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SECOND JUDICIAL CIRCUIT

January 8, 2016

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Re: Lauren Renee Poole v. Karen Elizabeth Poole
Docket No.: CL15-2998

Dear Counsel:

This matter came before the Court on November 2, 2015 on Plaintiff's petition for custody ancillary to the parties' pending divorce action. The child, P.P. was born during the marriage by use of a sperm donor and the Defendant gave birth to the child on July 28, 2014. Before the proceedings began, the Court entertained the legal question of whether the Plaintiff, the non-gestational spouse, is a legal parent of the minor child P.P. or, as the Defendant argues, whether her status is akin to that of a stepparent. Such a determination drastically affects the applicable burden of proof in this case as it relates to the issue of custody and/or visitation. The Court heard arguments and the submission of authority but continued the case to today's date for the submission of briefs and further authority and argument. The Court has considered the authority and arguments from both parties, and the Guardian ad Litem, and the Court has conducted its own research into this unique issue. For the reasons set forth below, the Court finds based on the arguments, briefs, and pleadings that the Plaintiff is entitled to parental rights to the minor child, P.P. and rejects Defendant's arguments.

A review of the history of this matter is appropriate in this case. The parties, Lauren Renee Poole (Hereinafter referred to as "Plaintiff") and Karen Elizabeth Poole (Hereinafter referred to as "Defendant") married in Snow Hill, Maryland on August 6, 2013. Shortly after, the parties decided to have a child together. The parties enlisted a friend to donate sperm and Defendant was inseminated via turkey baster or 10cc syringe[1] in October 2013. Pregnancy was confirmed in November 2013. The parties entered into a "Sperm Donation Agreement" (Hereinafter referred to as "Agreement") dated February 4, 2014 with the Donor, Alex Pineda, wherein he waives all rights and acknowledges the parties as parents. In January 2014, the parties began attending counseling due to issues in the relationship. The minor child, P.P., was born on July 28, 2014. The parties continued to have relationship issues culminating in Plaintiff moving out of the residence in January 2015. The Plaintiff filed for divorce on July 20, 2015 and requested joint custody in her initial pleading. The parties now contest whether Plaintiff, as the non-gestational spouse, has any parental rights to the minor child.

In the United States, marriage has a long and evolving history. Even in our country's recent past, restrictions on marriage were commonplace, proscribing rules about when marriage was appropriate between parties. One of the most notable changes to this was the Supreme Court decision in *Loving v. Virginia*, 388 U.S. 1 (1967), which invalidated a Virginia statute that prohibited white persons from marrying those of another race. In *Loving*, the Supreme Court stated that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.* at 12. The Supreme Court recognized that restrictions on marriage infringed on a personal right of citizens. This significant change in restrictions on marriage followed the changing social climate in regard to racial relations. The Supreme Court went on to further consider the right to marriage in *Turner v. Safley*, 482 U.S. 78 (1987). *Turner* involved a blanket regulation prohibiting inmates from marrying while incarcerated in Missouri. *Id.* In *Turner*, the Supreme Court considered "whether this regulation impermissibly burdens the right to marry." *Id.* at 97. The Supreme Court found the regulation unconstitutionally infringed on the rights of the inmates, because it was unrelated to valid penological objectives. *Id.* In both *Loving* and *Turner*, the Supreme Court characterized the restrictions on marriage as relating to the larger issue of the individual's right to marry instead of narrowly focusing on the restrictions themselves.

Most recently, the United States has faced changes in relation to same-sex marriage. Same-sex marriage has been at the forefront of the national spotlight since 1972 when the Supreme Court dismissed *Baker v. Nelson*, 490 U.S. 810 (1972), which was one of the first challenges to the denial of the right to marry to same-sex couples. The Supreme Court dismissed the case "for want of a substantial federal question."

[1] There is conflicting evidence as to whether a turkey baster or 10cc syringe was used. Regardless of which was used, the analysis in this opinion is not altered because the method used was not "medical technology" as defined in *Bruce v. Boardwine*, 64 Va. App. 623, 630-31 (2015).

