the access available to children of heterosexual couples.⁵ Although the athletic club later changed its definition of a family to allow families like Trinkle, Granados, and Oliver to gain membership, this event highlights one of the many problems gay dads face in Virginia as a result of the current state of Virginia law regarding legal parentage.⁶ Virginia law essentially prohibits two gay dads,

1. *Virginia Fitness Club to Allow Gay Parents to Join After Lawsuit*, FOXNEWS.COM (July 5, 2012), <http://www.foxnews.com/us/2012/07/05/virginia-fitness-club-to-allow-gay-parents-to-join-after-lawsuit/>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*; Charlene Gomes, *Partners as Parents: Challenges Faced by Gays Denied Marriage*, 63 HUMANIST 14, 14–15 (2003).

such as Trinkle and Granados, from both establishing legal rights over their children.⁷

As of 2012, there were more than 110,000 same-sex couples in the United States raising children.⁸ One way same-sex couples become parents is through assisted reproductive technology (“ART”).⁹ ART includes all fertility treatments in which both the egg and the sperm are manipulated.¹⁰ Typically, ART involves removing eggs from a woman’s ovaries, combining the ovaries with sperm in a laboratory, and placing the eggs in a woman’s body.¹¹ ART allows gay couples to create a family through gestational surrogacy. Gestational surrogacy is a treatment process where a woman, designated as the surrogate, carries to term a fertilized egg not genetically related to her.¹² One of the men in a same-sex couple may choose to donate his own sperm, thus allowing one partner to have a genetic connection to the child.¹³ Before initiating any gestational surrogacy treatment, the surrogate and the intended parents typically form a surrogacy contract. A surrogacy contract usually requires the surrogate to surrender any legal rights to the child once the child is born.¹⁴ Although gestational surrogacy allows two gay men hoping for a child to take part in the creation of a child, and a surrogacy contract has the potential to terminate the legal parental rights of the surrogate,

7. VA. CODE ANN. § 20-156 (2008); *id.* § 63.2-1225 (2012) (limiting adoption to married couples and unmarried individuals).

8. Press Release, Williams Inst., As Overall Percentage of Same-Sex Couples Raising Children Declines, Those Adopting Almost Doubles—Significant Diversity Among Lesbian and Gay Families (Jan. 25, 2012), available at <http://williamsinstitute.law.ucla.edu/press/press-releases/as-overall-percentage-of-same-sex-couples-raising-children-declines-those-adopting-almost-doubles-significant-diversity-among-lesbian-and-gay-families/>.

9. Tiffany L. Palmer, *The Winding Road to the Two-Dad Family: Issues Arising in Interstate Surrogacy for Gay Couples*, 8 RUTGERS J.L. & PUB. POL’Y 895, 895 (2011).

10. U.S. DEPT OF HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, 2005 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 3 (2007), available at <http://www.cdc.gov/art/ART2005/508PDF/2005ART508.pdf>.

11. *Id.* This specific technique is called in vitro fertilization. *Id.*

12. Dominique Ladomato, Note, *Protecting Traditional Surrogacy Contracting Through Fee Payment Regulation*, 23 HASTINGS WOMEN’S L.J. 245, 247 (2012).

13. See *id.* at 247–48; Palmer, *supra* note 9 at 896; Diane S. Hinson, *Is the VA Supreme Court Moving to the Left? VA Supreme Court Recognizes Paternity Rights of an Unmarried Father*, CREATIVE FAMILY CONNECTIONS (Jan. 11, 2013), <http://surrogacyguru.com/post/40403688876/is-the-va-supreme-court-moving-to-the-left-va-supreme>.

14. Ladomato, *supra* note 12 at 249 (citing *Sample TS Contract*, ALL ABOUT SURROGACY, http://www.allaboutsurrugacy.com/sample_contracts/TScontract.htm (last visited Apr. 14, 2014)).

legal problems still arise when attempting to establish parentage of the two dads.

Gestational surrogacy allows gay men to have a child with the help of a surrogate and an egg donor, but it does not come without legal, ethical, and social implications. One important question that must be addressed is who the child's legal parents are.¹⁵ Virginia, along with many other states, has passed statutes regulating the legal status of children conceived through ARTs in an effort to address the legal questions arising from this new form of reproductive technology.¹⁶ These Virginia statutes prohibit both gay men from establishing legal parentage.

Specifically, Virginia Code section 20-156 limits the enforceability of surrogacy contracts based on the marital status of the intended parents.¹⁷ The statute defines a surrogacy contract as "an agreement between intended parents, a surrogate, and her husband, if any."¹⁸ The code further defines intended parents as "a man and a woman, married to each other."¹⁹ These definitions preclude homosexual couples from entering into a binding surrogacy contract thus inhibiting them from establishing legal parenthood through ART.²⁰ Despite the hurdle that section 20-156 creates for homosexual couples on their path to parenthood through surrogacy contracts, the Supreme Court of Virginia's decision in *L.F. v. Breit* offers hope that homosexual couples will have success in establishing legal parentage in Virginia.

In January 2013, the Supreme Court of Virginia held that an unmarried paternal donor for in vitro fertilization had parental rights over the resulting child in *L.F. v. Breit*.²¹ The court reasoned that Virginia's marital preference in surrogacy contracts resulting from assisted conception is designed to protect "an intact family from the intervention from third-party strangers"—

15. Anne R. Dana, Note, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 354 (2011).

16. See VA. CODE ANN. § 20-156 to -165 (2008 & Cum. Supp. 2013).

17. *Id.* § 20-156 (2008); Brooke D. Rodgers-Miller, *Adam and Steve and Eve: Why Sexuality Segregation in Assisted Reproduction in Virginia Is No Longer Acceptable*, 11 WM. & MARY J. WOMEN & L. 293, 293 (2005).

18. VA. CODE ANN. § 20-156 (2008).

19. *Id.*

20. See Rodgers-Miller, *supra* note 17, at 293.

21. 736 S.E.2d 711, 722 (Va. 2013).

not to deprive a child of “a responsible, involved parent.”²² As a result of the *Breit* decision, the Virginia General Assembly passed Virginia Code section 1-240.1. Section 1-240.1 states that “a parent has a fundamental right to make decisions concerning the upbringing, education, and care of the parent’s child.”²³ The holding in *Breit* and Virginia Code section 1-240.1 should open the door for same-sex couples, in particular gay male couples who are more vulnerable under the law, to contract surrogacy agreements allowing them to assert parental rights.²⁴

This comment examines whether gay men can have a child through a surrogacy arrangement in Virginia and whether gay men can retain parental rights through surrogacy contracts under the Virginia Assisted Conception Act. The Virginia laws affect gay males and gay females equally, but this comment addresses the issues arising with same-sex couples in the context of gay dads. Part II provides a background of surrogacy and specifically discusses surrogacy in relation to same-sex couples. Part III provides a general background of adoption and the establishment of parentage rights. Part IV describes the Assisted Conception Act, the legislative history of the Act, and its consequences on gay men. Part V discusses the January 2013 Supreme Court of Virginia decision, *L.F. v. Breit*. Part VI discusses how the holding in *Breit* and Virginia Code section 1-240.1 can and should be applied to homosexual couples in order to protect their fundamental constitutional rights. Part VII recommends that to protect these rights, Virginia should amend its definition of “intended parents” in Virginia Code section 20-156 to include gay parents and to allow for second-parent adoption.

II. ASSISTED REPRODUCTIVE TECHNOLOGY AND SURROGACY

ARTs provide individuals and couples opportunities to create a child that they would not otherwise be able to create. There are two types of infertility that lead people to use ARTs—functional

22. *Id.* at 723.

23. VA. CODE ANN. § 1-240.1 (Cum. Supp. 2013).

24. Gay male couples are more vulnerable under the law than lesbian couples because gay men do not adopt the traditional gender roles for parents. Palmer, *supra* note 9, at 899. Gay couples become the caretakers of a child and that is a role traditionally held by women. *Id.* (citing Marla J. Hollandsworth, *Gay Men Creating Families Through Surrogacy Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U.J. GENDER & L. 183, 192 (1995)).

infertility and structural infertility.²⁵ Functional infertility occurs when a man or woman cannot reproduce for a medical reason such as age, endometrial polyps, pelvic infection, or not being able to carry a baby to term in women, and semen abnormalities in men.²⁶ Structural infertility is not the result of a medical condition, but instead occurs when an individual needs a person of the opposite sex's biological assistance to reproduce.²⁷ Structural infertility affects all gay couples looking to reproduce.²⁸

ARTs are a solution to both structural and functional infertility. ARTs "started out as an effort to help married couples fulfill their dreams of having genetically related children [but] has, within just a few short years, triggered a revolution about how we think about parentage, marriage, and even gender identification."²⁹ ARTs come in many forms, but they include all fertility procedures where both the egg and the sperm are handled outside of the body.³⁰ The most popular form of ART is in vitro fertilization. This is when eggs are removed from an ovary and combined with sperm in a petri dish.³¹ After the embryo is created, it is implanted in a woman's uterus.³² Artificial insemination³³ and surrogacy, although not technically ART because manipulation of the eggs and sperm outside the body is not required, are generally grouped with ARTs.³⁴ Surrogacy is particularly associated with

25. Dana, *supra* note 15, at 359.

26. See *id.* (citing Margarete Sandelowski & Sheryl de Lacey, *The Uses of a "Disease": Infertility as Rhetorical Vehicle*, in *INFERTILITY AROUND THE GLOBE: NEW THINKING ON CHILDLESSNESS, GENDER, AND REPRODUCTIVE TECHNOLOGIES* 33, 35 (Martin C. Inhorn & Frank van Balen eds., 2002); Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 *BERKELEY J. GENDER L. & JUST.* 18, 23–24 (2008)); *Infertility: Symptoms, Treatment, Diagnosis*, UCLA HEALTH, <http://obgyn.ucla.edu/body.cfm?id=326> (last visited Apr. 14, 2014).

