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## NOTE

### LEAVE IT TO BEAVER MEETS MODERN FAMILY: AN ANALYSIS OF *L.F. V. BREIT* IN THE CONTEXT OF THE CHANGING FAMILY

Joshua K. Drysdale<sup>†</sup>

#### I. INTRODUCTION

The definition of “family” is changing in American society, and children are helplessly caught in the crossfire. America’s family unit is shifting from a *Leave it to Beaver*<sup>1</sup> traditional family unit to one more accurately depicted in the hit-show *Modern Family*.<sup>2</sup> In an age when divorce is more and more common,<sup>3</sup>

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1. *Leave it to Beaver*, IMDB.COM, <http://www.imdb.com/title/tt0050032/> (last visited Feb. 18, 2015) (involving the “All-American” traditional family unit).

2. *Modern Family: Plot Summary*, IMDB.COM, [http://www.imdb.com/title/tt1442437/plotsummary?ref\\_=tt\\_stry\\_pl](http://www.imdb.com/title/tt1442437/plotsummary?ref_=tt_stry_pl) (last visited Feb. 18, 2015) (involving divorce, rebellious children, and homosexual parenting).

3. The Centers for Disease Control and Prevention (CDC) maintains the National Vital Statistics System which tracks national marriage and divorce rate trends based on State records. Due to “[l]imitations in the information collected by the States as well as budgetary considerations[,]” the CDC stopped collecting detailed data for the total numbers and rates of marriages and divorces throughout the United States. See CDC, MARRIAGES AND DIVORCES, <http://www.cdc.gov/nchs/mardiv.htm> (last visited Jan. 24, 2015). As such, the divorce rates the CDC produces are littered with fallacies. That said, according to the CDC, 6.8 people out of 1,000 were married in 2011 (not including statistics from Louisiana), but 3.6 marriages out of 1,000 faced divorce or annulments in 2011 (not including statistics from California, Georgia, Hawaii, Indiana, Louisiana, and Minnesota). CDC, NATIONAL MARRIAGE AND DIVORCE RATE TRENDS, [http://www.cdc.gov/nchs/nvss/marriage\\_divorce\\_tables.htm](http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm) (last visited Jan. 24, 2015). The United States Census Bureau also tracks marriage and divorce rates, but does so through survey, not official records. CDC, MARRIAGES AND DIVORCES, <http://www.cdc.gov/nchs/mardiv.htm> (last visited Feb. 21, 2015). Many of the surveys conducted by the Census Bureau only track data for the particular year in question, i.e. the divorce rate of 9.2 among men and 9.7 among women in 2009 only accounts for the men and women who actually got a divorce in 2009; it does not account for the total number of marriages that have ended in divorce prior to and including 2009. See UNITED STATES CENSUS BUREAU, MARITAL EVENTS OF AMERICANS: 2009, 3 <http://www.census.gov/prod/2011pubs/acs-13.pdf> (last visited Jan. 24, 2015). Given the statistical

children born out of wedlock are more prevalent,<sup>4</sup> same-sex couples have growing “families,”<sup>5</sup> and artificial procreation methods are far more prevalent,<sup>6</sup> it is vitally important that we understand the nature of the “modern family.”

This change in society’s view of the “family” is evident not only in society at large, but also in the courtroom. In Kansas, a sperm donor who provided sperm in a cup to a lesbian couple after reading their listing on Craigslist was ordered to pay child support to the biological mother after the two women split up nearly five years later.<sup>7</sup> In Michigan, a wife with no biological relation to her husband’s child was given custody of the child after her husband died because the biological mother had a history of drug abuse, lived in an abusive home, and tested positive for cocaine on the day of the evidentiary hearing.<sup>8</sup> In Pennsylvania, trial courts are not allowed to consider the effects of homosexual parenting in custody cases unless specific facts of the case point to an adverse effect on the children.<sup>9</sup> These are just a few examples of the cases courts are hearing.<sup>10</sup> Further, despite the efforts of some state

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flaws, it is difficult to determine an exact divorce rate in the United States, which is a matter of concern in and of itself. *See infra* Part III.B.1.a. Some organizations cite the divorce rates as high as 40-50%. AMERICAN PSYCHOLOGICAL ASSOCIATION, MARRIAGE & DIVORCE, <http://www.apa.org/topics/divorce/> (last visited Jan. 24, 2015). *Contra* Brittany Wong, *The Truth About the Divorce Rate is Surprisingly Optimistic*, HUFFINGTON POST (Dec. 2, 2014), [http://www.huffingtonpost.com/2014/12/02/divorce-rate-declining-\\_n\\_6256956.html](http://www.huffingtonpost.com/2014/12/02/divorce-rate-declining-_n_6256956.html) (claiming the divorce rate is actually dropping, but still acknowledging that, at its current “trend,” nearly 33% of marriages will end in divorce).

4. The current “proportion of all births to unmarried women” in 2012 was 40.7% and included significant increases among certain racial groups. NATIONAL VITAL STATISTICS REPORTS, BIRTHS: PRELIMINARY DATA FOR 2012, [http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62\\_03.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_03.pdf) (last visited on Jan. 24, 2015).

5. A 2013 study estimated that 111,000 same-sex couples were raising approximately 170,000 children at that time. Gary J. Gates, *LGBT Parenting in the United States*, THE UNIVERSITY OF CALIFORNIA SCHOOL OF LAW: THE WILLIAMS INSTITUTE (2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>.

6. *See generally* *Timeline: The History of In Vitro Fertilization*, AM. EXPERIENCE, <http://www.pbs.org/wgbh/americanexperience/features/timeline/babies/> (last visited Jan. 24, 2015).

7. Chandrika Narayan, *Kansas Court Says Sperm Donor Must Pay Child Support*, CNN.COM (Jan. 23, 2014), <http://www.cnn.com/2014/01/23/justice/kansas-sperm-donation/>.

8. *Kane v. Anjoski (In re Anjoski)*, 770 N.W.2d 1, 5-8 (Mich. Ct. App. 2009).

9. *M.A.T. v. G.S.T.*, 989 A.2d 11, 17-18 (Pa. Super. Ct. 2010). Of special note, the long-term effects of homosexual parenting are potentially substantial, but difficult to prove with specific facts of each particular case at a particular moment in time. *See infra* Part III.B.1.c.

10. These examples are obviously just a minor sampling of the daily challenges family law courts across the country face. The problem is not limited to the United States. The United Kingdom is on its way, at the time of this publication, to legalizing the artificial production of

legislatures to protect the *Leave it to Beaver* traditional family,<sup>11</sup> the United States Supreme Court recently held that homosexual couples have a “fundamental right to marry in all States.”<sup>12</sup>

These changing concepts of family present unique challenges for courts, which are tasked with navigating between changing social views on family and reproduction on the one hand, and the practical considerations of biological parentage, parental rights, and child well-being on the other. In 2013, the Supreme Court of Virginia decided a case that involved the interplay of several of these changing circumstances. Before exploring the facts and analysis of this case, however, picture this scenario.

Dan and Susan have been dating for six years. Due to Dan’s intense social phobias and fear of formal settings, they have never “tied the knot.” For all intents and purposes, however, they live as a married couple. They own a home where they both reside, have a monogamous intimate relationship, have joint bank accounts, and even have a family dog, Fido. For whatever reason, they also both wear wedding bands, presumably to ward off potential suitors. The fact remains, however, that they have never been legally married.

For the past four years, Dan and Susan have been actively trying to conceive a child. Unfortunately, their attempts have proven unsuccessful. Finally, Dan and Susan have decided that artificial insemination may be the answer to their childless woes. Unable to afford formal fertility treatment, Dan and Susan read about at-home artificial insemination techniques and decide to give it a try.<sup>13</sup> Each attempt has involved Dan’s sperm. After a few months, Susan becomes pregnant. The couple is overjoyed and they begin preparations to welcome their new child into the world. They send baby announcements to all of their friends and family. Susan’s friends throw her a baby shower, and Dan is relieved to discover that most everything they need for the new baby has been given to them. They attend prenatal doctor appointments together, even if Dan has to miss work to do so. Nine months later, Dan and Susan welcome a bouncing baby boy into the world. Life could not be better.

Dan and Susan continue life as usual after Timmy is born. Timmy has his own room in Dan and Susan’s home and lives as any happy boy should. Dan

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embryos using three different biological parents. See James Gallagher, *MPs Say Yes to Three-Person Babies*, BBC.COM (Feb. 3, 2015), <http://www.bbc.com/news/health-31069173>.

11. See *infra* Part II.B.

12. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

13. These at-home inseminations are actually quite common. See *At Home Artificial Insemination to Get Pregnant – Turkey Baster Method*, BABYMED.COM, <http://www.babymed.com/home-artificial-insemination-get-pregnant-turkey-baster-method> (last visited Oct. 24, 2015).

and Susan have recovered from the sleep deprivation and everything is going well. Four more years pass and Susan suddenly decides she's bored with her life. In a mindless search for adventure, she meets another man and runs off into the sunset with him, taking Timmy with her. Dan immediately seeks out an attorney to help him get Timmy back. Unfortunately for Dan, the process takes longer than he expected. Though his heart breaks daily over the loss of his son, he decides to try and meet another woman. Eventually, he meets someone else, gets over his fear of formal settings and decides to get married, and he and his new wife have twins. Meanwhile, Susan continues to avoid Dan at all costs, has left her one-night-stand boyfriend, and has started stripping to afford food for her and Timmy.