Following *Baker,* several state courts began to individually dismiss challenges to the marriage ban. Hawaii was the first state to legalize same-sex marriage in 1993 when the Hawaii Supreme Court ruled in *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (Haw. 1993), that the restraint on marriage violated the Equal Protection Clause of the Hawaii Constitution.

In 1996, President Clinton signed the Defense of Marriage Act ("DOMA") into law. DOMA mandated the exclusion of certain protections for same-sex couples at the federal level. From the 90's forward, the state of same-sex marriage was in flux throughout the United States. *Baehr* would end up being invalidated when Hawaii went on to amend the state constitution, and the Hawaii Supreme Court reversed its prior decision based upon that amendment. Several states went on to pass anti-marriage amendments preventing same-sex couples from marrying. In 2004, Massachusetts became the first state to pass "Freedom to Marry" legislation. Some states followed Massachusetts in introducing legislation legalizing civil unions and domestic partnerships. However, many states continued to pass legislation preventing same-sex marriage.

The Supreme Court made a distinctive decision in *United States v. Windsor* by overturning Section 3 of DOMA. 133 S. Ct. 2675 (U.S. 2013). Section 3 amended the Dictionary Act to define marriage to exclude same-sex spouses. *Id.* at 2683. The Court found this section unconstitutional because it "demeans the couple, whose moral and sexual choices the Constitution protects." *Id.* at 2694. This decision allowed same-sex spouses to claim certain privileges under federal law like the spousal estate exemption. Around this time, the freedom to marry movement enjoyed a surge of support. In Virginia, this culminated in the Fourth Circuit Court of Appeals ruling in *Bostic v. Schaefer* that banning same-sex marriage violated the Fourteenth Amendment because it unconstitutionally infringed on the right to marry. 760 F.3d 352 (4th Cir. Va. 2014), *cert. denied,* 135 S. Ct. 308 (U.S. 2014). The decision in *Bostic* became law when the Supreme Court declined to issue certiorari on October 6, 2014. *Schaefer v. Bostic*, 135 S. Ct. 308 (U.S. 2014). The Fourth Circuit Court of Appeals held, "[t]he Supreme Court has demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms." *Bostic,* 760 F.3d at 376. The U.S. Supreme Court would then go on to legalize same-sex marriage nationwide in the landmark decision *Obergefell v. Hodges*. 135 S. Ct. 2584 (U.S. 2015).

Obergefell struck down the bans against same-sex marriage in thirteen remaining states and legalized same-sex marriage. 135 S.Ct. at 2607-08. While legalizing same-sex marriage, *Obergefell* recited many concerns about the family unit for children of same-sex couples. *Id.* at 2600-02. *Obergefell* emphasized the importance of the family structure and legitimacy. *Id.* The Court held "the right to marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Id.* at 2600. *Obergefell* went on to say that marriage provides a structure for children to understand family and the community. *Id.* The Court acknowledged that prior to its decision hundreds of thousands of children were being raised and nurtured by same-sex

couples that created loving, supportive families. *Id. Obergefell* found that without recognizing same-sex marriage "children suffer the stigma of knowing their families are somehow lesser." *Id.* at 2590.

Another important consideration is that of a child's "legitimacy," which is a status that is tied to marriage. There is an obvious and quite reasonable argument that legitimacy has no place in the analysis of this issue. It would be rather easy and somewhat intellectually comforting to simply opine that because the assignment of legitimacy is the product of a man and woman bearing offspring within wedlock, it therefore does not follow that such a construct could exist in a same sex marriage such as this case. Yes, nature and biology dictate that human conception is produced with a male and a female participant, however, science and nature have nothing to do with the label of illegitimacy; "bastard" is a label born out of social and moral behavior dating back to the origins of marriage itself. The real nexus between child and the label "bastard", in this court's opinion, is the production of a child out of wedlock. It is the act of marriage, or nonexistence of same, the produces the label, and so the label is not solely dependent on the science of conception alone. See, for example, Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (finding that the marital presumption of legitimacy could constitutionally trump biology, as "our traditions have protected the marital family"). If biology and science were to control legitimacy, then illegitimacy will be forced on every child born of a same sex marriage. Just as same-sex couples have now been afforded equality in marriage, so too should children born during their marriage share equality in legitimacy.