27. Dana, *supra* note 15, at 359.

28. *Id.*

29. DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 1063 (2d ed. 2009) (quoting Bruce Lord Wilder, *Current Status of Assisted Reproduction Technology 2005: An Overview and Glance at the Future*, 39 *FAM. L.Q.* 573, 573 (2005)) (internal quotation marks omitted).

30. Dana, *supra* note 15, at 360.

31. Bridget M. Fuselier, *The Trouble With Putting All of Your Eggs in One Basket: Using a Property Rights Model to Resolve Disputes Over Cryopreserved Pre-Embryos*, 14 *TEX. J. C.L. & C.R.* 143, 144 (2009).

32. *Id.*

33. Artificial insemination means sperm is injected into the female by some unnatural means. *BLACK'S LAW DICTIONARY* 128–29 (9th ed. 2009).

34. Dana, *supra* note 15, at 360 (citing JESSICA ARONS, CTR. FOR AM. PROGRESS, *FUTURE CHOICES: ASSISTED REPRODUCTIVE TECHNOLOGIES AND THE LAW* 5 (2007), available at <http://www.americanprogress.org/issues/2007/12pdf/arond-art.pdf>).

ARTs since it utilizes artificial insemination or in vitro fertilization in order to fulfill the pregnancy.³⁵

Surrogacy is a means of “curing” structural infertility for gay men, single men, and also some straight couples.³⁶ A woman, the surrogate, agrees to carry the fetus in her womb and give birth to a child that she does not plan on raising as her own.³⁷ After the birth, the woman gives the child to the intended parents—the single man, the same-sex couple, or the heterosexual couple who contracted with the surrogate.³⁸

There are two options for surrogacy: gestational or traditional.³⁹ Traditional surrogacy is when the surrogate agrees to be the egg donor *and* the carrier of the child.⁴⁰ For male gay couples, one of the intended fathers can donate the sperm to artificially inseminate the surrogate, but this is not always the case.⁴¹ Prospective gay dads could also choose to use the sperm of a third-party donor to inseminate the carrier. Although traditional surrogacy allows a gay couple to choose one partner to be genetically related to the child, the gay couple can also choose that neither of them be genetically related to the child. In contrast, the egg donor and the surrogate in traditionally surrogacy are the same woman, so the surrogate will always be genetically related to the child she gives birth to.

In traditional surrogacy, the surrogate and the intended parents typically enter into an agreement called a surrogacy contract.⁴² In uncontested cases, once the child is born, the surrogate terminates her parental rights and the intended parents, the gay dads, become the child’s legal parents.⁴³ In contested cases, an issue appears if the surrogate decides to retain parental rights of

35. *See id.*

36. *Id.* (citing ARONS, *supra* note 34, at 6).

37. *Id.*

38. *See id.*

39. *Id.*

40. *Traditional Surrogacy: A Summary of the Traditional Surrogacy Process*, ALL ABOUT SURROGACY, <http://www.allaboutsurgacy.com/traditionalsurrogacy.htm> (last visited Apr. 14, 2014).

41. *See Dana, supra* note 15, at 360–61.

42. Weldon E. Havins & James J. Dalessio, *Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating “Non-Traditional” Gestational Surrogacy Contracts*, 31 MCGEORGE L. REV. 673, 675 (2000).

43. Dana, *supra* note 15, at 361.

the child that she gave birth to and is genetically linked.⁴⁴ Traditional surrogacy agreements are typically not well received in common law courts.⁴⁵

Many ethical and legal debates arise in traditional surrogacy when the surrogate decides to retain parental rights. On the one hand, the woman is depriving the intended parents of their child, but on the other, many argue that surrogacy exploits the woman by treating her as an object.⁴⁶ One solution to this ethical dilemma is gestational surrogacy, where a third-party donor egg as well as a donor sperm is used. This form of surrogacy has become more socially acceptable, since the surrogate is not genetically related to the child.⁴⁷ Gestational surrogacy helps to curb characterization of a woman as an object and a baby-seller.⁴⁸ It has also transformed the legal debate surrounding surrogacy.⁴⁹

Gestational surrogacy contracts are significantly different from traditional surrogacy contracts. Unlike traditional surrogacy, the surrogate in gestational surrogacy has no biological relation to the child she is carrying and giving birth to.⁵⁰ Gestational surrogacy complicates the determination of who the legal parents of the resulting child will be.⁵¹ In some circumstances where a third-party egg and donor sperm are used, there can be up to five prospective parents for the child.⁵² These five potential parents are the intended mother, the intended father, the gestational mother, the egg donor, and the sperm donor.⁵³ For gay male couples, one of the intended fathers can donate sperm, but there must be a third-party egg donor.⁵⁴ At most, only one of the intended fathers can be genetically related to the child.⁵⁵

44. *Id.*

45. Havins & Dalessio, *supra* note 42, at 675.

46. Dana, *supra* note 15, at 361 (citing Elizabeth S. Anderson, *Is Women's Labor a Commodity*, 19 PHIL. & PUB. AFF. 71, 76, 80 (1990)).

47. *Cf. id.* at 362.

48. *Id.* at 363.

49. *Id.* at 362 (citing Debora L. Spar, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 78, 82 (2006)).

50. *Id.* (citing Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329, 341 (1995)).

51. *Id.* at 363.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

Gay male couples attempting to create a family not only face obstacles in creating a child and establishing legal parentage, but they also face financial obstacles. In both gestational and traditional surrogacy contracts, the intended parents must provide for the surrogate's reasonable medical and ancillary expenses.⁵⁶ These costs can include payment to the surrogacy agency connecting the parties, legal fees for the creation of the surrogacy contract, and medical expenses.⁵⁷ Despite the cost and complications, gestational surrogacy is becoming more common, with about 1400 children born in 2008 through gestational surrogacy.⁵⁸ Many of those children are the son or daughter of gay couples.

III. ADOPTION AND ESTABLISHMENT OF PARENTAGE

Parentage is the lawful recognition of a child's parents.⁵⁹ Parentage can be established through genetic relation to the child, giving birth to the child, or adoption.⁶⁰ Adoption is a viable option for a homosexual male couple looking to have a child. Generally adoption occurs in one of two ways: traditional adoption or second-parent adoption.⁶¹ In traditional adoption, the identities of the birth parents and the adoptive parents are unknown to each other,⁶² and the couple or individual person adopts the child from foster care or another child placement source.⁶³ In contrast, in second-parent adoption one partner or spouse already has parental rights over the child, and the other spouse or partner adopts the child so that both partners have parental rights.⁶⁴ Second-parent adoption provides enormous benefits to the child, including allowing the child to receive health benefits from both parents, enabling parents to make important decisions regarding the

56. VA. CODE ANN. § 20-160(B)(5) (Cum. Supp. 2013); *id.* § 20-162(B)(3) (Cum. Supp. 2013).

57. *Id.* § 20-160(B)(5) (Cum. Supp. 2013); Dana, *supra* note 15, at 363.

58. Christopher White, *Surrogates and Their Discontents*, PUBLIC DISCOURSE (Aug. 16, 2012), <http://www.thepublicdiscourse.com/2012/08/6137/>.

59. See PETER NASH SWISHER, ANTHONY MILLER, & HELENE S. SHAPO, *FAMILY LAW: CASES, MATERIALS, AND PROBLEMS* 285 (3d ed. 2012).

60. VA. CODE ANN. § 20-49.1 (2008).

61. *Family Formation*, EQUALITY VIRGINIA, <http://www.equalityvirginia.org/what-we-do/protecting-families/adoption/> (last visited Apr. 14, 2014).

62. *Traditional Adoption*, ADOPTION.COM, <http://encyclopedia.adoption.com/entry/traditional-adoption/359/1.html> (last visited Apr. 14, 2014).