Despite his new marriage, Dan still passionately pursues custody of Timmy. Finally, Dan's attorney calls with the bad news. Virginia law does not consider Dan to be Timmy's father because Timmy was conceived using artificial insemination to get Susan pregnant while Dan and Susan were not married.<sup>14</sup> The attorney also informs Dan that since Dan and Susan never signed a contract stating that each of them would accept parental responsibilities for Timmy, Virginia law does not consider Dan to be Timmy's father. Dan is blindsided. Why would he think, in the midst of all the joy of welcoming his son into the world with his long-time love, to sign a contract with his partner and mother of his child? Since the attorney loves giving bad news, he also informs Dan that, even if Dan and Susan had signed this contract, Virginia courts would not be required to consider his current marital status, or Susan's lack thereof, when deciding whether Timmy can come back home with Dan.

This hypothetical is, unfortunately, all too real, for under current Virginia law the result is most likely to be the same.<sup>15</sup> In *L.F. v. Breit*, the court considered whether a man who donated his sperm to a woman with whom he was involved in a long-term relationship could pursue custody of the child conceived through artificial insemination after his relationship with the mother ended and the mother attempted to break all contact between him and the child.<sup>16</sup> This case, and the dicta included in the decision, has potentially lasting impacts on the way our judicial system decides intricate and delicate custody and visitation issues. In this note, I will highlight the case law and statutory history that predated *Breit*, evaluate the court's decision based on competing societal interests in preserving the family unit

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14. See *infra* Part III.A.

15. The facts have been slightly changed from the actual *Breit* case to allow for a more thorough analysis of Virginia law on the topic.

16. *L.F. v. Breit*, 285 Va. 163, 170-72 (2013).

and parental rights, and expand on two scenarios the court suggested would have changed the outcome of *Breit*: (i) a situation in which a written agreement had not been signed by both biological parents, or (ii) a change in marital status of either biological parent.<sup>17</sup> Finally, I recommend that the General Assembly consider changing Virginia law to incorporate clear and convincing evidence as a standard to establish paternity and require courts to consider the marital and familial status of individuals seeking custody and visitation of children. These recommendations fail to address the underlying problem of the crumbling traditional family unit, but both have the potential to salvage some aspects of it.

## II. BACKGROUND: TRACING THE STEPS FROM SUPREME COURT DECISIONS TO *L.F. V. BREIT*

Pivotal to a proper understanding of *Breit* is a complete understanding of the development of parental rights as recognized by the courts and how those conflict with or complement the preservation of the traditional family unit. The United States Supreme Court has held on numerous occasions that parental rights are fundamental.<sup>18</sup> The Supreme Court of Virginia has addressed fundamental parental rights in the context of the state's "significant interest in encouraging the institution of marriage."<sup>19</sup> The Virginia General Assembly has also expressed the same interests.<sup>20</sup>

### A. Case Law: The "Family" According to the Courts

#### 1. United States Supreme Court Decisions

##### a. *Meyer v. Nebraska*

In 1923, the United States Supreme Court held that parental rights were fundamental under the Due Process Clause of the United States Constitution.<sup>21</sup> *Meyer* considered the State of Nebraska's ability to restrict teaching in any school, private or public, to occur only in the English language prior to the student's attaining and passing the eighth grade.<sup>22</sup> Mr. Meyer was accused of violating a 1919 Nebraska state law that imposed this

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17. *Id.* at 183 n.8, 184-85.

18. *E.g.*, *Troxel v. Granville*, 530 U.S. 57 (2000).

19. *Breit*, 285 Va. at 181.

20. *See infra* Part II.B.

21. *Meyer v. Nebraska*, 262 U.S. 309, 399-400 (1923).

22. *Id.* at 396-97.

restriction after he taught a ten year-old to read German.<sup>23</sup> In holding that the statute violated the Due Process Clause,<sup>24</sup> the Court cited one's right to "establish a home and bring up children" as a "liberty" protected under the Fourteenth Amendment.<sup>25</sup> The Court further alluded to this fundamental right in holding that parents had the power to monitor the education "of their own [children]."<sup>26</sup>

b. *Pierce v. Society of Sisters*

Two years later, the Supreme Court reiterated this principle in *Pierce*. In that case, an Oregon statute mandated that "every parent, guardian, or other person having control or charge or custody of a child between eight and sixteen years . . . send him 'to a public school for the period of time a public school shall be held during the current year' in the district where the child reside[d] . . . ."<sup>27</sup> The Society of Sisters was an Oregon corporation that provided care for orphans and education for youth.<sup>28</sup> It maintained valuable facilities for its services, and the education it provided mirrored that taught in Oregon public schools.<sup>29</sup> The Compulsory Education Act of 1922, however, caused the Society to lose students to the public school system who would have otherwise continued using the Society's programs.<sup>30</sup> In holding the statute unconstitutional, the Court reasoned,

Under the doctrine of *Meyer v. Nebraska* . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. *The child is not the mere creature of the State*; those who nurture him

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23. *Id.*

24. *Id.* at 402.

25. *Id.* at 399.

26. *Id.* at 401. See *Troxel v. Granville*, 530 U.S. 57 (2000).

27. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 530 (1925).

28. *Id.* at 531.

29. *Id.* at 532.

30. *Id.*

and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>31</sup>

c. *Michael H. v. Gerald D.*

If there is any case that shows the progression of the modern family in real time, it is *Michael H.* The case involved the marriage of Carole D. and Gerald D., which occurred on May 9, 1976.<sup>32</sup> The couple lived together in Playa del Rey, California. During the summer of 1978, Carole D. began having an extramarital affair with Michael H., the couple's neighbor.<sup>33</sup> On May 11, 1981, Carole D. gave birth to a baby girl, Victoria D.<sup>34</sup> Even though Gerald was listed as "father" on the birth certificate, Carole D. informed Michael that she thought he was Victoria's biological father.<sup>35</sup> Unfortunately for Victoria, "[i]n the first three years of her life, [she] remained always with Carole, but found herself within a variety of quasifamily units."<sup>36</sup>

Michael attempted to visit Victoria, but was prevented from doing so.<sup>37</sup> He subsequently filed a filiation action in a California Superior Court in order to "establish his paternity and right to visitation."<sup>38</sup> Over the course of the following months, several complaints and motions were filed by all parties involved, including Victoria through her court-appointed guardian ad litem.<sup>39</sup> In the meantime, Carole moved back to New York to live with Gerald, but then quickly went back to California to be with Michael.<sup>40</sup> During part of the litigation, Michael lived with Carole and Victoria in Los Angeles and held

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31. *Id.* at 534-35 (emphasis added).

32. *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989).

33. *Id.*

34. *Id.*

35. *Id.* at 113-14.

36. *Id.* at 114 ("In October 1981, Gerald moved to New York City to pursue his business interests, but Carole chose to remain in California. At the end of that month, Carole and Michael had blood tests of themselves and Victoria, which showed a 98.07% probability that Michael was Victoria's father. In January 1982, Carole visited Michael in St. Thomas, where his primary business interests were based. There Michael held Victoria out as his child. In March, however, Carole left Michael and returned to California, where she took up residence with yet another man, Scott K. Later that spring, and again in the summer, Carole and Victoria spent time with Gerald in New York City, as well as on vacation in Europe. In the fall, they returned to Scott in California.").

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*



Victoria out to be his daughter.<sup>41</sup> After signing a “stipulation that Michael was Victoria’s natural father,” Carole left Michael and instructed her attorneys not to file the stipulation.<sup>42</sup> The following month, Carole and Gerald resumed their relationship and, as of the time of the case, had two more children.<sup>43</sup>

The Superior Court granted a motion for summary judgment in January 1985, brought by Gerald after Michael was awarded limited visitation privileges *pendente lite* prior to Carole and Gerald resuming their relationship.<sup>44</sup> Gerald claimed the California Evidence Code eliminated any dispute as to Victoria’s father since it provided that, “the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.”<sup>45</sup>

In February 1988, after a series of appeals, the U.S. Supreme Court noted probable jurisdiction and, in denying Michael parental rights, stated that, “the Due Process Clause affords only those protections so rooted in the traditions and conscience of our people as to be ranked as fundamental” and that its “cases reflect[ed] continual insistence upon respect for the teaching of history and solid recognition of the basic values that underlie our society . . .”<sup>46</sup> The Court alluded to its supposed desire to maintain the integrity of the family unit by framing the issue before the Court as “whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection.”<sup>47</sup> Ultimately, the Court concluded that it had not been traditionally protected, and that Michael’s assertion of parental rights of Victoria did not stand.<sup>48</sup>

## 2. Supreme Court of Virginia Decisions

The Commonwealth of Virginia has also explicitly recognized the fundamental right to parent one’s child. In *Wyatt v. McDermott*, the Supreme Court of Virginia answered certified questions from the United States District Court for the Eastern District of Virginia, Alexandria Division,

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41. *Id.*

42. *Id.* at 114-15.

43. *Id.* at 115.

44. *Id.*

45. *Id.* (internal citations omitted).

46. *Id.* at 122-23 (internal citations omitted).

47. *Id.* at 124.