The presumption of legitimacy dates back to the early nineteenth century and is considered one of the strongest common law doctrines in family law.[2] "The presumption of legitimacy was a fundamental principle of the common law."[3] "The primary policy rationale...appears to be an aversion to declaring children illegitimate." *Michael H. v. Gerald D.*, 491 U.S. 110, 125 (U.S. 1989). Outside the law, the presumption of legitimacy has long been an important facet of society. "A secondary policy concern was the interest of promoting the 'peace and tranquility of States and families.'" *Id.* Since that time, there has been a "strong bias against ruling the children of married women illegitimate." *Id.* This common law presumption has been the basis for diverse legislation codifying the presumption. In examining the effect of parentage in a same-sex marriage, a Vermont court noted "in accordance with common law, the couple's legal union at the time of the child's birth is extremely persuasive evidence of joint parentage." *Miller-Jenkins v. Miller-Jenkins*, 180 Vt. 441, 466, 912 A.2d 951, 971 (Vt. 2006). Vermont is not the only state that applies the presumption of parentage to same-sex couples. In Massachusetts, the assumed parentage statute has been applied to same-sex spouses even though the language reads as "husband" and "wife." "The need for a second-parent adoption to confer legal parentage on the non-biological parent is eliminated when the child is born

[2] Alexandra Eisman, Note: The Extension of the Presumption of Legitimacy to Same-Sex Couples in New York, 19 Cardozo J.L. & Gender 579, 583 (2013).
[3] H. Nicholas, Adulturine Bastardy I (1836).

of the marriage."[4] Thus, Massachusetts applied a gender-neutral reading to the statute. New York also grants same-sex couples this protection when applying the presumption to children born during the marriage by artificial insemination. "The Court holds that the non-biological spouse is a parent of this child under the common law of New York as much as the birth-mother." *Wendy G-M v. Erin G-M*, 45 Misc. 3d 574, 596, 985 N.Y.S.2d 845 (N.Y. Sup. Ct. 2014). Same-sex couples now more frequently receive the same protections under the law as heterosexual couples. The presumption of legitimacy remains an important key to legal parentage.

It is important to recognize children as being born of a marriage. The children benefit "from the increased financial security that accompanies marriage, and benefit from the medical decision made on their behalf by either parent."[5] If the parents are divorced, the children benefit from rules regarding custody, support, and visitation.[6] If the parents are hospitalized, the child is prioritized over strangers for visitation, and if the parent were to die then the child can "inherit without a will, sue for the parent's wrongful death, and receive survivors' benefits."[7] Children who do not have the presumption of legitimacy are not afforded any of these basic rights. The rights afforded to children of a marriage iterated above are important to any child regardless of whether that child was born of a heterosexual or same-sex marriage.[8] The presumption is a legal fiction constructed to protect children and afford them important rights.

The common law presumption of legitimacy has a long history in Virginia. The presumption of legitimacy is to favor the children who are innocent of any wrongdoing. Statutes enacted to construe legitimacy were "to remove the stain and disabilities of bastardy from all 'innocent and unoffending' children who for any cause might be classed as illegitimate." *Goodman v. Goodman*, 150 Va. 42, 45 (1928). Courts were instructed to liberally construe statutes to provide for legitimacy for children. *Id.* "Every fair presumption should be indulged in favor of legitimacy." *Wyatt v. Virginia Dep't of Social Services*, 11 Va. App. 225, 229 (1990). Virginia courts have stated, "the law so favors legitimacy rather than illegitimacy." *Hoover v. Hoover*, 131 Va. 522, 541 (1921). These cases did not involve same-sex marriage, but the policy concerns holds true in regard to the importance of legitimacy for children. In *Henderson v. Henderson*, the court held "the issue of marriages decreed null in law, without regard to the grounds of nullity, are legitimated…[children] are put on a par with children born in lawful wedlock." 187 Va. 121 (1948). Protecting the children and indulging presumptions of legitimacy are clearly favored by the common law and the courts. Although the mark of bastardy is not as controversial as it once was, legitimacy is still an important marker in our society for

[4] 1-10 Child Custody and Visitation § 10.05A (2015)
[5] Eisman, *supra* note 1, at 603.
[6] *Id.*
[7] *Id.*
[8] *Id.*

children. Policy considerations favor legitimacy because the children are the ones who are protected by legitimacy, not the parents.