63. *Family Formation*, *supra* note 61.

64. *Id.*

child's health, and ensuring the child has another legally recognized parent if one parent should die.⁶⁵

The Virginia Code does not explicitly prohibit same-sex couples from adopting a child, but Virginia Code section 63.2-1225 excludes same-sex couples from its enumeration of individuals or couples eligible to adopt a child.⁶⁶ Section 63.2-1225 states that a "married couple or an unmarried individual shall be eligible to receive placement of a child for purposes of adoption."⁶⁷ Although this section essentially precludes gay couples from adopting a child, the court must also consider the "best interest of the child" in determining the appropriate home for adoption.⁶⁸ Although the code does not directly enumerate factors for determining the "best interest of the child" in section 63.2-1225, the code does enumerate these factors for purposes of determining custody or visitation arrangements in section 20-124.3.⁶⁹ The "best interest" standard established in section 20-124.3 can transfer to adoption.⁷⁰ These factors include the age and physical and mental condition of the child, the age and physical and mental condition of each parent, the relationship between the parent and the child, the needs of the child, the role the parent has played in the past and will play in the future, the parent's ability to actively support the child, the parent's willingness to have an active relationship with the child, the child's preference, history of family abuse, and any other factors the court deems necessary.⁷¹ Nowhere in this section does the law require the judge to consider the sexual orientation of the parent.

Second-parent adoption is one way for a gay couple to legally parent a child together, although currently it is not allowed in Virginia. As of March 2014, potential parents can petition for second-parent adoption in fourteen states and the District of Colum-

65. *Id.*

66. VA. CODE ANN. § 63.2-1225 (2012); *see also* FAMILY EQUALITY COUNCIL, ADOPTION AND FOSTER CARE, *available at* http://www.familyequality.org/_asset/Orq050/Adoption-and-Foster-Care-FINAL.pdf (last visited Apr. 14, 2014).

67. *Id.*

68. *Id.*

69. VA. CODE ANN. § 20.124.3 (2008).

70. *Id.*; Alison M. Schmieder, *Best Interest and Parental Presumptions: Bringing Same-Sex Custody Agreements Beyond Preclusion by the Federal Defense of Marriage Act*, 17 WM. & MARY BILL RTS. J. 293, 308-10 (2008); *Family Formation*, *supra* note 61.

71. *Id.*

bia.⁷² Seven states restrict second-parent adoption for same-sex couples.⁷³ Virginia is not one of those states.⁷⁴ The Virginia Code does not include a specific statutory provision for second-parent adoption, but second-parent adoption is not exclusively banned.⁷⁵

The Virginia Code also does not include a specific provision addressing the legal parentage of homosexual couples that use ART. However, the evolution of the law determining the parentage of a child whose parents are unmarried is important to the homosexual parentage discussion. Historically, there has been no common law duty of a father to support his child if he is not married to the child's mother.⁷⁶ However, in 1952, Virginia passed legislation requiring a father to support his child once paternity was proven, but the father had to admit to paternity under oath.⁷⁷ This law was then revised to be less stringent in 1954, allowing an out-of-court admission as proof of paternity in writing under oath.⁷⁸ This statute was repealed in 1988 and then re-codified at the current Virginia Code section 20-49.1.⁷⁹ Section 20-49.1 defines legal parentage when a child's parents are unmarried.⁸⁰ It allows for the establishment of paternity when the biological father and mother enter into a voluntary written agreement made under oath.⁸¹ In 1992, the statute was expanded to include paternity revealed through genetic testing.⁸² Section 20-49.1 does not

72. *Second Parent Adoption*, FAMILY EQUALITY COUNCIL, http://www.familyequality.org/get_informed/equality_maps/second-parent_adoption_laws/ (last visited Apr. 14, 2014).

73. *Id.*

74. *Id.*

75. See VA. CODE ANN. § 63.2-1200 (2012); Leslie M. Fenton & Ann Fenton, *The Changing Landscape of Second-Parent Adoptions*, AMERICAN BAR ASSOCIATION (Oct. 25, 2011), <http://apps.americanbar.org/litigation/committees/childrights/content/articles/fall2011-changing-landscape-second-parent-adoptions.html>; see also *Family Formation*, *supra* note 61.

76. *L.F. v. Breit*, 736 S.E.2d 711, 717 (Va. 2013).

77. Act of Apr. 3, 1952, ch. 584, 1952 Va. Acts 611 (codified as amended at VA. CODE ANN. § 20-61.1 (1958)).

78. Act of Apr. 6, 1954, ch. 577, 1954 Va. Acts 350 (codified as amended at VA. CODE ANN. § 20-61.1 (1958)).

79. Act of Apr. 20, 1988, ch. 866, 1988 Va. Acts 1025 (codified as amended at VA. CODE ANN. §§ 20-49.1 to -49.8 (1988)).

80. *Id.*

81. *Id.*

82. Act of Mar. 30, 1992, ch. 516, 1992 Va. Acts 228 (codified as amended at VA. CODE ANN. § 20-49.1 (Cum. Supp. 1992)).

address the establishment of paternity by those who use assisted conception.⁸³

IV. THE VIRGINIA STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT

In response to the increased use of ARTs, many states passed statutes regulating reproduction with the use of these advanced technologies, including Virginia, which adopted the Uniform Status of Children of Assisted Conception Act (“USCACA”).⁸⁴ In some aspects, Virginia’s response to ARTs is more progressive than other states.⁸⁵ For example, Virginia allows circuit courts to approve surrogacy contracts that statutorily comply with Virginia Code section 20-160,⁸⁶ whereas Louisiana will not honor any remuneration for surrogacy services.⁸⁷ However, in other aspects, Virginia’s response to ARTs has been more conservative, especially with respect to the sexual orientation of the intended parents.⁸⁸

A. *Adoption of Virginia Status of Children of Assisted Conception Act*

Virginia adopted the USCACA in 1991, which became the Virginia Status of Children of Assisted Conception statute, otherwise known as the Assisted Conception Act,⁸⁹ as a response to the

83. *Id.*

84. Rodgers-Miller, *supra* note 17, at 295; see DEP’T OF LEGISLATIVE SERVS., LEGAL ISSUES CONCERNING ASSISTED REPRODUCTION 3 (2012) [hereinafter ASSISTED REPRODUCTION].

85. Rodgers-Miller, *supra* note 17, at 295.

86. VA. CODE ANN. § 20-160 (Cum. Supp. 2013). To approve a surrogacy agreement the following twelve requirements must be met: the court must have jurisdiction; a home study of the intended parents and the surrogate has been conducted and filed with the court; the surrogate and intended parents meet the standards of fitness that apply to adoptive parents; the contract was voluntarily entered into; there is a guarantee of payment of medical expenses; the surrogate has had one successful pregnancy; the intended parents and surrogate have undergone physical and psychological evaluations; the intended mother is unable to carry the child for medical reasons; at least one of the parents is expected to be genetically related to the child; the surrogate’s husband, if any, signs the agreement; the parties have received counseling regarding surrogacy; and the agreement is not substantially detrimental to any affected persons. *Id.*

87. Rodgers-Miller, *supra* note 17, at 295.

88. See VA. CODE ANN. § 20-156 (2008) (defining intended parents as “a man and a woman, married to each other”).

89. H.D. 1973, 1991 Gen. Assembly, Reg. Sess. (Va. 1991); see ASSISTED REPRODUCTION, *supra* note 84, at 3.

Court of Appeals of Virginia decision in *Welborn v. Doe*.⁹⁰ In *Welborn* a married couple used a third-party sperm donor to have a child, and the husband asserted parental rights over the child.⁹¹ The court held that the only way for the husband, who was not the biological father, to secure parental rights, was by divesting the rights of the third-party donor and enacting the parental rights of the husband through adoption.⁹²

The purpose of the USCACA, which Virginia adopted as its own, was to ensure that a child created by an ART had two legal parents when possible.⁹³ The National Conference of Commissioners on Uniform State Laws drafted the USCACA in 1988.⁹⁴ The committee's mission was "to effect the security and well-being of children born and living in our midst as a result of assisted conception," which included the "use of such limited and monitored surrogacy procedures as might be necessary to accomplish" the committee's instructions.⁹⁵ Under the provisions of the USCACA, the "intended parents" in a surrogacy agreement are restricted to "a man and woman, married to each other."⁹⁶ This requirement reflects the committee's goal of protecting the interests of the child by providing the child with two legal parents. However, this provision harms unmarried couples, including homosexuals, who wish to procreate using ARTs.⁹⁷

The statutory language of the Assisted Conception Act effectuates the purpose of ensuring a child has two legal parents, but discriminately limits these two parents to a man and woman who are married. The Assisted Conception Act begins with a list of definitions,⁹⁸ and the definition that stands as an obstacle to gay

90. *L.F. v. Breit*, 285 Va. at 175, 736 S.E.2d at 717 (citing *Welborn v. Doe*, 10 Va. App. 631, 394 S.E. 2d 732 (1990)).