48. *Id.*

regarding whether Virginia recognized tortious interference with parental rights as a cause of action.<sup>49</sup> Answering in the affirmative, the court recognized parental rights as “constitutionally protected,” of “essential value,” and “perhaps the oldest of the fundamental liberty interests recognized . . . .”<sup>50</sup>

Unfortunately, the best interests of children and the fundamental rights enjoyed by their parents are typically at odds in custody and visitation cases. Since parental rights are fundamental, they seem to trump the desire the court may have to protect children and the family unit.

a. *Bottoms v. Bottoms*

In *Bottoms v. Bottoms*, the Supreme Court of Virginia discussed the interplay between parental rights and the well-being of children in the way society would expect the decision to be made: in the best interest of the child. *Bottoms* involved a custody dispute between the maternal grandmother and the child’s mother.<sup>51</sup> Sharon, the child’s mother, dropped out of high school and lived at various homes of relatives and a short-term husband (the child’s father).<sup>52</sup> Following the couple’s divorce, Sharon was awarded custody of the child, but continued her destructive lifestyle.<sup>53</sup> After a series of court hearings and multiple rulings, the Supreme Court of Virginia eventually held that the grandmother—who cared for the child for most of the child’s life—should be given custody of the child.<sup>54</sup> In doing so, the court stated that Virginia law creates a “strong” presumption that a child’s best interest will be served when the child is in the custody of the his parents.<sup>55</sup> The court went on to conclude, however, that “when the contest is between parent and non-parent, this rule is conditioned upon the principle that a parent’s rights ‘are to be respected if at all consonant with the best interests of the child.’”<sup>56</sup> In granting custody to the grandmother, the court acknowledged that parental rights can be rebutted by clear and convincing evidence that the best interests of the child

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49. *Wyatt v. McDermott*, 283 Va. 685, 689 (2012).

50. *Id.* at 692 (internal citations omitted).

51. *Bottoms v. Bottoms*, 249 Va. 410, 412 (1995).

52. *Id.* at 414.

53. *Id.* The case goes on to cite Sharon’s multiple sexual relationships over time (which led to a venereal disease that prevented her from having any future children) in the same room where the child’s crib was kept, her “temper” that resulted in physical abuse to the child, and her eventual lesbian relationship with a “recovering alcoholic” woman recently discharged from the U.S. Army (the child was ten months old at this point in time). *Id.* at 414-15.

54. *Id.* at 421.

55. *Id.* at 413 (internal citations omitted).

56. *Id.* at 413-14 (quoting *Malpass v. Morgan*, 213 Va. 393, 399 (1972)).

are served by awarding custody to someone other than the biological parents.<sup>57</sup>

b. *Griffin v. Griffin*

In *Griffin v. Griffin*, Mrs. Griffin (“wife”) gave birth to a child and presumed the child was Mr. Griffin’s (“husband”) child. In actuality, the wife had had an extramarital affair with a Mr. Groh, who was the child’s actual father.<sup>58</sup> During the pregnancy and throughout the child’s first year-and-a-half of life, the wife and husband assumed the child was the husband’s and the husband cared for the child as his own.<sup>59</sup> In December 1999, a court-ordered paternity test identified Mr. Groh as the father.<sup>60</sup> Upon this discovery, the wife “denied husband any further . . . visitation with her son.”<sup>61</sup> The Juvenile and Domestic Relations District Court (“JDR court”) awarded husband temporary visitation rights despite the results of the paternity test.<sup>62</sup> The JDR court subsequently expanded the visitation schedule and made its order final, citing the best interest of the child.<sup>63</sup> Mr. Groh eventually testified at trial that, while he paid child support, he “did not intend to foster a relationship with the child.”<sup>64</sup> The court of appeals reversed and vacated the trial court’s visitation order.<sup>65</sup> The court of appeals held that the wife’s fundamental right to raise her son took priority over the best interests of her son.<sup>66</sup>

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57. *Id.* at 413. The court defined clear and convincing evidence as “the measure or degree of proof that will produce . . . a firm belief or conviction upon the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the degree of proof beyond a reasonable doubt . . . it does not mean clear and unequivocal.” *Id.* It is interesting to note here that the court recognized the strong presumption towards parental rights, but applied a clear and convincing evidence standard to rebut that presumption. Of course, this seems to make sense in the context of the well-being of a child. “[W]hile the legal rights of a parent should be respected in a custody proceeding, those technical rights may be disregarded if demanded by the interests of the child.” *Id.* at 419.

58. *Griffin v. Griffin*, 41 Va. App. 77, 79 (2003).

59. *Id.* at 79-80.

60. *Id.* at 80.

61. *Id.* Prior to this paternity test, wife took the child and moved to wife’s mother’s house, but allowed weekly child visitation with husband. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 86.

66. Evidence introduced at trial suggested that husband had a “history of drinking” and often argued with wife in front of the child out of a sense of betrayal. *Id.* at 80.

Citing *Williams v. Williams*, the court of appeals held that, “for the constitutional requirement to be satisfied, before visitation can be ordered over the objection of the child’s parents, a court must find an *actual harm to the child’s health or welfare* without such visitation.”<sup>67</sup> The court seemed to disregard the preservation of the marital unit and held that “a very different kind of legal contest . . . exists in a dispute between a fit parent and a non-parent.”<sup>68</sup> The court seemed to disregard the husband and wife’s marriage in the determination of the best interest of the child. In fact, the court compared husband’s involvement in the child’s life to one of a seemingly flippant third-party. The court held that denying the husband visitation of the child would undoubtedly cause “some measure of sadness and a sense of loss,” but that those emotional responses did not rise to the level of “actual harm” to the child.<sup>69</sup> The court concluded that if this sadness and emotional attachment classified as actual harm, “any non-parent who ha[d] developed an emotionally enduring relationship with another’s child would satisfy the actual-harm requirement. The constitutional rights of parents cannot be so easily undermined.”<sup>70</sup> While the court’s reasoning makes sense for the neighbor across the street creating an emotional bond with someone else’s child, it seems out of place in *Griffin*. The court was not deciding whether Jane Doe, the hypothetical neighbor across the street who took an emotional interest in Junior, gets visitation rights; the court was dealing with a married couple (albeit in a rocky marriage) that believed the child to be theirs for a year-and-a-half of the child’s life.<sup>71</sup>

Finally, the court touched on an area that this note will discuss in greater detail below.<sup>72</sup> In rejecting the husband’s suggestion that the wife’s marital status should be considered when evaluating the best interest of the child, the court held,

We are equally unpersuaded by husband’s suggestion that wife has no constitutionally protected rights as a parent because she and the child’s father cannot be considered an “intact family.” [*Troxel v. Granville*] involved an unmarried, single mother. Nothing in *Troxel* implies that the legal superiority of a fit parent’s rights over those of a non-parent turns on whether the parent is married, separated, divorced, or widowed. A single mother has no less

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67. *Id.* at 83 (emphasis in original) (quoting *Williams v. Williams*, 256 Va. 19, 22 (1998)).

68. *Id.*

69. *Id.* at 85-86.

70. *Id.* at 86.

71. *Id.* at 80.

72. See *infra* Part IV.B.

constitutional right to parent her son than a married mother. We, therefore, reject any argument that single parents are entitled to less constitutional liberty in decisions concerning the care, custody, and control of their children.<sup>73</sup>

*B. Legislation: The “Family” According to the Assembly*

Several Virginia statutes are discussed in *Breit* and are worth mentioning in detail here. The interplay between these statutes makes up a significant part of the *Breit* decision.<sup>74</sup> As the court outlines, the court must “construe these linked statutes that address the same subject matter ‘so as to avoid repugnance and conflict between them.’”<sup>75</sup> Further, these statutes must be read in conjunction with one another as “consistent and harmonious” to give meaning to the “overall statutory scheme.”<sup>76</sup> The *Breit* court goes to great lengths to ensure these seemingly conflicting statutes are read in a manner consistent with each other.<sup>77</sup>

1. Va. Code § 20-49.1

The *Breit* court goes into great detail regarding the legislative history of VA. CODE § 20-49.1 (hereinafter “Parentage Statute”).<sup>78</sup> Citing the common law, the court acknowledged that there was no historical duty of an unmarried father to support his biological children.<sup>79</sup> In 1952, however, Virginia’s General Assembly statutorily modified the common law and allowed proof of paternity to establish that duty, but only by the father’s admission of paternity via a sworn statement in court.<sup>80</sup> This policy was further expanded in 1954 to include out-of-court admissions.<sup>81</sup> In 1988, the statute was labeled “How parent child relationship established,” and amended to state that paternity could be established by a voluntary written agreement, made under oath, of the biological father and mother.<sup>82</sup> In 1992,

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73. *Griffin*, 41 Va. App. at 84 (citations omitted) (internal quotation marks omitted).

74. *L.F. v. Breit*, 285 Va. 163, 174-84 (2013).

75. *Id.* at 178 (internal citations omitted).

76. *Id.* (internal citations omitted).

77. *Id.* at 176-80.

78. VA. CODE ANN. § 20-49.1 (1988).

79. *Breit*, 285 Va. at 174.