There is no clear reason why the same policy considerations would not apply in this instance. The Pooles were married at the time P.P. was conceived and born, with the consent of both spouses to their joint parentage. Public policy and the common law dictate that the presumption of legitimacy applies to the Pooles marriage and minor child P.P., who is the child of both Karen and Lauren Poole. Both Virginia and the United States Supreme Court in *Obergefell* have emphasized the importance of legitimacy for children. Following these presumptions, a child conceived and born during a same-sex marriage should be entitled to the same presumption of legitimacy. Children of a same-sex marriage should be afforded the same protections and benefits that are afforded to those children of heterosexual marriages. The Plaintiff, Lauren Poole is entitled to the presumption that she is the second legal parent of the minor child, P.P. This presumption also follows the intent of the Agreement. The Agreement clearly indicated that if P.P. were to have a second legal parent, then the parent would be Lauren Poole, the Plaintiff. The presumption of legitimacy tracks with the intended result of the parties' Agreement.

The Agreement is useful in illustrating the parties' intent at the time Defendant was pregnant with the minor child. While some of the language of the Agreement is conflicting, that merely reflects the state of flux regarding the validity of same-sex marriages at the time of its execution. Despite this, there are numerous indications that Plaintiff was to act as, and be, a parent for the resulting child. The first indicator that both Plaintiff and Defendant would be parents is the fact Plaintiff is a party to the Agreement. The Plaintiff initialed every page and signed as a party to the Agreement. A conscious decision was made to include Plaintiff in this Agreement.

The section on Paternity indicates that recipient and recipient's partner are the parents of the child. The Plaintiff, Lauren, ("recipient partner") indicates her consent that she cannot "hold the Donor legally, financially, or emotionally responsible for any child that results from the Artificial Insemination."[9] If Plaintiff was not a parent of the conceived child, then presumably this language would not be necessary, as she would not be responsible for any obligations with regard to the minor child. Furthermore, Plaintiff would likely have no legal standing to enforce any obligation against the donor if she were not a parent. While the section states that parental rights and responsibilities fall solely to recipient, it also goes on to say that recipient is not precluded from sharing those rights and responsibilities in accordance with standard law.[10] The section shows an intent for both Plaintiff and Defendant to act as parent for the minor child, P.P.

The section on second-parent adoption clearly states that "recipient's partner intends to act as a second parent for the child, and is fully involved in recipient's decision

[9] Sperm Donor Agreement, pg. 2
[10] Agreement, pg. 2.

to bear and raise a child."[11] The section follows to recite "[i]f it is ever found that the child has an interest in having a second legal parent, then the second parent shall be recipient's partner."[12] This recitation is one of the instances in which the Agreement was clearly written in contemplation of changing laws. The paragraph goes on to state "the reality is that the child will have two parents, recipient and recipient's partner."[13] The Agreement goes on to state that the two made the decision to raise the child and took the steps together.[14] This section, while contemplating a second-parent adoption, indicates that the parties intended for Plaintiff to be the second parent. In the same section discussing a second-parent adoption, the section also recites that Plaintiff should be the second legal parent if the child has a second legal parent. The intent behind this Agreement was for recipient's partner to be the second parent for the conceived child. Additionally, under Virginia law it is no longer strictly necessary for the non-gestational parent to adopt the child born during the marriage. The two spouses can file to include the second parent on the birth certificate without filing for adoption. The fact the parties did not file for a second-parent adoption is not determinative of Plaintiff's status as a parent. Again, it is the finding of this Court that the intent of the parties' in regard to Plaintiff's status is clear.