91. *Id.* at 733.

92. *Id.*

93. Robert C. Robinson & Paul M. Kurtz, *Uniform Status of Children of Assisted Conception Act: A View From the Drafting Committee*, 13 NOVA L. REV. 491, 493 (1989); see UNIF. PARENTAGE ACT art. 7 (2002), available at http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf.

94. Robinson & Kurtz, *supra* note 93, at 491.

95. *Id.* at 492.

96. *Id.* at 490 (quoting UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, 9B U.L.A. § 1 (Supp. 1988)) (internal quotation marks omitted).

97. *Id.* at 496.

98. "Assisted conception" is defined as "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." VA. CODE ANN. § 20-156 (2008). Medical tech-

couples who wish to become parents through ARTs is the definition of “intended parents.”⁹⁹ Virginia Code section 20-156 defines “intended parents” through assisted conception as:

[A] man and a woman, married to each other, who enter into an agreement with a surrogate under the terms of which they will be the parents of any child born to the surrogate through assisted conception regardless of the genetic relationships between the intended parents, the surrogate, and the child.¹⁰⁰

Virginia Code section 20-160 allows circuit courts to approve surrogacy contracts that comply with a list of qualifications, including a surrogacy contract signed by the “intended parents,” the surrogate, and her husband.¹⁰¹ This section, read in connection with the definitions section, effectively prevents gay couples from forming a valid surrogacy contract under the statute. Section 20-160 also requires the intended parents, the surrogate, and her husband to fulfill the “standards of fitness applicable to adoptive parents” and requires the surrogate be married with at least one living child.¹⁰² The statute further requires the intended parents, the surrogate, and her husband to undergo physical and psychological evaluations before the surrogacy contract can be approved.¹⁰³ Additionally, the statute indicates that “[a]t least one of the intended parents is expected to be the genetic parent of any child resulting from the agreement.”¹⁰⁴ Section 20-160 then lists a number of requirements for the court to find in order to approve a surrogacy contract, and section 20-162 provides the circuit courts with guidance as to approval of contracts that do not necessarily meet all of those requirements.¹⁰⁵

The Virginia Code offers guidelines for how courts should treat surrogacy contracts not approved by the courts in sections 20-162 and 20-158. Section 20-162 allows the surrogate to finalize the

nologies the state considers to be “assisted conception” include “artificial insemination by donor, cryopreservation of gametes and embryos, in vitro fertilization, uterine embryo lavage, embryo transfer, gamete intrafallopian tube transfer, and low tubal ovum transfer.” *Id.* Additionally, the statute restricts the definition of “compensation” to medical and ancillary expenses and requires the surrogate to wait three days to release her parental rights. *Id.*; see *id.* § 20-162(A)(3) (Cum. Supp. 2013).

99. *Id.* § 20-156 (2008).

100. *Id.*

101. *Id.* § 20-160(A) (Cum. Supp. 2013).

102. *Id.* § 20-160(B) (Cum. Supp. 2013).

103. *Id.* § 20-160(B)(7) (Cum. Supp. 2013).

104. *Id.* § 20-160(B)(9) (Cum. Supp. 2013).

105. *Id.* §§ 20-160, -162 (Cum. Supp. 2013).

surrogacy contract if one of the intended parents is genetically related to the child by delivering the child to the intended parents and signing a consent form, or alternatively allows the surrogate to break the surrogacy contract by retaining her parental rights if she is genetically related to the child.¹⁰⁶ Under section 20-158(E), in a non-approved surrogacy contract, the genetic father of a child, often a gay man who donates his sperm, is precluded from any parental rights if the surrogate is married and decides to retain her parental rights.¹⁰⁷ Thus, in a non-approved surrogacy contract, if the surrogate is married, her husband is part of the contract, the surrogate is genetically related to the child, and the surrogate decides to retain her parental rights to the child, the intended parents, often the prospective gay dads, no longer have any parental rights over the child.¹⁰⁸ The surrogate and her husband in this circumstance would be considered the parents of the child.¹⁰⁹ Sections 20-162 and 20-158 thus allow the circuit court to deny a homosexual male his parental rights as result of these explicit provisions.¹¹⁰

B. *Parentage on Birth Certificates*

Virginia Code section 32.1-261 defines the requirements for a new birth certificate after adoption or proof of paternity.¹¹¹ The issuance of a new birth certificate after surrogacy or adoption is limited based on marital status.¹¹² Section 32.1-261 states that birth certificates for children born through surrogacy shall be issued in compliance with sections 20-160 and 20-158, which deny homosexuals parental rights.¹¹³

Virginia is required to issue a new birth certificate listing both of the partners as parents only if a state or foreign country has certified a decree of adoption that includes the same-sex couple as

106. *Id.* § 20-162(A)(3) (Cum. Supp. 2013); *see id.* § 20-158(D) (2008).

107. *Id.* § 20-158(E)(2) (2008).

108. *Id.*

109. *Id.*

110. Rodgers-Miller, *supra* note 17, at 297.

111. VA. CODE ANN. § 32.1-261 (2011).

112. *Id. But cf. Davenport v. Little-Bowser*, 611 S.E.2d 366, 371 (Va. 2005) (“[T]here is nothing in the statutory scheme that precludes recognition of same-sex couples as ‘adoptive parents.’”).

113. VA. CODE ANN. § 20-158 (2008); *id.* § 20-160 (Cum. Supp. 2013); VA. CODE ANN. § 32.1-261 (2011).

parents.¹¹⁴ Virginia requires that the State Registrar establish a new birth certificate for those born out of state if an adoption report from any state or foreign country or a certified decree of adoption is supplied.¹¹⁵ This provision allows homosexual couples to be legal parents of a child together if they had a second-parent adoption in another state and then moved to Virginia and requested a new birth certificate for their child. Under section 32.1-261, Virginia must then recognize that adoption on the new birth certificate.¹¹⁶

A new birth certificate can also be issued if there is evidence, as may be required by the Office of Vital Records, proving that paternity has been legitimated or that the Commonwealth has proven paternity of that person by final order.¹¹⁷ This provision allows for a gay man who is biologically related to a child to be placed on the birth certificate. Finally, the statute requires that, “[a] surrogate consent and report form as authorized by § 20-162. . . . contain[s] sufficient information to identify the original certificate of birth and to establish a new certificate of birth in the names of the intended parents.”¹¹⁸ This provision allows for married couples or single parents to be placed on the birth certificate, but not gay couples, since a court cannot approve their surrogacy contracts under sections 20-160 and 20-162.¹¹⁹

C. *The Assisted Conception Act and Homosexual Couples*

Same-sex couples do not fit within the confines of the Assisted Conception Act as parents.¹²⁰ Both Virginia Code sections 20-160 and 20-162 require that the intended parents are a party to the surrogacy contract, and section 20-156 requires that these intended parents be “a man and a woman, married to each other.”¹²¹ These provisions allow a court to approve a surrogacy contract based on marital status, preventing homosexual couples from en-

114. *Id.* § 32.1-261 (2011); see *Davenport*, 611 S.E.2d at 371, 372.

115. VA. CODE ANN. § 32.1-26.1 (2011).

116. *See id.*

117. *Id.*

118. *Id.*

119. *Id.* §§ 20-160, -162 (Cum. Supp. 2013).

120. *Id.* § 20-156 (2008).

121. *Id.*; *id.* §§ 20-160, -162 (Cum. Supp. 2013).

forcing a surrogacy contact.¹²² In effect, these provisions of the Assisted Conception Act affect homosexual couples, who cannot marry in Virginia,¹²³ by deeming them per se unfit parents.¹²⁴

Although the Assisted Conception Act discussed above only applies to married intended parents, there is no case law or statute that prohibits a single man from entering into an unapproved surrogacy agreement. Thus, either one of the partners of a homosexual couple can enter into a surrogacy contract as a single man in order to have a child.¹²⁵ If the intended father is genetically related to the child through the use of his sperm, then his name can be effortlessly placed on the child's birth certificate, as long as the surrogate is not married.¹²⁶ If the surrogate is married, then an Order of Parentage needs to be obtained, in which a DNA test establishes that the intended father *is* the biological father and the surrogate's husband is not.¹²⁷ If the intended father is, in fact, the biological father, then his name is placed on the child's birth certificate.¹²⁸ Getting the biological father's name on the birth certificate is the easy part.