80. *Id.* The original statutory revision was codified as VA. CODE ANN. § 20-61.1, but was re-codified to § 20-49.1 in 1988. *Id.*

81. *Id.*

82. *Id.*

the statute allowed for genetic testing to establish paternity.<sup>83</sup> In its current state, the Parentage Statute provides that the parent-child relationship between a child and a woman may be established, *prima facie*, by proof that the woman gave birth to the child.<sup>84</sup> For a man, however, the statute provides different avenues to establish the parent and child relationship: (1) scientifically reliable genetic testing that affirms at least a ninety-eight percent probability of paternity, (2) a voluntary written statement of the father and mother made under oath acknowledging paternity, or (3) as otherwise provided in the chapter.<sup>85</sup>

## 2. Va. Code § 20-158

Commonly referred to as the Assisted Conception Statute, VA. CODE § 20-158(A) discusses parentage of a child resulting from assisted conception.<sup>86</sup> The statute was passed in response to *Welborn v. Doe*<sup>87</sup> and was enacted “specifically to protect the interests of married parents.”<sup>88</sup> In doing so, the General Assembly sought to ensure that “infertile married couples such as the Welborn’s . . . were not threatened by parentage claims from third-party donors” and could “obtain sperm from an outside donor without fear that the donor would claim parental rights.”<sup>89</sup> The statute generally provides that (1) the gestational mother of a child is the child’s mother, (2) the husband of

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83. *Id.*

84. VA. CODE ANN. § 20-49.1(A) (1988).

85. VA. CODE ANN. § 20-49.1(B)(1)-(3) (1988). The statute also provides that the written agreement, in addition to acknowledging paternity, must also “confirm[] that prior to signing the acknowledgment, the parties were provided with a written and oral description of the rights and responsibilities of acknowledging paternity and the consequences arising from a signed acknowledgment, including the right to rescind.” *Id.* § 20-49.1(B)(2). The statute goes on to address the rescission of the acknowledgment and the legal effect of such acknowledgment. *Id.* The “otherwise provided by this chapter” ambiguity is discussed below. *See infra* Part II.V.

86. VA. CODE ANN. § 20-158 (1991).

87. *Welborn v. Doe*, 10 Va. App. 631 (1990). *Welborn* involved a married couple that gave birth to a child using artificial insemination and an unknown third party’s sperm. *Id.* at 633. The court considered “whether a man . . . may adopt a child born to his wife by artificial insemination with a third party donor’s sperm,” and determined that he could. *Id.* at 632. In holding such, however, the court also held that the sperm donor’s rights were not terminated under then VA. CODE §§ 32.1-257 and 64.1-7.1 by the mere fact that the biological mother and her husband were married. *Welborn*, 10 Va. App. at 634. “Until such time as the Code is amended to terminate possible parental rights of a sperm donor, only through adoption may the rights of the sperm donor be divested . . .” *Id.* at 635.

88. *Breit*, 285 Va. at 175.

89. *Id.*

the gestational mother of the child is the child's father, and (3) a donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother.<sup>90</sup> While enacted to protect married couples from outside interference in their familial relationships, the statute created a loop-hole that fails to protect consenting, but unmarried, adults who use artificial insemination to get pregnant. While the courts have acknowledged the "significant interest in encouraging the institution of marriage,"<sup>91</sup> this statute leaves a gaping hole that can easily be taken advantage of in today's modern family structure. Further, on its face this statute seems to conflict with the Parentage Statute<sup>92</sup> since it relies on the marital status of the mother to determine the identity of the father, not genetic testing or a written acknowledgment of paternity. This seeming contradiction, however, is remedied in *Breit* and discussed further below.<sup>93</sup>

### 3. VA. CODE § 20-124.3

Virginia's General Assembly has developed ten factors that the courts must consider when determining the best interests of a child for the purposes of determining custody or visitation arrangements.<sup>94</sup> Under VA. CODE § 20-124.3 (hereinafter "Best Interest Statute"), these factors include:

- (1) The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;
- (2) The age and physical and mental condition of each parent;
- (3) The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;
- (4) The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;
- (5) The role that each parent has played and will play in the future, in the upbringing and care of the child;

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90. VA. CODE ANN. § 20-158 (1991); *Breit*, 285 Va. at 175-177. The statute provides some exceptions for the husband of the gestational mother, but those exceptions are not applicable here.

91. *Breit*, 285 Va. at 181.

92. See *supra* Part II.B.1.; VA. CODE ANN. § 20-49.1 (1988).

93. See *supra* Part II.C.

94. See *Young v. Forrest*, No. 1435-00-2, 2001 Va. App. LEXIS 296 (May 29, 2001).

- (6) The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;
- (7) The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;
- (8) The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;
- (9) Any history of family abuse as that term is defined in § 16.1-228 or sexual abuse. If the court finds such a history, the court may disregard the factors in subdivision 6; and
- (10) Such other factors as the court deems necessary and proper to the determination.<sup>95</sup>

As we will see, these factors were not considered in the *Breit* decision and understandably so. *Breit* was concerned with whether Mr. Breit could pursue custody of L.F. at all, not whether he was granted custody.<sup>96</sup> That said, the *Breit* court alluded to these factors in footnote eight of the case and suggested an addition to these factors that should be given careful thought.<sup>97</sup>

### C. L.F. v. Breit: A Forced Interplay Between Case Law and Legislation

The case law and statutory history intersected in *L.F. v. Breit*. The Supreme Court of Virginia heard a case regarding Ms. Beverly Mason and Mr. William Breit.<sup>98</sup> The two were involved in a long-term relationship and lived together for several years as an unmarried couple.<sup>99</sup> Although they wanted to have a child together, their attempts to conceive a child naturally failed and they were forced to seek reproductive assistance from a board-certified fertility doctor.<sup>100</sup> After two cycles of in vitro fertilization using Breit's sperm and Mason's eggs,<sup>101</sup> the couple conceived a child through this assisted

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95. VA. CODE ANN. § 20-124.3 (1994).

96. *Breit*, 285 Va. at 170.

97. See *infra* Part III.B.; *Breit*, 285 Va. at 183 n.8.

98. *Breit*, 285 Va. at 171.

99. *Id.*

100. *Id.*

101. In vitro fertilization (IVF) is "a complex series of procedures used to treat fertility or genetic problems and assist with the conception of a child. During IVF, mature eggs are



conception.<sup>102</sup> Breit was “present for all stages of the in vitro fertilization process and continued to live with Mason throughout the resulting pregnancy.”<sup>103</sup> While the couple chose not to get married prior to the child’s birth, they believed visitation rights for Breit were in the best interests of the child and the couple executed a written custody and visitation agreement that gave Breit visitation rights.<sup>104</sup> Upon the birth of L.F. in July 2009, Breit, who was present for the birth, was listed as the father on the child’s birth certificate.<sup>105</sup> L.F. was named after extended family members of both Mason and Breit, and her last name was a hyphenated combination of Mason and Breit’s last names.<sup>106</sup> The day after the birth, “Mason and Breit jointly executed a written agreement, identified as an ‘Acknowledgment of Paternity,’ stating that Breit [was] L.F.’s legal and biological father.”<sup>107</sup> The couple carried on normal life with Breit as the father of L.F.<sup>108</sup> Four months after L.F.’s birth, however, the couple separated.<sup>109</sup> Breit continued to pay child support for L.F., kept her as a beneficiary of his health insurance policy, and “consistently” visited L.F. on holidays and weekends.<sup>110</sup> All-in-all, Breit maintained an active role in L.F.’s life until August 2010, when Mason “unilaterally terminated all contact between Breit and L.F.”<sup>111</sup>

On August 24, 2010, Breit filed a petition for custody and visitation in the Juvenile and Domestic Relations District Court of the City of Virginia Beach.<sup>112</sup> Mason filed a motion to dismiss.<sup>113</sup> The court dismissed Breit’s

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collected (retrieved) from [a woman’s] ovaries and fertilized by sperm in a lab. Then the fertilized egg (embryo) or eggs are implanted in [a woman’s] uterus.” *In Vitro Fertilization (IVF)*, MAYO CLINIC, <http://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/basics/definition/prc-20018905> (last visited Dec. 31, 2014).

102. *Breit*, 285 Va. at 171.

103. *Id.*

104. *Id.* It is important to note here that Breit is an attorney. See *Attorney Profile*, BREIT LAW PC, <http://breitlawyer.com/attorney-profile/> (last visited Feb. 21, 2015).

105. *Breit*, 285 Va. at 171.

106. *Id.*

107. *Id.*

108. *Id.* The case further cites joint birth announcements naming Mason and Breit as the parents, statements to friends and family that Breit was the father, and the fact that the couple continued to live together for four months following the birth. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 171-72.

112. *Id.* at 172.