The Agreement also contains an indemnity clause in which recipient and recipient's partner agree to indemnify the donor for any personal financial loss or expense arising from any act or omission arising from his role as donor.[15] The Agreement also includes a clause requesting that the deciding agency in any arbitration or legal action enforce the basic intent of the Agreement: that recipient and recipient's partner are the sole parents of the resulting children.[16] This Agreement was endorsed by Defendant, Plaintiff and Alex Pineda, the Donor. The inclusion of Plaintiff in the Agreement is a clear indication that Plaintiff was a part of the decision-making process and intended to be a parent for the resulting minor child. While the parties now contest whether Plaintiff is a parent, it is clear that at the time of conception and birth Plaintiff was intended to be a parent to the minor child. Despite the existence of conflicting language, the Court finds that the unambiguous intent of the parties at the signing of the Agreement was that Plaintiff was to be and act as a parent of this child, born of the marriage, consistent with a desire to build a marital family with structure and stability. The contentiousness of a divorce does not mean that Plaintiff is no longer a parent because the Defendant, as the gestational parent, no longer wishes her to be one.

In the alternative, it appears to the Court that Plaintiff would be a legal parent under Maryland law and, accordingly, comity could apply in this case. New York examined a case with similar circumstances to the case at hand. *Debra H. v Janice R.*, 14 N.Y.3d

[11] Agreement, pg. 3.
[12] Agreement, pg. 3.
[13] Agreement, pg. 4.
[14] Agreement, pg. 4.
[15] Agreement, pg. 6.
[16] Agreement, pg. 7.

576, 930 N.E.2d 184 (N.Y. 2010). The birth mother and her same-sex spouse entered into a civil union in Vermont before same-sex marriage was legal under New York law. *Id.* at 586. A child was born the month after the civil union. *Id.* When confronted with a similar situation, the New York court found the parentage standard to be a question of Vermont law, because the civil union was entered into in Vermont at a time when the union was illegal in New York. *Id.* at 599. Examining Vermont law, the New York Court held that the non-gestational spouse was a parent. *Id.* at 600. Vermont law afforded same-sex couples all the same protections as heterosexual couples, and, thus, the presumption of legitimacy was applied to same-sex couples in Vermont. *Id.* at 598. The New York court judged that comity should be accorded to Vermont. *Id.* at 600. Under the principle of comity, the New York court recognized the law of Vermont as applicable to the situation and adjudged the non-gestational partner to be a legal parent. *Id.* at 601. The situation at hand is substantially similar to *Debra H.*, and the Court agrees that, in addition to the reasons given in this opinion, the same principle of comity could be used for determining parentage in the instant case.

Similar to *Debra H.*, Plaintiff and Defendant decided to enter into a legal same-sex marriage in Maryland at a time when the legal ramifications were unknown. Same-sex marriage was still illegal in Virginia at the time the parties were married in Maryland. Under Maryland Estates and Trusts Code Ann. §1-206,[17] Maryland law finds that a child born or conceived during a marriage is presumed to be the legitimate child of both spouses. Plaintiff and Defendant married in Maryland in August 2013. Defendant was known to be pregnant in November 2013, and Defendant gave birth on July 28, 2014. Under §1-206, the child is presumed to be a child of both spouses. The statute is written to be gender neutral. Therefore, the presumption can be read to include partners in same-sex marriages. Furthermore, a Maryland Court suggested the presumption would apply if same-sex spouses were married at the time of birth. *Michelle L. Conover v. Brittany D. Conover*, 224 Md. App. 366, 120 A.3d 874 (2013). *Conover* involved a same-sex divorce where the minor child was born prior to the marriage. *Id.* The Court emphasized the fact that the parties could have chosen to marry and suggested the presumption would apply if the child was conceived and born during the marriage. *Id.* at 373. The Maryland court noted, "the couple could have married before Jaxon was born, but did not." *Id.* at 381. The Maryland court declined to apply the presumption because the child was both conceived and born before the pair was married even though they could have legally married in at least three states at the time. *Id.* The opinion suggests that Maryland would apply the presumption in cases where same-sex couples are legally married when the child is born. In the case at bar, Lauren and Karen Poole were married in August 2013

[17] (a) Marriage of parents.—A child born or conceived during a marriage is presumed to be the legitimate child of both spouses. Except as provided in §1-207 of this subtitle, a child born at any time after his parents have participates in a marriage ceremony with each other, even if the marriage is invalid, is presumed to be the legitimate child of both parents.