In Virginia, getting the surrogate off the birth certificate as the mother while adding another a homosexual partner to the birth certificate is where the trouble begins.¹²⁹ Single-parent adoption allows the surrogate to be taken off the birth certificate if the intended father was not already named on the original birth certificate.¹³⁰ Also, if the surrogate is not genetically related to the child, an Order of Non-Parentage can remove the surrogate from the birth certificate.¹³¹

122. See *L.F. v. Breit*, 736 S.E.2d 711, 717, 721 (Va. 2013).

123. VA. CONST. art. 1, § 15-A.

124. *Rodgers-Miller*, *supra* note 17, at 297 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 446–47 (1972)).

125. *Assisted Reproductive Technology Options for Same-Sex Parents in Virginia*, QUINN LAW CENTERS, <http://www.quinnlawcenters.com/law-centers/adoption-and-surrogacy/reproduction/same-sex-options> (last visited Apr. 14, 2014) [hereinafter *ARTs for Same-Sex Parents*].

126. VA. CODE ANN. § 32.1-261(2) (2011).

127. *Id.* §§ 20-49.1, -49.8 (2008).

128. *Id.* § 20-49.8(C) (2008); *id.* § 32.1-269 (2008).

129. *ARTs for Same-Sex Parents*, *supra* note 125.

130. VA. CODE ANN. § 63.2-1201 (2012); *Assisted Reproductive Technology Options for Single Parents in Virginia*, QUINN LAW CENTERS, <http://www.quinnlawcenters.com/law-centers/adoption-and-surrogacy/reproduction/single-parent-optional> (last visited Apr. 14, 2014) [hereinafter *ARTs for Single Parents*].

131. *ARTs for Single Parents*, *supra* note 130. See generally VA. CODE ANN. § 20-158

A court can enter an Order of Non-Parentage after DNA testing establishing that the gestational carrier, a surrogate who carries a child from both a donated egg and sperm, is not the genetic parent of a child.¹³² This order terminates any claim by the surrogate for parental rights.¹³³ Failure to enter an Order of Non-Parentage would be a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article 1, section 1 of the Virginia Constitution.¹³⁴ If a man can use DNA testing to get relief from parental rights under the Virginia Code, then so should a woman.¹³⁵ Although this order is necessary to protect a surrogate's constitutional right, as of 2012, a Non-Parentage Order in Virginia has not been successfully executed.¹³⁶

Even if the surrogate is removed from the birth certificate, a gay couple cannot, under Virginia law, add the non-biologically related parent to the birth certificate because the couple is not married and there is no second-parent adoption in Virginia.¹³⁷ The best outcome available in Virginia is that the same-sex couple can request a Joint Custody and Co-Guardianship Order by a court, but entry of this order is at the court's discretion and it still does not establish both gay dads as parents.¹³⁸ Additionally, Virginia does not allow second-parent adoptions for any couple—gay or straight.¹³⁹ For the second parent to be added to the birth certificate, the family must move to another state that allows second-parent adoption.¹⁴⁰ Then the second parent, gay or straight, can be added to a birth certificate after the couple moves back to Virginia, because the Full Faith and Credit Clause forces the Department of Vital Records to abide by the other state's adoption order.¹⁴¹ This is an option for homosexual couples to establish legal parentage, but it is not reasonable since it requires the couples to

(2008); Colleen Quinn, *The Single's & Same-Sex Couple's Guide to Building a Family in Virginia*, GAYRVA.COM (July 30, 2012), <http://www.gayrva.com/lifestyle/the-singles-same-sex-couples-guide-to-building-a-family-in-virginia/>.

132. *ARTs for Same-Sex Parents*, *supra* note 125; Quinn, *supra* note 131.

133. Quinn, *supra* note 131.

134. *Id.*

135. *Id.*

136. *Id.* Based on the author's research, there is no record of a successful Non-Parentage order as of 2014.

137. *See ARTs for Same-Sex Parents*, *supra* note 125.

138. *Id.*

139. *Id.*; Fenton & Fenton, *supra* note 75.

140. *ARTs for Same-Sex Parents*, *supra* note 125.

141. *Id.*

reside in another state for a period of time for the sole purpose of getting a second-parent adoption. Thus, homosexual male partners cannot attain legal parentage of a child together in Virginia because they are not married and there is no second-parent adoption.

V. *L.F. v. BREIT*

In January 2013, Virginia took a significant step towards recognizing the rights of unmarried parents who participate in assisted conception with the Supreme Court of Virginia's decision in *L.F. v. Breit*.¹⁴² In *Breit*, the court interpreted the Assisted Conception Act, Virginia Code sections 20-156 through 20-164, concluding that the right of a child to have two parents is more important than the state's goal in preserving and promoting traditional marriage.¹⁴³

A. *The Lower Court's Approach to Parentage of a Child Created Through ART*

In *L.F. v. Breit*, an unmarried father filed a petition for parentage of child he conceived with an unmarried mother through in vitro fertilization.¹⁴⁴ Beverley Mason and William D. Breit were in a long-term relationship and lived together several years as an unmarried couple when they decided to have a child together through in vitro fertilization using Breit's sperm and Mason's egg.¹⁴⁵ Prior to the child's birth, Mason and Breit filed a written custody and visitation agreement providing Breit with visitation rights and stating that those rights were in the best interest of the child.¹⁴⁶ On July 13, 2009, Mason gave birth to a daughter, L.F.¹⁴⁷ Breit was present at the birth and named on the birth cer-

142. See generally 736 S.E.2d 711 (Va. 2013).

143. *Id.* at 722; Andrew Vorzimier, *Unmarried Sperm Provider Has Constitutional Right to Assert Parental Rights*, THE SPIN DOCTOR (Jan. 14, 2013, 10:20 AM), <http://www.eggdonor.com/blog/2013/01/14/unmarried-sperm-provider-constitutional-assert-parental-rights/>.

144. *Breit*, 736 S.E.2d at 715.

145. *Id.*

146. *Id.* A written custody agreement, such as the one Breit and Mason entered into, is the same as what attorneys in Virginia are recommending to gay couples as their best outcome for joint parental rights in the state. See *Assisted Reproductive Technology Options*, *supra* note 125.

147. *Breit*, 736 S.E.2d at 715.

tificate as the father.¹⁴⁸ Breit and Mason named the child after Mason's paternal grandmother and Breit's maternal grandmother, and the couple hyphenated the child's last name as a combination of both their surnames.¹⁴⁹

After the child's birth, the couple entered a jointly executed "Acknowledgment of Paternity" agreement, which stated that Breit was the legal and biological father of the child.¹⁵⁰ Additionally, the couple mailed birth announcements together, naming both as parents to the child.¹⁵¹ They lived together as a family for the next four months.¹⁵² The couple then separated and Breit paid child support to Mason and maintained the child's health insurance.¹⁵³ Breit also established a relationship with the child by visiting her on weekends and holidays.¹⁵⁴

In August 2010, Mason terminated all contact between Breit and the child.¹⁵⁵ In response, Breit filed a petition for custody and visitation in the Juvenile and Domestic Relations District Court for the City of Virginia Beach and Mason responded with a motion to dismiss.¹⁵⁶ The court dismissed Breit's petition without prejudice.¹⁵⁷ Breit then filed a petition to determine parentage and establish custody and visitation in the Circuit Court for the City of Virginia Beach under Virginia Code section 20-49.2.¹⁵⁸ Breit filed a motion for summary judgment, in which he argued that the written Acknowledgment of Paternity that he and Mason agreed to under Virginia Code section 20-49.1(B)(2) was binding in establishing his parental rights of the child.¹⁵⁹ The court denied his motion for summary judgment and dismissed by nonsuit the remainder of his petition seeking custody and visitation.¹⁶⁰ Breit appealed.¹⁶¹ The court of appeals reversed the circuit court's deci-

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 715-16.

159. *Id.* at 716.

160. *Id.*

161. *Id.*

sion.¹⁶² The court of appeals held that a sperm donor is not barred from filing a parentage action to establish paternity of a child of assisted conception when the donor donated for the purpose of having a child with the mother and the mother entered into the Acknowledgment of Paternity voluntarily.¹⁶³

An explanation of the court's reasoning requires a brief overview of Virginia Code sections 20-49.1(B)(2) and 20-158(A)(3). Section 20-158(A)(3) states that a sperm donor cannot be the parent of child conceived through assisted conception, unless the donor is the husband of the gestational mother.¹⁶⁴ Section 20-49.1(B)(2) states that a parent and child relationship between a child and a man can be established in a written Acknowledgment of Paternity agreement between the mother and father.¹⁶⁵ The court of appeals "harmonized" section 20-49.1(B)(2) and the written "Acknowledgment of Paternity" agreement entered into by the couple, with section 20-158(A)(3).¹⁶⁶ The court noted that this result was necessary to ensure consistency with the "the intent of the legislature to ensure that all children born in the Commonwealth have a known legal mother and legal father."¹⁶⁷ The court concluded that it would be ridiculous to preclude a father from establishing legal parentage of a child conceived by assisted conception just because he was considered a "donor."¹⁶⁸

Mason appealed to the Supreme Court of Virginia, arguing that the court of appeals erred in "harmonizing" these two Virginia Code sections.¹⁶⁹ Mason also argued that the Acknowledgment of Paternity entered into by the couple was void and that Breit lacked standing for asserting parentage.¹⁷⁰ Breit argued that Virginia Code sections 20-158(A)(3) and 32.1-257(D) are unconstitutional because they violate Breit's protected "liberty rights of equal protection and due process."¹⁷¹

162. *Id.* (citing *Breit v. Mason*, 718 S.E.2d 482, 489 (Va. Ct. App. 2011)).