113. *Id.*

petition without prejudice.<sup>114</sup> In November 2010, Breit again pursued custody of L.F. by filing a “petition to determine parentage” under VA. CODE § 20-49.2.<sup>115</sup> Breit argued that the “acknowledgement of paternity that he and Mason voluntarily executed pursuant to [the Parentage Statute] created a final and binding parent-child legal status between Breit and L.F.”<sup>116</sup> Mason “filed pleas in bar asserting that, pursuant to the Assisted Conception Statute and 32.1-257(D),<sup>117</sup> Breit was not L.F.’s legal parent because he and Mason were never married and L.F. was conceived through assisted conception.”<sup>118</sup> The court appointed a guardian ad litem for L.F., but again dismissed Breit’s motion and petition.<sup>119</sup> Breit appealed and the court of appeals reversed the circuit court’s decision. The court of appeals held that a “known sperm donor who, at the request of a woman to whom he is not married, donates his sperm for the purpose of . . . pregnancy . . . and who, together with the biological mother, executes an uncontested Acknowledgement of Paternity” under the Parentage Statute is “not barred” from pursuing parentage under the Commencement Statute.<sup>120</sup> Mason appealed.<sup>121</sup> The Supreme Court of Virginia was forced to consider how two seemingly contradictory Virginia statutes defined parentage in artificial insemination cases involving unmarried individuals.<sup>122</sup>

The court’s analysis centered around Mason’s two claims: (1) that the court of appeals erroneously harmonized the Parentage Statute and the Assisted Conception Statute,<sup>123</sup> and (2) that § 20-157, which mandates the

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114. *Id.*

115. *Id.* VA. CODE ANN. § 20-49.2 (2008) is entitled “Commencement of action; parties; jurisdiction” and merely discusses the basics of initiating a legal action under this chapter of the Virginia Code. This statute will be referred to as the “Commencement Statute” hereinafter.

116. *Breit*, 285 Va. at 172.

117. *See infra* note 216; VA. CODE ANN. § 32.1-257 (1994) is entitled “Filing birth certificates; from whom required; signatures of parents” and discusses the administrative requirements for obtaining a birth certificate. The *Breit* court briefly addressed this statute in its analysis, but merely concluded that the statute’s purpose was to “ensure that the Commonwealth’s records accurately reflect the intended parent-child relationship” and that the statute had to be interpreted in a way to “avoid[] constitutional conflict.” *Breit*, 285 Va. at 186.

118. *Breit*, 285 Va. at 172.

119. *Id.*

120. *Breit*, 285 Va. at 172 (internal citations omitted); VA. CODE ANN. § 20-49.2 (2008).

121. *Breit*, 285 Va. at 173.

122. *Id.* at 174.

123. *Breit*, 285 Va. at 176; *see supra* Part II.B.2.; VA. CODE ANN. § 20-158 (1991).

Virginia law that shall control under Chapter 9 of Title 20,<sup>124</sup> prevents the Parentage Statute from applying.<sup>125</sup> The court first analyzed the Parentage Statute, which provides that parentage can be established by scientifically reliable genetic testing or a voluntary written agreement.<sup>126</sup> Since there was a voluntary written agreement in this case, the court did not expand its analysis under this statute. Next, however, the court examined VA. CODE § 20-156<sup>127</sup> and the Assisted Conception Statute. The court cited the statute's legislative and procedural history to conclude that the statute was "clearly . . . enacted to ensure that infertile married couples . . . were not threatened by parentage claims from third-party donors."<sup>128</sup> The court cited VA. CODE § 20-164, which makes specific reference to the Parentage Statute. The court declared that certain children are considered children only of their parent or parents for "all purposes including, but not limited to" certain estate planning situations.<sup>129</sup> In order to reach that holding, the Assisted Conception Statute and the Parentage Statute had to be "read in conjunction."<sup>130</sup> After lengthy statutory interpretation, the court concluded that the General Assembly did not intend to limit parentage rights only to married individuals, and instead these rights extended to unmarried couples living together that had signed a parental agreement.<sup>131</sup>

The court then addressed Mason's second claim, that VA. CODE § 20-157<sup>132</sup> prevented the Parentage Statute from applying to the case at hand. The court used the explicit reference to the Parentage Statute found in VA. CODE § 20-164 as a platform to expand on two "constitutional imperatives."<sup>133</sup> After doing so, the court turned to Breit's arguments. It quickly dismissed Breit's

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124. VA. CODE ANN. § 20-157 (1991) ("The provisions of this chapter shall control, without exception, in any action brought in the courts of this Commonwealth to enforce or adjudicate any rights or responsibilities arising under this chapter."). Title 20 of the Virginia Code is entitled "Domestic Relations." Chapter 9 is entitled "Status of Children of Assisted Conception."

125. *Breit*, 285 Va. at 180; *see supra* Part II.B.2.; VA. CODE ANN. § 20-49.1 (1988).

126. *Breit*, 285 Va. at 174. The statute also provides that parentage can be established "as otherwise provided in this chapter," but does not expand on what that means. VA. CODE ANN. § 20-49.1 (1988); *see supra* Part II.B.2.

127. Note that VA. CODE ANN. § 20-156 (1997) provides "definitions"; VA. CODE ANN. § 20-158 (1991) discusses the parentage of children resulting from assisted conception.

128. *Breit*, 285 Va. at 175.

129. VA. CODE ANN. § 20-164 (1994).

130. *Breit*, 285 Va. at 176.

131. *Id.* at 179-80.

132. *See supra* note 125.

133. *Breit*, 285 Va. at 180.

equal protection claim based on the Assisted Conception Statute's differing treatment of male and female donors, concluding that the disparate treatment was a "result of biology, not discrimination."<sup>134</sup> And while the court did conclude that the Assisted Conception Statute distinguished based on marital status, it held that the distinction was rationally related to the legitimate governmental purpose of protecting married couples from potential donor interference.<sup>135</sup> However, the court moved on to Breit's second argument without addressing how that legitimate government purpose was actually harming a biological parent's rights under an equal protection argument.

The court instead addressed Breit's problem from a due process perspective and concluded that Breit had a constitutional right to "make decisions concerning the care, custody, and control of his child."<sup>136</sup> Citing several United States Supreme Court and Supreme Court of Virginia cases, the court held that any statute challenging a parent's fundamental rights would only survive constitutional scrutiny if it was "narrowly tailored to serve a compelling state interest."<sup>137</sup> The court used this standard of review in its statutory interpretation to conclude that the seemingly conflicting Virginia statutes should be read in a way that protected Breit's constitutional rights to parentage.<sup>138</sup> In short, the man who donated sperm to his long-time girlfriend that later resulted in the birth of a child was able to pursue parental rights of that child despite the objection of the biological mother.<sup>139</sup> The court reiterated the Commonwealth's "significant interest in encouraging the institution of marriage,"<sup>140</sup> but then further stated that the "governmental policy that encourages children to be born into families with married parents" does not "overcome the constitutionally protected due process interest of a responsible, involved, unmarried . . . father."<sup>141</sup> The court concluded that "there is no compelling reason why a responsible, involved,

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134. *Id.* at 181.

135. *Id.* at 181.

136. *Id.* at 181.

137. *Id.* at 182 (citing *Troxel v. Granville*, 530 U.S. 57 (2000); *Wyatt v. McDermott*, 283 Va. 685 (2012); *Copeland v. Todd*, 282 Va. 183 (2011)).

138. *Breit*, 285 Va. at 182-83.

139. *Id.* at 183.

140. *Id.* at 181.

141. *Id.* at 183.

unmarried, biological parent should never be allowed to establish legal parentage of her or his child born as a result of assisted conception.”<sup>142</sup>

### III. PROBLEM

The *Breit* court ultimately held that Mr. Breit could pursue custody of his biological child, L.F.<sup>143</sup> Considering the purpose behind the General Assembly’s enacting of family law statutes in Virginia and the scientific studies that depict the significant impact that a solid family structure has on developing children, it is easy to conclude that the court made the best decision possible in this case.<sup>144</sup> The *Breit* court suggested that the outcome of the case would have been different had two different factual scenarios played out: (1) the Acknowledgement of Paternity had not been signed, or (2) either parent had changed their marital status.<sup>145</sup> Both scenarios are addressed below.

#### A. Lack of Acknowledgement of Paternity

Essentially, the decision in *Breit* rested on the written acknowledgment of paternity signed by both Mr. Breit and Ms. Mason in accordance with the Parentage Statute.<sup>146</sup> The court acknowledged that the biological ties that Mr. Breit had to the child were not enough to establish legal paternity.<sup>147</sup> If that were the case, sperm and egg donors could always make claims of paternity

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142. *Id.* Interestingly, the *Breit* court never cited *Meyer v. Nebraska*, *Pierce v. Soc’y of Sisters*, or *Bottoms v. Bottoms*. The court only cited *Michael H. v. Gerald D.* in a footnote and explained it simply as a case in which a “biological father who spent a short amount of time as the mother’s live-in boyfriend sought to establish paternity after the mother had reconciled with her husband.” *Breit*, 285 Va. at 183 n.8. The court did cite *Troxel* and *Wyatt*, but only for the assertion that “perhaps the oldest of the fundamental liberty interests recognized by [the U.S. Supreme Court]” is the “parent’s right to form a relationship with his or her child.” *Breit*, 285 Va. at 182. The court also cited *Lehr v. Robertson*, 463 U.S. 248 (1983), to conclude that “parental rights do not arise solely from the biological connection between a parent and child.” *Breit*, 285 Va. at 182. Given the facts at hand, these limited citations to fundamental case law are probably appropriate; the court established that parental rights were fundamental. It does seem odd, however, that in a case with such far reaching consequences regarding a constitutionally-protected, fundamental right, the court’s analysis of U.S. Supreme Court and Supreme Court of Virginia case law is limited to four cases and two paragraphs of analysis. *See id.*

143. *Breit*, 285 Va. at 182-183.

144. *See infra* Part III.B.1.

145. *Breit*, 285 Va. at 179.