(b) Artificial insemination.—A child conceived by artificial insemination of a married woman with consent of her husband is the legitimate child of both of them for all purposes. Consent of the husband is presumed.

when same-sex marriage was legal in Maryland. Defendant became pregnant during that marriage and the minor child P.P. was born during the marriage. It appears to this Court under §1-206 and Maryland law that Plaintiff would be the presumed parent of the minor child P.P because the child was conceived and born during the marriage. Thus, in addition to the other reasons given for relief in this opinion, Plaintiff could be afforded the relief under comity to be the second legal parent of the minor child, P.P.

The Court notes that the *de facto* parent doctrine does not apply in this situation. Virginia has repeatedly declined to recognize the *de facto* parent doctrine. This doctrine is a judicial construct that rebuts the presumption in favor of biological parents with regard to parental rights. The doctrine allows courts to afford rights to third parties who have a psychological bond with the child established through care, nurture, and affection even over the natural parent's objections. *Stadter v. Siperko*, 52 Va. App. 81, 91-92 (2008). "No appellate court in Virginia has ever so applied the de facto parent doctrine." *Id.* A person must either be a parent or a person with so legitimate an interest that the child is harmed by preventing visitation. Because Virginia recognizes the legitimate interest doctrine, Virginia Courts have declined to create additional legal framework recognizing the de facto parent doctrine. *Id.* The doctrine does not apply in Virginia, and therefore Plaintiff must be a legal parent in order to have rights with respect to the minor child. As discussed above, much more is involved in this case than a "psychological bond," so application of the de facto parent doctrine is not necessary.

It is clear to the Court in this case that the parents are not protected by the assisted conception statute. Section 20-158[18] says that a donor is not the parent of a child conceived through assisted conception. Assisted conception is defined by Virginia Code as "pregnancy resulting from intervening medical technology."[19] Here, the insemination was done at home via turkey baster or 10cc syringe. Virginia Courts examined turkey basters in an earlier case, *Boardwine v. Bruce*. 88 Va. 218 (2014). In *Boardwine*, a single mother was inseminated with a friend's sperm via turkey baster. *Id.* at 224. The Court found that this was not a pregnancy resulting from intervening medical technology, and,

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[18] A. Determination of parentage, generally. -- Except as provided in subsections B, C, D, and E of this section, the parentage of any child resulting from the performance of assisted conception shall be determined as follows:

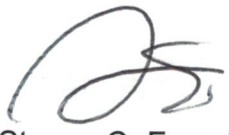
1. The gestational mother of a child is the child's mother.
2. The husband of the gestational mother of a child is the child's father, notwithstanding any declaration of invalidity or annulment of the marriage obtained after the performance of assisted conception, unless he commences an action in which the mother and child are parties within two years after he discovers or, in the exercise of due diligence, reasonably should have discovered the child's birth and in which it is determined that he did not consent to the performance of assisted conception.
3. A donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother.

[19] §20-156

therefore §20-158 did not apply. *Id.* In the case at hand, Defendant was similarly inseminated by a turkey baster or 10cc syringe at home. Thus, in this case, the assisted conception statute does not apply because the insemination was not done by intervening medical technology.

Accordingly, based upon the development of the law of marriage, strong public policy favoring the presumption of legitimacy and of a strong family structure, the parties' intent as evidenced by their Agreement, and the effect of Maryland law the Court finds that the Plaintiff, Lauren Renee Poole, is a legal parent of the minor child, P.P.

Sincerely,



Steven C. Frucci
Presiding Judge

SCF/ahj/nc