163. *Id.* (quoting *Mason*, 718 S.E.2d at 489).

164. VA. CODE ANN. § 20-158(A)(3) (2008).

165. *Id.* § 20-49.1 (2008).

166. *Breit*, 736 S.E.2d at 716 (citing *Mason*, 718 S.E.2d at 489).

167. *Id.*

168. *Id.* (citing *Mason*, 718 S.E.2d at 489).

169. *Id.*

170. *Id.*

171. *Id.*

B. *The Supreme Court of Virginia's Opinion*

The Supreme Court of Virginia disagreed with Mason's argument that Breit had no parental rights because Breit was never married to Mason and the child was conceived through assisted conception. The court held that the Due Process Clause of the Fourteenth Amendment protects the unmarried father's fundamental right to the care, custody, and control of his child, despite his marital status.¹⁷² The court emphasized that Breit was an involved and interested parent who voluntarily executed an Acknowledgment of Paternity with the child's mother.¹⁷³

1. The Virginia Assisted Conception Act

The Supreme Court of Virginia rejected Mason's argument that the Assisted Conception Act be interpreted under its plain meaning. Virginia Code section 20-164 states, "A child whose status as a child is declared or negated by [chapter 9] is the child only of his parent or parents as determined under this chapter . . . and, when applicable, . . . § 20-49.1 et seq. . . . for all purposes"¹⁷⁴ The court found that Mason's argument neglected this provision of the statute, and since section 20-164 explicitly references section 20-49.1, the two sections must be read in "harmony" with one another.¹⁷⁵ Section 20-49.1 provides guidelines for how a parent-child relationship may be established between a child and a man. The section allows a man to establish parentage over a child if there is a "voluntary written statement of the father and mother made under oath acknowledging paternity."¹⁷⁶ Mason and Breit entered into one of these agreements after the child's birth.¹⁷⁷

The court also rejected Mason's argument that, despite a mention of Virginia Code section 20-49.1 in the Assisted Conception Act, the written agreement is null and void under the plain meaning of section 20-49.1¹⁷⁸ Mason claimed that section 20-49.1 is only applicable to existing parent-child relationships, not to the estab-

172. *Id.* at 721.

173. *Id.* at 721–22.

174. *Id.* at 718 (quoting VA. CODE ANN. § 20-164 (Cum. Supp. 2013)).

175. *Id.* at 718, 720.

176. VA. CODE ANN. § 20-49.1(B) (2008).

177. *Breit*, 736 S.E.2d at 715.

178. *Id.* at 718.

lishment of new parentage rights.¹⁷⁹ The court disagreed, concluding that the statute expressly allows for parentage rights to be initially established with a written agreement under section 20-49.1.¹⁸⁰

Mason also argued that Breit should be denied parental rights despite the Acknowledgment of Paternity entered into under section 20-49.1 because unmarried sperm donors cannot establish parental rights under section 20-158(A)(3).¹⁸¹ The court harmonized sections 20-158(A)(3) and 20-49.1(B) because section 20-49.1 is referenced in the Assisted Conception Act and section 20-158(A)(3) is a part of that act.¹⁸² The court noted that the two statutes must be read together so as to avoid conflict since they address the same subject.¹⁸³ The court determined that sections 20-49.1(B)(1) and 20-158(A)(3) conflict, because under section 20-49.1(B)(1), a gestational mother could force parental responsibilities on a sperm donor, or under section 20-49.1(B)(1) a sperm donor, could establish parental rights above the mother's objection, which would go against the intent of the statute.¹⁸⁴ Thus, the court concluded that the sperm donor, aided only by the results of genetic testing, may not establish parentage.¹⁸⁵ However, the use of Virginia Code section 20-49.1(B)(2), as with the voluntary agreement used by the couple in this case, does not cause a conflict with Virginia Code section 20-158(A)(3).¹⁸⁶

The court stated that although the Assisted Conception Act was written with married couples in mind, its purpose is to protect cohesive family units from third-party donors' potential intrusion.¹⁸⁷ Breit is not the third-party intruder that the Act was meant to exclude, because Breit was the person whom Mason originally intended to be the child's father, she treated Breit as the child's father for a length of time, and she voluntarily acknowledged Breit as the legal father in the Acknowledgment of

179. *Id.*

180. *Id.*

181. *See id.* at 719.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 720.

Paternity.¹⁸⁸ Breit also had a relationship with the child, and provided for her financially, until Mason cut him out of the child's life.¹⁸⁹ The court determined that Mason, Breit, and the child were a "family unit" protected by the statute.¹⁹⁰ Thus, the court applied Virginia Code section 20-49.1(B)(2).¹⁹¹

2. Equal Protection and Due Process

The court next addressed Breit's argument regarding a violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. The court held that the Assisted Conception Act does not violate the Equal Protection Clause but, if not harmonized with a statute that allows an unmarried father parentage rights, would violate the Due Process Clause.¹⁹² Breit argued, and the court agreed, that if the Assisted Conception Act was applied as Mason wished, without being in harmony with Virginia Code section 20-49.1, the Act would have violated his constitutionally protected right to make decisions concerning the "care, custody, and control of his child."¹⁹³

The parent-child relationship is protected under the Due Process Clause.¹⁹⁴ Both married and unmarried fathers enjoy this right by showing "a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child."¹⁹⁵ Thus, since Breit showed a commitment to raising and having a relationship with the child, the court held that Breit had the fundamental right to make decisions concerning the child's "care, custody and control, despite his status as an unmarried donor."¹⁹⁶ The court stated that, "[s]imply put, there is no compelling reason why a responsible, involved, unmarried, biological parent should never be allowed to establish legal parentage of her or his child

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 721–22.

193. *Id.* at 721.

194. *Id.* at 721 (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Wyatt v. McDermott*, 725 S.E.2d 555, 558 (Va. 2012); *Copeland v. Todd*, 715 S.E.2d 11, 19 (Va. 2011)).

195. *Id.* (quoting *Lehr v. Robertson*, 463 U.S. 248, 261 (1983)).

196. *Id.* at 722.

born as a result of assisted conception.”¹⁹⁷ The court concluded that “[d]ue process requires that unmarried parents such as Breit, who have demonstrated a full commitment to the responsibilities of parenthood, be allowed to enter into voluntary agreements regarding the custody and care of their children.”¹⁹⁸ The court stated that

it is incumbent on courts to see that the best interests of a child prevail, particularly when one parent intends to deprive the child of a relationship with the other parent. “The preservation of the family, and in particular the parent-child relationship, is an important goal for not only the parents but also government itself”¹⁹⁹

The court also noted that preventing Breit’s name from appearing on the birth certificate violated the Due Process Clause.²⁰⁰ The court noted that the purpose of the birth certificate is to show an intended parent-child relationship and under Virginia Code section 32.1-257(D), Breit was entitled to have his name listed on the child’s birth certificate.²⁰¹

In conclusion, the Supreme Court of Virginia upheld the court of appeals’ decision that Breit was entitled to parental rights over the child, despite the fact that Breit was not married to the child’s mother.²⁰² In doing so, the court took a big step in family law by putting the value of a child having two parents above the state’s motive in promoting and preserving traditional marriage. In response to *L.F. v. Breit*, the Virginia General Assembly codified the opinion in Virginia Code section 1-240.1, the Rights of Parents Act.²⁰³ Section 1-240.1 states, “A parent has a fundamental right to make decisions concerning the upbringing, education, and care of the parent’s child.”²⁰⁴

197. *Id.*

198. *Id.*

199. *Id.* at 723 (quoting *Weaver v. Roanoke Dep’t of Human Res.*, 265 S.E.2d 692, 695 (Va. 1980)).

200. *Id.* at 723–24.

201. *Id.* at 724.

202. *Id.*

203. VA. CODE ANN. § 1-240.1 (Cum. Supp. 2013) (“That it is the expressed intent of the General Assembly that this act codify the opinion of the Supreme Court of Virginia in *L.F. v. Breit*, issued on January 10, 2013, as it relates to parental rights.”).