146. *Id.*; *see supra* Part II.B.1.; VA. CODE ANN. § 20-49.1 (1988).

147. *Breit*, 285 Va. at 179.

and essentially destroy an otherwise functioning family unit. The court cites this occurrence as the policy goal behind the Assisted Conception Statute, further ensuring “that a married couple could obtain sperm from an outside donor without fear that the donor would claim parental rights.”<sup>148</sup>

This case raises an interesting predicament, because the average unmarried couple attempting to have children through artificial insemination is not likely to have knowledge of the statutory paternity acknowledgement requirement. If biological ties are not enough to establish legal paternity in artificial insemination cases, and if both parties are unfamiliar with the only other clearly defined statutory way to establish legal paternity in Virginia, how is legal paternity established where these written agreements are not in place?

Anonymous sperm donors typically waive “all parental rights and responsibilities to children conceived from the purchase from their sperm.”<sup>149</sup> Further, “[b]y signing, donors assume no responsibility or liability for any offspring conceived through donor semen; donors will have no rights to any offspring conceived.”<sup>150</sup> However, this waiver of parental rights may not always be desired, especially where the parties know each other and both intend to act as parents to the child. It also would not apply in cases of informal artificial insemination where the use of a sperm bank is not a factor. Thankfully, a Virginia circuit court seems to have remedied the disparity, albeit in the context of a very *Modern Family* arrangement. In *Boardwine v. Bruce*, the Circuit Court of the City of Roanoke allowed a biological father, a gay man who donated sperm to his lesbian friend which she used to impregnate herself through the use of a turkey baster, to establish legal paternity of a child without having a signed acknowledgement of paternity because (1) the Assisted Conception Statute did not apply because the artificial insemination by turkey baster did not include the assistance of a physician under VA. CODE § 20-156, (2) genetic testing confirmed the father’s paternity, and (3) “clear and convincing evidence” demonstrated that the parties intended him to be the father, in accordance with VA. CODE § 20-49.4.<sup>151</sup>

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148. *Id.* at 175.

149. *Sperm Donor FAQs*, BEASPERMDONOR.COM, <http://www.beaspermdonor.com/spermdonorfaqs.shtml#legalities> (last visited Dec. 31, 2014).

150. *Id.*

151. *Boardwine v. Bruce*, 88 Va. Cir. 218 (2014); *see supra* Part II.B.; *see infra* Part IV.A.

B. *Change in Marital Status of Either Parent*

The *Breit* court further suggested a factual scenario that would have produced a different result in *L.F. v. Breit*. In footnote eight, the court rebutted Mason's application of *Michael H.*,<sup>152</sup> stating that:

[I]n [*Michael H.*] . . . [t]he Supreme Court refused to recognize a liberty interest on behalf of the boyfriend, holding that relationships between children and adulterous fathers should not be constitutionally protected given society's historical interest in safeguarding the family institution. . . . [But] [i]nterference with the family institution is not at issue here: Mason and Breit represent the closest thing L.F. has to a 'family unit,' as Mason has no husband to claim parentage over Breit."<sup>153</sup>

The court suggested that if Mason had been married, the case might have turned out differently. This logic seems to align with the court's acknowledgment that "[a] governmental policy that encourages children to be born into families with married parents is legitimate,"<sup>154</sup> but also has overreaching impacts on the biological father. If, for instance, the marital status of the biological mother changed over the course of time, would that impact the biological father's custody or visitation of his child? Would it be possible for a biological mother to get married to an otherwise absent man solely to preclude the biological father from ever having custody of his child? On the other hand, would it make a difference if the biological mother (or father for that matter) had reestablished a stable living environment for the child, complete with a loving spouse, other children to interact with, and a presumed stable economic standing while the other biological parent remained unmarried (or possibly divorced several times)? Could it be in the best interest of the child to grow up in a two-parent family environment as opposed to a single-parent household? Unlike the Acknowledgment of Paternity issue that seems to be addressed in *Boardwine*,<sup>155</sup> the marital status problem has yet to be addressed by the courts or legislature.

There are significant benefits to children in an otherwise healthy, two-parent, heterosexual family unit (as discussed below), but Virginia courts are not required to consider either parents' marital status when evaluating the best interest of the child under the Best Interest Statute.<sup>156</sup> Not every

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152. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

153. *Breit*, 285 Va. at 183 n.8 (internal citations omitted).

154. *Id.* at 183.

155. *See supra* Part III.A.

156. *See supra* Part II.B.3.; VA. CODE ANN. § 20-124.3 (1994).

jurisdiction takes the same approach. In Oregon, for instance, judges are allowed to consider the marital status of either party to a custody suit if it is shown that the marital status is causing or may cause emotional or physical damage to the child.<sup>157</sup>

### 1. Scientific Research

Virginia courts should be required to consider the marital status of those pursuing custody and parental rights in considering the best interests of the child. There have been countless studies on the impacts that divorce, single-parent homes, and homosexual parenting have on children. They are briefly summarized below.

It is important to note that there is a significant amount of emerging bias in this area of study. The impact of divorce and single-parent homes is largely uncontested and spans across the political aisle.<sup>158</sup> Homosexual parenting, however, is a relatively new concept. While generation after generation have felt the impacts of divorce and single-parenting, even the most liberal estimates cite homosexual parenting as having only started to become more mainstream in the past forty years or so.<sup>159</sup> As such, legitimate studies on the subject are limited in number.<sup>160</sup> While I find it hard to believe that homosexual parenting could have any less significant impacts on children than divorce or single-parent homes, the studies face significant bias.<sup>161</sup> Even people raised by homosexual parents and those directly impacted cannot agree on whether their home-life was healthy and beneficial.<sup>162</sup> At the very

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157. OR. REV. STAT. § 107.137 (1975).

158. *See infra* Parts III.B.1.a., III.B.1.b.

159. *Milestones in LGBT Parenting History*, WASHINGTON BLADE (Oct. 11, 2015), <http://www.washingtonblade.com/2012/10/11/milestones-in-lgbt-parenting-history/>.

160. *See infra* Part III.B.1.c.

161. *Id.*

162. Compare Katy Faust, *Dear Justice Kennedy: An Open Letter From the Child of a Loving Gay Parent*, THE WITHERSPOON INSTITUTE, <http://www.thepublicdiscourse.com/2015/02/14370/> (last visited Feb. 13, 2015) (claiming that “same-sex couples and opposite-sex couples are wholly unequal and should be treated differently for the sake of the children” and that “redefining marriage [to include same-sex couples] would actually serve to strip [children of gay parents] of their most fundamental rights”), and Janna Darnelle, *Breaking the Silence: Redefining Marriage Hurts Women Like Me – and Our Children*, THE WITHERSPOON INSTITUTE, <http://www.thepublicdiscourse.com/2014/09/13692/> (last visited Feb. 13, 2015) (arguing that her children, who the court gave to her ex-husband after he “came out” as gay face identity issues that are “deep and unique”), with Iowa Democrats, *Zach Wahls Speaks About Family*, YOUTUBE.COM (Feb. 1, 2011),



least, this is a subject the courts should approach with caution; our nation's children should not be thrust into situations of unknown consequences merely to ensure we're "keeping up with the Joneses."

a. Impacts of Divorce on Children

According to the Family Research Council, "[i]n 2001, the divorce rate was almost double that of 1960. [In 2004], 40 to 50 percent of marriages [were] likely to end in divorce, with second and subsequent marriages having an even higher likelihood of divorce than first marriages."<sup>163</sup> While there are many reasons for these divorces to take place, the effects divorce has on children are significant.<sup>164</sup> The Family Research Council cites emotional and behavioral problems,<sup>165</sup> lower educational attainment,<sup>166</sup> illegal drug use,<sup>167</sup> and cohabitation and out-of-wedlock childbearing<sup>168</sup> as some of the effects divorce has on children. The Council further cites depression and suicide,<sup>169</sup>

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<https://www.youtube.com/watch?v=FSQQK2Vuf9Q> (last visited Feb. 13, 2015) (depicting activist Zach Wahls testifying before the Iowa House of Representatives claiming "I was raised by a gay couple, and I'm doin' pretty well.") (timestamp 1:25).

163. Bridget Maher, *Deterring Divorce*, FAMILY RESEARCH COUNCIL 3 (2004), <http://downloads.frc.org/EF/EF04E17.pdf>.

164. *Id.* at 7-9.

165. *Id.* at 7-8 ("A 2002 study found that, compared to children with married parents, children with divorced parents are more likely to have behavior problems, such as aggression of acting out. A 1999 study found a higher incidence of depression and delinquency among children whose parents had divorced.").

166. *Id.* at 8 ("Compared to children raised by widowed mothers, children from divorced single-mother homes are significantly less likely to complete high school and to attend or to graduate from college, according to a 2000 study.").

167. *Id.* ("A 2003 study found that compared to persons from intact families, those who experienced parental divorce are one-and-a-half times more likely to use illegal drugs by age 14 and more likely to use illicit drugs at any age.").

168. *Id.* ("A 2004 study found that young women who experience parental divorce are twice as likely to cohabit before marriage and to have a child out of wedlock, when compared to those raised by their married biological parents.").