204. *Id.*

VI. APPLICATION OF *L.F. v. BREIT* TO GAY COUPLES

The decision in *L.F. v. Breit* regarding unmarried parents' parental rights and the subsequent Rights of Parents Act should open the door not only to unmarried heterosexual parents, but also to homosexual parents who seek to have a child through assisted conception. Both parents should be allowed to enter into binding surrogacy agreements and both parent's names should be allowed to be placed on birth certificates, granting them parental rights. The Due Process Clause should require that a gay man, similar to the father in *Breit*, who is unmarried but has demonstrated a full commitment to parenthood, be allowed to enter into voluntary agreements regarding the custody and care of his children, even if he is not biologically related to the child.²⁰⁵

A. *The Parent-Child Relationship Is a Fundamental Right for Parents and Children Regardless of Biological Connection*

A gay male parent who has demonstrated a commitment to the responsibilities of raising a child should have the protection of the Due Process Clause in his relationship with his child. As the *Breit* court stated, "[t]he relationship between a parent and child is a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment."²⁰⁶ The United States Supreme Court has recognized that parental rights do not arise solely from the biological link between the child and parent.²⁰⁷ Instead, "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the Due Process Clause."²⁰⁸

Many states, such as Wisconsin and New Jersey, have recognized third parties, who have neither adopted nor are biologically related to the child, as legal parents under a psychological parent

205. Cf. *Breit*, 736 S.E.2d at 722 (ruling that due process requires that unmarried parents who demonstrate a commitment to parenthood be allowed to enter into voluntary custody agreements).

206. *Id.* at 721 (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Wyatt v. McDermott*, 725 S.E.2d 555, 558 (Va. 2012)).

207. *Id.* (citing *Lehr v. Robertson*, 463 U.S. 248, 261 (1983)).

208. *Id.* (quoting *Lehr*, 463 U.S. at 261).

standard.²⁰⁹ In *V.C. v. M.J.B.*, for example, the Supreme Court of New Jersey set a standard that allows “all persons who have willingly, and with the approval of the legal parent, undertaken the duties of a parent to a child not related by blood or adoption” to have parental rights.²¹⁰ The court adopted the de facto parenting test created in the Wisconsin Supreme Court case *Holtzman v. Knott*.²¹¹ This test established four necessary elements for de facto parenting: (1) the legal parent consented to the parent-like relationship with the third party; (2) the third party and the child lived in the same household; (3) the petitioner assumed the responsibilities of a parent by taking care of the child by supporting the child’s education and development and by providing financial support; and (4) the third party has had a relationship with the child long enough to have established a “bonded, dependent relationship parental in nature.”²¹² An individual parent who meets these elements and who has neither adopted nor is biologically related to the child can be granted similar parental rights to biologically related or adoptive parents.²¹³ Granting parental rights through this de facto test allows the state to remain unbiased towards those of various sexual orientations, while also preserving the state’s interest in maintaining the family.

The Supreme Court of Virginia determined that parental rights should apply to Breit as the unmarried father of the child because he had shown a “full commitment to the responsibilities of parenthood.”²¹⁴ By adopting this standard, the court acknowledged that something beyond genetics is needed to establish parentage of a child born through ART. Virginia should take the court’s decision a step further. Virginia should join other states such as New Jersey and Wisconsin and establish a psychological parent standard when determining parental rights. This standard should look at the responsibilities the parent is willing to take on and the relationship between the parent and the child, regardless of genetic connection.²¹⁵ The court in *Breit* stated, “we

209. See, e.g., *V.C. v. M.J.B.*, 748 A.2d 539, 541–42 (N.J. 2000); *Holtzman v. Knott (In re Custody of H.S.H.-K.)*, 533 N.W.2d 419, 421 (Wis. 1995).

210. *Id.* (footnote omitted).

211. *Id.* at 551 (citing *Holtzman*, 533 N.W.2d at 421).

212. *Id.* (quoting *Holtzman*, 533 N.W.2d at 421).

213. See *Holtzman*, 533 N.W.2d at 420–21, 436–37 (discussing parental rights for a non-biological parent in the context of visitation rights).

214. *L.F. v. Breit*, 736 S.E.2d 711, 722 (Va. 2013).

215. *Cf. V.C. v. M.J.B.*, 748 A.2d 539, 550–51 (N.J. 2000) (laying out standards to be-

recognize that children also have a liberty interest in establishing relationships with their parents.”²¹⁶ If this is true, by not establishing a psychological parent standard or something similar, Virginia is denying many children, raised by gay dads, their liberty interest in having a relationship with both of their parents. Restricting a child to one legal parent when, in fact, the child is being raised by two caring adults, clearly violates this liberty interest.

As the Supreme Court of Virginia applied this protection to a parent-child relationship under the Due Process Clause to *Breit*, so too should Virginia apply this protection to gay dads. *Breit*'s commitment to parenthood as a biological father is no different from a non-biological father who has shown a “full commitment to the responsibilities of parenthood.”²¹⁷ The sexual orientations of *Breit* and a gay parent have no effect on their ability to commit to parenthood. Thus, like in *Breit*, the Due Process Clause should protect gay male fathers' fundamental right to make decisions concerning the “custody and care of their child” regardless of their genetic relation to their child.²¹⁸

B. *Equal Protection for Parent-Child Relationship of Gay Fathers Post-Windsor*

The protection provided by the Due Process Clause for the parent-child relationship of unmarried fathers should extend to gay fathers because granting the protection to an unmarried straight father who had a child through ARTs and not an unmarried gay man raising a child conceived by ARTs would be to withhold this right based on sexual orientation.

Although equal protection jurisprudence does not prohibit the states from treating various classes and groups of people differently, those classifications must be reasonable.²¹⁹ Even though the United States Supreme Court has not recognized sexual orienta-

come a psychological parent).

216. *Breit*, 736 S.E.2d at 723 (citing *Commonwealth ex rel. Gray v. Johnson*, 376 S.E.2d 787, 791 (Va. Ct. App. 1989)).

217. *Id.* at 721.

218. *Id.* at 722.

219. *See Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)) (internal quotation marks omitted); *Rodgers-Miller*, *supra* note 17, at 298.

tion as a suspect class, homosexuals have been the victims of hate crimes and have been publicly ostracized for decades, qualifying them as a politically unpopular group.²²⁰ In *United States v. Windsor*, the Court held “[t]he Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.”²²¹ To bar a father who is fully committed to raising his child created through assisted conception from due process protection of his parent-child relationship simply because of his sexual orientation would be to harm him based on his sexual orientation. The Equal Protection Clause should allow gay fathers of children conceived through ARTs the due process protection provided in Virginia Code section 1-240.1.²²²

The *Windsor* Court additionally stated that responsibilities and rights enhance the dignity of people, and to deprive people of their rights and responsibilities unequally creates instability.²²³ As the Court wrote, the federal Defense of Marriage Act (“DOMA”) demeaned same-sex couples and humiliated the tens of thousands of children being raised by these couples in not recognizing their legal marriages.²²⁴ “The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”²²⁵

This reasoning should be applied to parental rights as well. To bar children from having two legal parents even though they are being raised and cared for by two parents is a state-imposed form of humiliation and discrimination. Restricting children to only one legal parent also makes it more difficult for children to understand the integrity of the family. They may not understand why they are prevented from having two legal parents simply because their parents are homosexual, while other children with heterosexual parents are allowed two legal parents. Similar to

220. See *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (“*Romer* nowhere suggested that the Court recognized [homosexuals as] a new suspect class.”); *Rodgers-Miller*, *supra* note 17, at 299–300.

221. *United States v. Windsor*, 570 U.S. ___, ___, 133 S. Ct. 2675, 2693 (2013) (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

222. VA. CODE ANN. § 20-156 (2008); *id.* §§ 20-160, -162 (Cum. Supp. 2013).

223. *Windsor*, 570 U.S. at ___, 133 S. Ct. at 2694.

224. *Id.* at ___, 133 S. Ct. at 2694.

225. *Id.* at ___, 133 S. Ct. at 2694.

DOMA creating second-tier marriages, the Assisted Conception Act creates second-tier families.²²⁶ To bar a child from two legal parents simply because of his or her parents' sexual orientation is discrimination and should be seen as causing humiliation for children being raised by these parents in the eyes of the state.