169. *Id.* at 8-9 ("A 2003 study found that those who experienced parental divorce by age seven were twice as likely to suffer from major depression as adults (regardless of whether their mother remarried), compared to those raised in intact families. Other research found that compared to those raised in intact families, adults who had experienced parental separation or divorce in childhood were twice as likely to attempt suicide.").

lower economic achievement,<sup>170</sup> higher risk of divorce,<sup>171</sup> and weak family relationships<sup>172</sup> as lasting effects that children of divorce continue to experience as adults.

b. Impacts of Single Parenting on Children

There is ample research discussing the challenges children face in single-parent homes compared with children in married-parent homes.<sup>173</sup> Research conducted by Professor Paul R. Amato, the Arnold and Bette Hoffman Professor of Family Sociology and Demography at Pennsylvania State University, states that, when compared to children raised in married-parent homes, children raised outside of marriage face adulthood with “less education, earn less income, have lower occupational status, are more likely to be idle (that is, not employed and not in school), are more likely to have a nonmarital birth (among daughters), have more troubled marriages, experience higher rates of divorce, and report more symptoms of depression.”<sup>174</sup> Other studies show that children raised in single-parent homes, when compared to children raised in families with two parents, are twice as likely to attempt suicide,<sup>175</sup> two to three times more likely to try marijuana,<sup>176</sup> and generally more likely to be physically or sexually abused.<sup>177</sup>

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170. *Id.* at 9 (“Compared to children raised by widowed mothers, adults who grew up in divorced single-mother homes are more likely to take lower status jobs and less likely to report happiness in adulthood.”).

171. *Id.* (“Children of divorce are twice as likely to divorce as are the offspring of continuously married parents, according to a national longitudinal study of two generations. The authors suggest that their higher risk of divorce is due to a weaker commitment to lifelong marriage.”).

172. *Id.* (“Adults who have experienced parental divorce are less likely to have frequent contact and close relationships with their parents than are adult children from intact families.”).

173. See W. Bradford Wilcox & Robin Fretwell Wilson, *Reforming Parentage Laws: Bringing up Baby: Adoption, Marriage, and the Best Interests of the Child*, 14 WM. & MARY BILL OF RTS. J. 883, 883 (2006).

174. *Id.* at 892 (citing Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 FUTURE OF CHILD. 75, 78 (2005)).

175. *Id.* (citing Gunilla Ringback Weitof et al., *Mortality, Severe Morbidity, and Injury in Children Living with Single Parents in Sweden: A Population-Based Study*, 361 LANCET 289 (2003)).

176. *Id.* at 892-93 (citing Robert L. Flewelling & Karl E. Bauman, *Family Structure as a Predictor of Initial Substance Use and Sexual Intercourse in Adolescence*, 52 J. MARRIAGE & FAM. 171, 176 (1990)).

177. *Id.* at 894 (internal citations omitted).

c. Impacts of Homosexual Parenting on Children

In addition to divorce and single-parenting, homosexual parenting is on the rise and is affecting children in the process. Unfortunately, the studies of homosexual parenting are not as conclusive as the studies of single parenting, but not for the reasons the pro-homosexual movement would like us to believe. A significant number of studies regarding the impacts of homosexual parenting on children have been conducted, but most seem to contain the same common flaws: bias, oversimplification of sample data, and the assumption that one can self-recognize subconscious developmental issues.

Lynn Wardle, a professor of law at the J. Reuben Clark School of Law, Brigham Young University, conducted a review of homosexual parenting research from a legal perspective.<sup>178</sup> In doing so, he identified multiple concerns with the research present at the time of his publishing. Unfortunately, most of those concerns have yet to be addressed in more modern studies and, as a result, their validity can still be called into question.<sup>179</sup> Wardle points out that,

[t]he “social desirability” bias taints the studies of homosexual parenting. Both researchers and respondents perceive that within society, or at least the subgroup of society with which they identify, it is deemed desirable, progressive, and enlightened to support one particular outcome—in this case, that homosexual parenting is just as good as heterosexual parenting.<sup>180</sup>

This bias is prevalent in the research currently being conducted on the topic. Despite its publication in the *American Sociological Review* and the authors’ affiliation with the nationally recognized Department of Sociology at the University of Southern California, one such study admits its bias quite clearly, claiming that “social prejudice and institutionalized discrimination against lesbians and gay men . . . exerts a powerful policing effect on the basic terms of psychological research . . . .”<sup>181</sup> The study goes on to coin the phrase “heterosexism” and to call the literature and research that supports

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178. Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (1997).

179. See Walter R. Schumm, *Are Two Lesbian Parents Better Than a Mom and Dad? Logical and Methodological Flaws in Recent Studies Affirming the Superiority of Lesbian Parenthood*, 10 AVE MARIA L. REV. 79, 117 (2011) (“It appears clear that value biases have dramatically influenced how social scientists: evaluate scientific literature, develop their theoretical models, and conduct their research in the area of lesbian parenting.”).

180. Wardle, *supra* note 178, at 848.

181. Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOCIOLOGICAL REV., NO. 2, 159, 160 (2001).

homosexual parenting and its supposed nonexistent impact on children “far more responsible.”<sup>182</sup> Their bias is unquestionable, but many other researchers have used their work as a foundation for further study. Fiona Tasker based her entire study published in the *Journal of Marriage and Family* on validating the claims made by Stacey and Biblarz.<sup>183</sup>

In addition to obvious bias, Wardle also states that small sample size and “samples of convenience” used during research are areas of further concern and lead to an oversimplification of sample data.<sup>184</sup> Again, the tendencies to examine small sample sizes and gather a “sample of convenience,” that is, a sample made up of “self-selected, or at least not randomly selected” subjects, has not changed in modern research.<sup>185</sup> Wardle cited a study unrelated to homosexual parenting conducted in 1996 that examined the effect of “at risk” factors on children’s welfare that included “a survey of 34,129 children from an initial sample of 250,000 surveys taken in 460 communities in thirty-two states.”<sup>186</sup> The largest modern study found for the purposes of this note involved only 2,269 people;<sup>187</sup> most included far fewer.<sup>188</sup> In addition to small sample sizes, much of the research being conducted on this topic involves “self-selected” sample groups.<sup>189</sup> Given the often heated and passionate debate surrounding this topic in modern society, it is reasonable to assume that societal-driven pressure to conform to the standards of that society may dissuade some from “questionable” backgrounds to participate in public research. In addition, without randomly generated sample groups, it is easy to question the motives of those participants choosing to take part in research surveys. As Wardle points out, “educated, economically stable white lesbians are typically overrepresented in the trendy samples; poor, minority, uneducated, or troubled homosexuals are seldom included. Gay male couples typically are not included.”<sup>190</sup> Many of these concerns have yet to be addressed in modern research.<sup>191</sup>

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182. *Id.* at 162.

183. Fiona Tasker, *Same-Sex Parenting and Child Development: Reviewing the Contribution of Parental Gender*, 72 J.OF MARRIAGE AND FAM. 1, 35 (2010).

184. Wardle, *supra* note 178, at 846.

185. *Id.*; Schumm, *supra* note 179, at 87.

186. Wardle, *supra* note 178, at 846.

187. Mark Henrickson, *Lavender Parents*, 26 SOC. POL’Y J. OF N.Z. 68, 70 (2005).

188. A study from Deakin University in Melbourne, Australia was comprised of just nine people. See J. Pennington & T. Knight, *Through the Lens of Hetero-Normative Assumptions: Re-thinking Attitudes Towards Gay Parenting*, 13 CULTURE, HEALTH & SEXUALITY 1, 59 (2011).

189. Wardle, *supra* note 178, at 846-47.

190. *Id.* at 847.

191. See Schumm, *supra* note 179.

In addition to bias and concerns with the research sample groups, most research on this topic is conducted through surveys and, thus, makes the assumption that one can recognize subconscious developmental issues in himself. Psychologist Jean Piaget's, physician Sigmund Freud's, and psychoanalyst Erik Erikson's theories prove otherwise.<sup>192</sup> Their theories form modern thought on human development, and all studied the subconscious cognitive development of humans.<sup>193</sup> Obviously, these studies were done from a third-party perspective; it would be impossible to ask an infant his exact feelings about a situation and the impact his surroundings had on his development. One could assume an infant's feelings by observing his behavior, but it is impossible to achieve complete accuracy. Likewise, it is unreasonable to assume that someone understands his current "stage" of development and the challenges he may be facing on the subconscious level as they compare to other people's development. Research based completely on surveys assumes that the subject is consciously aware of his subconscious state of mind.

Recognizing the impacts of divorce, single-parenting, and homosexual parenting on children, let us return to the hypothetical Dan and Susan discussed at the beginning of this note and assess how these impacts relate to the case.

#### IV. SOLUTION

Recall Dan's plight in attempting to regain custody of Timmy after Timmy's mother, Dan's long-time partner, ran off. Considering the historical background and current Virginia law as determined by the General Assembly and the Supreme Court of Virginia, Dan seems left with nothing more than uncertainty in his case. Two simple changes to current legislation, however, could provide Dan at least a little more peace at heart.<sup>194</sup>

##### A. *Acknowledging Clear and Convincing Evidence of Paternal Intent to Establish Parentage*

As mentioned, the Virginia General Assembly has yet to address custody of children conceived through artificial insemination by unmarried parents

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192. See ROBERT S. FELDMAN, DEVELOPMENT ACROSS THE LIFE SPAN 13-22 (6th ed. 2010).