In the recent case of *Bostic v. Rainey*, the United States District Court for the Eastern District of Virginia held that Virginia's laws banning same-sex marriage are unconstitutional.²²⁷ The court rejected the Commonwealth's argument that parenting is a legitimate reason for banning same-sex couples from marrying.²²⁸ In defending Virginia's marriage laws, proponents argued that "responsible procreation" and "optimal childrearing" are sufficient state interests to allow Virginia to prohibit same-sex couples from marrying.²²⁹ The Commonwealth contended that natural parents should also be the legal parents.²³⁰ In disagreeing with this argument the court stated:

[T]he welfare of our children is a legitimate state interest. However, limiting marriage to opposite-sex couples fails to further this interest. Instead, needlessly stigmatizing and humiliating children who are being raised by the loving couples targeted by Virginia's Marriage Laws betrays that interest. . . . [T]housands of children being raised by same-sex couples, [are] needlessly deprived of the protection, the stability, the recognition and the legitimacy that marriage conveys.²³¹

The court noted that homosexual couples are just as capable of raising children as heterosexual couples, and to hold otherwise is "unconstitutional, hurtful and unfounded."²³² The court further opined that, "state-sanctioned preference for one model of parenting that uses two adults over another model of parenting that uses two adults is constitutionally infirm."²³³

This rationale regarding parenting and marriage laws should apply to the Assisted Conception Act. Similar to limiting marriage to only between a man and woman, narrowly defining in-

226. See *id.* at ___, 133 S. Ct. at 2694.

227. *Bostic v. Rainey*, No. 2:13cv395, 2014 WL 561978, at *23 (E.D. Va. Feb. 13, 2014).

228. *Id.* at *17-18.

229. *Id.* at *17 (internal quotation marks omitted).

230. *Id.* at *18.

231. *Id.* at *18.

232. *Id.* at *18-19.

233. *Id.* at *19.

tended parents in Virginia Code section 20-156 to only a married man and woman is unconstitutional because it essentially asserts that homosexual couples cannot be good parents.²³⁴ As the Eastern District Court of Virginia stated, homosexual couples are just as capable of being good parents as heterosexual couples.²³⁵ Denying children the ability to have two legal parents under the Assisted Conception Act deprives them of the protection, stability, and legitimacy that having two legally-recognized parents provides.²³⁶ Children deserve to have the benefits and security of two legal parents and denying that benefit discriminates against these children based on the sexual orientation of their parents. If the state holds the welfare of children as an interest, then the state must remedy this humiliation and discrimination by allowing children of gay couples to have two legal parents through second-parent adoption or revision of the Assisted Conception Act.

C. *Surrogacy Agreements and Birth Certificates Should Be Constitutionally Protected*

In *L.F. v. Breit*, the Supreme Court of Virginia held that “[d]ue process requires that unmarried parents such as Breit, who have demonstrated a full commitment to the responsibilities of parenthood, be allowed to enter into voluntary agreements regarding the custody and care of their children.”²³⁷ The court determined that not allowing Breit to enter into a Virginia Code section 29-49.1 agreement and denying him parentage on the birth certificate merely because he is an unmarried sperm donor for a child conceived through ARTs violates his constitutionally protected right to a parent-child relationship.²³⁸

This reasoning should also be applied to surrogacy agreements. By not allowing a homosexual male, especially one who is not genetically related to a child conceived through ARTs, to enter into an approved surrogacy contract in Virginia because he cannot fulfill the definition of “intended parents” precludes him from a legal means of establishing parentage of his child should the surrogate decide to maintain her parental rights. This prohibition should

234. VA. CODE ANN. § 20-156 (2008).

235. *Bostic*, 2014 WL 561978, at *18.

236. *Id.*

237. 736 S.E.2d 711, 722 (Va. 2013).

238. *Id.*

not withstand constitutional scrutiny. An unmarried homosexual male who has demonstrated a full commitment to raising a child should be free to enter into an approved agreement with a surrogate in order to retain his constitutionally protected parent-child relationship, and it should reflect a pure intent perspective.

The intent test was established in *Johnson v. Calvert*, a California case from 1993.²³⁹ In this case, the intent test was used to determine maternal parentage when, under state law, two women qualified to be the mother of one child.²⁴⁰ Intent is determined by who was responsible for the initial fertilization of the embryo and who initially intended to raise the child.²⁴¹ It is also known as the “but for” test—but for the intended mother’s acted-on intention, the child would not be in existence.²⁴² This standard allows the truly intentional parents, regardless of gender, sexual orientation, or marriage status, to gain parental rights. The intent test directly affects the parties’ constitutional claims.²⁴³ Since gestational carriers or mere donors are not the “but for” factor creating the child, they are barred from claims for parental rights under the Constitution.²⁴⁴ The intent test is an unambiguous and neutral standard for establishing parentage that assures parties to surrogacy agreements that the intended outcome will be undeterred.²⁴⁵

By adopting the intent test as applied in *Johnson*, Virginia would eliminate many issues surrounding surrogacy agreements and parentage rights for gay couples. If the law defined parents of the child born by ARTs as the parties whose intent was the reason the child was born, regardless of the parties’ gender, marital status, or sexual orientation, then the surrogacy agreement would be protected under the constitution from outsider’s claims for parental rights.

Finally, the analysis regarding the father’s right to appear on the birth certificate under the Fifth Amendment in *L.F. v. Breit* should also apply to any intended fathers under Virginia Code

239. *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

240. *Id.* at 779; Dana, *supra* note 15, at 367.

241. *Johnson*, 851 P.2d at 782; Dana, *supra* note 15, at 367.

242. *Johnson*, 851 P.2d at 782; Dana, *supra* note 15, at 367.

243. See Dana, *supra* note 15, at 368.

244. *Id.*

245. *Id.* (citations omitted).

section 32.1-257(D).²⁴⁶ Preventing an unmarried gay father from appearing on the birth certificate violates his constitutionally protected right to a parent-child relationship since parentage on a birth certificate shows intent of a parent-child relationship.²⁴⁷

VII. RECOMMENDATIONS AND CONCLUSION

The definition of “intended parents” in the Assisted Conception Act violates gay male couples’ constitutionally protected right to a parent-child relationship. To remedy this constitutional violation, Virginia should amend the definition of “intended parents” in the Assisted Conception Act so that unmarried gay males may enter into approved surrogacy agreements in Virginia.²⁴⁸ The definition of “intended parents” in Virginia Code section 20-156 should be amended to simply reflect the intent of the parties, rather than marital status, genetic relationship to the child, or gender status in establishing parentage. The statute should state that “intended parents” are individuals whose intent is to create a child, and without whom no parent-child relationship would exist. This would overcome the constitutional violation of an unmarried male’s right to make decisions concerning his child’s interests, regardless of his genetic relationship to the child, because he would now be able to enter into an approved surrogacy agreement with the protections those contracts provide in Virginia.

Another potential solution is to allow second-parent adoption in Virginia. Senator Janet D. Howell sponsored Senate Bill 336, which would allow for a second-parent adoption.²⁴⁹ This bill came before the Virginia General Assembly in January 2014.²⁵⁰ The bill states:

[a] person other than the parent of a child may adopt a child if (i) . . . the child had only one parent or the child is the result of surrogacy and the surrogate or carrier consents to the adoption, (ii) the petition does not seek to terminate the parental rights of the parent of the

246. VA. CODE ANN. § 32.1-257(D) (Cum. Supp. 2013).

247. See *L.F. v. Breit*, 736 S.E.2d 711, 724 (Va. 2013).

248. Rodgers-Miller, *supra* note 17, at 314.

249. S. 336, Gen. Assembly, Reg. Sess. (Va. 2014); *Bills to Allow Second Parent Adoption Head to 2014 GA with Bi-Partisan Support*, GAYRVA.COM (Jan. 10, 2014), <http://www.gayrva.com/news-views/bills-to-allow-second-parent-adoption-head-to-2014-ga-with-bi-partisan-support/> [hereinafter *Bills to Allow Second Parent Adoption*].

250. S. 336, Gen. Assembly, Reg. Sess. (Va. 2014); *Bills to Allow Second Parent Adoption*, *supra* note 249.

child, and (iii) the parent of the child joins the petition for the purpose indicating consent.²⁵¹

The purpose of this bill is to provide security to children of both straight and gay couples living in two-parent families with only one legal parent.²⁵² This bill would create an option for a gay dad, who is not genetically related to his child, to gain parental rights alongside his partner.²⁵³ On January 24, 2014, the bill was deadlocked in the Senate and thus killed during the 2014 legislative session.²⁵⁴

If Virginia values a child's right to have two parents over its interest in promoting traditional marriage, the Commonwealth must redefine the Assisted Conception Act or approve second-parent adoption. Virginia should allow for a child to have two fully committed gay fathers rather than restricting a child to only one legal gay parent.²⁵⁵

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251. S. 336, Gen. Assembly, Reg. Sess. (Va. 2014); *Bills to Allow Second Parent Adoption*, *supra* note 249.

252. *Bills to Allow Second Parent Adoption*, *supra* note 249.

253. *Id.*

254. John Riley, *Virginia Senate Kills Second-Parent Adoption Bill*, METROWEEKLY (D.C.), (Jan. 24, 2014), <http://www.metroweekly.com/poliglot/2014/01/virginia-senate-slau-ghters-second-parent-adoption.html>.

255. L.F. v. Breit, 736 S.E.2d 711, 721 (Va. 2013).

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