193. *Id.*

194. It is important to note here that this note does not attempt to address the differences between awarding parental rights and custody or visitation. Unfortunately, the two are not equal in society, and parental rights are not always pursued with the purest of intentions.

who have not signed an Acknowledgment of Paternity.<sup>195</sup> The Supreme Court of Virginia has yet to address this issue either. Recall, however, the Circuit Court of the City of Roanoke's holding in *Boardwine v. Bruce* that allowed an unmarried man to establish legal paternity over a child who was conceived through at-home artificial insemination using the man's sperm, even without an Acknowledgment of Paternity, through clear and convincing evidence that the parties intended him to be the child's father.<sup>196</sup> In reaching this

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195. The Virginia Department of Vital Records, the issuing authority of birth certificates in the Commonwealth, does require an Acknowledgment of Paternity Form (Form VS22) for the biological father's name to be included on the birth certificate if the biological parents are not married at the time of the child's birth. The form must be signed by both parents and signed before a notary public. See VIRGINIA DEPARTMENT OF HEALTH, VITAL RECORDS, VA. CODE ANN. § 32.1-257(D) (1994) also provides,

If the mother of a child is not married to the natural father of the child at the time of birth or was not married to the natural father at any time during the ten months next preceding such birth, the name of the father shall not be entered on the certificate of birth without a sworn acknowledgment of paternity, executed subsequent to the birth of the child, of both the mother and of the person to be named as the father. In any case in which a final determination of the paternity of a child has been made by a court of competent jurisdiction pursuant to § 20-49.8, from which no appeal has been taken and for which the time allowed to perfect an appeal has expired, the name of the father and the surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court.

Children born of marriages prohibited by law, deemed null or void or dissolved by a court shall nevertheless be legitimate and the birth certificate for such children shall contain full information concerning the father.

For the purpose of birth registration in the case of a child resulting from assisted conception, pursuant to Chapter 9 (§ 20-156 et seq.) of Title 20, the birth certificate of such child shall contain full information concerning the mother's husband as the father of the child and the gestational mother as the mother of the child. *Donors of sperm or ova shall not have any parental rights or duties for any such child.*

In the event any person desires to have the name of the father entered on the certificate of birth based upon the judgment of paternity of a court of another state, such person shall apply to an appropriate court of the Commonwealth for an order reflecting that such court has reviewed such judgment of paternity and has determined that such judgment of paternity was amply supported in evidence and legitimate for the purposes of Article IV, Section 1 of the United States Constitution.

If the order of paternity should be appealed, the registrar shall not enter the name of the alleged father on the certificate of birth during the pendency of such appeal. If the father is not named on the certificate of birth, no other information concerning the father shall be entered on the certificate.

VA. CODE ANN. § 32.1-257 (1994) (emphasis added).

196. See *Boardwine v. Bruce*, 88 Va. Cir. 218 (2014).

holding, the court first determined that Virginia's Assisted Conception Statute did not apply to the facts of the case because the artificial insemination was completed without the assistance of a physician.<sup>197</sup> Citing *Breit*, the court further held that, since the Assisted Conception Statute did not apply, the Parentage Statute allowed for the father to establish parental rights by clear and convincing evidence.<sup>198</sup>

The *Boardwine* court provides insight into the proper method of determining parentage when an Acknowledgment of Paternity is not present, but its reasoning falls short of addressing all possible situations involving the birth of a child through artificial insemination using donations from unmarried, but devoted, couples. In *Breit*, the court held that the Assisted Conception Statute and the Parentage Statute should be read to coincide with one another as much as possible, but the court only addressed a situation in which an Acknowledgment of Paternity was signed.<sup>199</sup>

To remedy the otherwise confusing statutory interpretation, the Assisted Conception Statute should be amended to codify judicial reasoning with specific reference to the Parentage Statute and allow for parentage of children conceived through artificial insemination to be determined by genetics, an Acknowledgment of Paternity, or clear and convincing evidence that the parties intended for each other to be the parents of the child.<sup>200</sup> The current "as otherwise provided in this chapter" standard in the Parentage Statute has created confusion throughout the court system.<sup>201</sup>

#### B. *Mandatory Consideration of Marriage in Best Interest of the Child Analysis*

In addition to the Assisted Conception Statute mentioned above, the Best Interest of the Child Statute needs revision. Given the research above regarding the developmental impacts of divorce, single-parent homes, and homosexual parenting, the marital and familial status of either parent should

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197. *Id.* I do not see the practical distinction made in *Boardwine* between artificial insemination conducted under the supervision of a medical professional and artificial insemination conducted in one's living room. The distinction in *Boardwine* seems to be more of an effort to avoid having to apply the Assisted Conception Statute to that case given the complex statutory interpretation required by *Breit*. See *supra* Part II.C. As such, I recommend this addition of "clear and convincing evidence" to all artificial insemination cases.

198. *Boardwine*, 88 Va. Cir. at 233.

199. *L.F. v. Breit*, 285 Va. 163, 178 (2013).

200. The clear and convincing standard comes from the Parentage Statute's reference to VA. CODE ANN. § 20-49.4. I would also recommend the Parentage Statute be amended with specific reference to VA. CODE ANN. § 20-49.4.

201. See *supra* Part II.B.1.; VA. CODE ANN. § 20-49.1 (1988).

be considered when determining custody and visitation. As such, the marital and familial status (that is, the parent's relationship history, sexual orientation, and current marital status, etc.) should be added as the eleventh factor under the Best Interest Statute that Virginia courts must consider when determining custody and visitation.<sup>202</sup>

This addition would not be a novel concept. Montana, for instance, currently lists marital status as a factor to be considered in the best interest of the child analysis for adoption purposes.<sup>203</sup> In fact, Virginia courts have alluded to this principle already. In *Hughes v. Hughes*, the Court of Appeals of Virginia addressed whether a mother's living with another man to whom she was not married was enough to revoke her custody rights.<sup>204</sup> While the *Hughes* court held that it was not, the court explained that, "exposing [our] children to their parents' living with persons to whom they are not married has been disfavored by our Supreme Court."<sup>205</sup> In *Brown v. Brown*, the Supreme Court of Virginia held that a mother's adulterous relationship rendered her an unfit parent.<sup>206</sup> The court went one-step further and acknowledged that "the moral climate in which children are to be raised is an important consideration for the court in determining custody, and adultery is a reflection of the mother's moral values. An illicit relationship to which minor children are exposed cannot be condoned."<sup>207</sup> Surely the court would not have held the same way if the mother and her lover were, in fact, married. The court has alluded to its desire to consider marital status of parents in custody cases. Perhaps it's time the General Assembly consider it as well.

It is also important to note that I recommend this consideration be included as a factor in a custody or visitation dispute, not a decisive element. As suggested above, a "hard and fast" rule preferring married parents to unmarried parents could lead to further destruction of the family unit.<sup>208</sup> A child's relationship with a stepparent may not be as strong as that child's

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202. I think it important to remind the reader that not all custody arrangements take place immediately following a divorce. At first glance, it seems odd to require courts to consider the marital status of either parent who are in the midst of a custody battle given their likely recent divorce. These best interest factors, however, are considered any time the court is determining the best interest of a child for "purposes of determining child custody or visitation arrangements." VA. CODE ANN. §20-124.3 (2014).

203. MONT. CODE ANN. § 42-4-201 (2014).

204. *Hughes v. Hughes*, No. 2565-97-2, 1998 WL 463323, at \*1-2 (Va. Ct. App. Aug. 11, 1998).

205. *Id.* at \*3 (internal citations omitted) (quoting *Brown v. Brown*, 218 Va. 196 (1977)).

206. *Brown v. Brown*, 218 Va. 196, 199-201 (1977).

207. *Id.* at 199.

208. *See supra* Part III.B.



relationship with her biological parents. Further, just because people are married does not mean they maintain a healthy living environment for children. The potential for abuse, abandonment, and neglect are still very present dangers. That said, the benefits that a married household can provide are substantial and should at least be considered when evaluating the best interests of a child. To completely ignore either parent's current marital and familial status, and only look to the interaction between the biological parents and the child, leaves a gaping hole in the "best interest" consideration.<sup>209</sup>

#### V. CONCLUSION

As current Virginia law stands, our friend Dan is left with a lot of uncertainty regarding his parental rights in relation to Timmy. As the Commonwealth of Virginia decides what elements of the traditional family unit it wants to protect, there are custody disputes being decided daily using confusing and unclear standards that do not promote those elements that the Commonwealth, and the United States for that matter, has determined are fundamental. Virginia's General Assembly should make the Assisted Conception Statute more clear by specifically allowing clear and convincing evidence of the biological parents' intent regarding the parentage of their children to establish parentage over children conceived through artificial insemination. Further, given the severe and substantial effects on a child's development associated with divorced parents, single-parent homes, or homosexual parents, the General Assembly should add marital and familial status of the individuals seeking custody or visitation to the factors the courts must consider when determining the best interests of a child.

The legislature and the courts have expressed the desire to preserve the *Leave it to Beaver* traditional family unit, but the break-down of the "modern family" and technological advances have forced the need to adapt our laws to explicitly preserve what we desire to preserve; our reliance on societal moral standards is no longer working.

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209. I also acknowledge that the "best interest v. parental rights" debate is far from settled, but that debate is also beyond the scope of this note. See *infra* Part II.A.2.