

IN THE
Court of Appeals of Virginia

RECORD NO. 2192-04-4

JANET MILLER-JENKINS,

Appellant,

v.

LISA MILLER-JENKINS,

Appellee.

BRIEF OF APPELLEE

Mathew D. Staver
Rena M. Lindevaldsen
Scott E. Thompson (VSB# 45033)
LIBERTY COUNSEL
210 East Palmetto Avenue
Longwood, Florida 32750
Tel: (407) 875-2100
Fax: (407) 875-0770

Phillip S. Griffin, II (VSB# 34576)
Peter T. Hansen (VSB# 34819)
PHILLIP S. GRIFFIN, II, P.C.
102 South Kent Street
Winchester, VA 22601
Tel: (540) 667-4647

Counsel for Appellee Lisa Miller-Jenkins

STATEMENT OF THE CASE

This case concerns the statutory and constitutional rights of Appellee, Lisa Miller (“Lisa”), the biological mother of two year old Isabella (“IMJ”), to raise her daughter without interference from Appellant, Janet Jenkins (“Janet”), a woman who has no biological or adoptive relationship to IMJ. At the outset, it bears emphasis that IMJ was born *in Virginia*, as the result of artificial insemination that took place *in Virginia*, at a time when Lisa and Janet lived together *in Virginia*. Janet is Lisa’s one-time domestic partner who did not adopt IMJ and is not listed on IMJ’s birth certificate. Lisa petitioned the Circuit Court of Frederick County, Virginia to establish her parentage under Virginia’s assisted conception statute and requested declaratory relief consistent with her status as a single parent. The Circuit Court, after concluding that it had jurisdiction, declared Lisa the sole parent of IMJ. Janet argues on appeal that the Circuit Court lacked jurisdiction to issue the order based on the Parental Kidnapping Prevention Act (“PKPA”) and the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”).

Appellant’s arguments that the trial court lacked jurisdiction are wrong for several reasons. First, the PKPA only comes into play where a first court with jurisdiction properly issues a custody or visitation determination. Under those circumstances, a second court is precluded from modifying the custody or visitation determination, absent certain specified exceptions. The PKPA does not, however, prevent a second court from taking jurisdiction, as it did here, to determine a *parentage* action. Second, even if the Virginia order could somehow be construed as a custody order, which it is not because the Vermont court did not *properly* issue a custody or visitation determination, nothing

prevented the Virginia trial court from taking jurisdiction to enter its own initial custody order. Third, even if the Vermont order were considered a properly issued custody or visitation determination, the Virginia Marriage Affirmation Act (“Marriage Affirmation Act”) precludes enforcement of any rights afforded to Appellant under the Vermont order. In other words, even if the PKPA were to require that Virginia afford full faith and credit to the Vermont initial order, the Marriage Affirmation Act, which is authorized by the federal Defense of Marriage Act (“DOMA”), would dictate a contrary result. Thus, the PKPA does not prevent the Virginia courts from exercising jurisdiction in this case. Finally, by operation of the Vermont Civil Union law, under which the Vermont court issued its order, the Vermont Civil Union law, and any order issued pursuant to said law, is parochial only to Vermont. Every court in the country that has considered Vermont’s Civil Union law has refused to recognize its validity outside of Vermont.

The trial court also properly exercised jurisdiction under the UCCJEA. Significantly, as stated in the trial court’s order, Virginia is not precluded from exercising jurisdiction because of any pending Vermont proceeding. First, the Vermont action is not a “child custody proceeding.” Second, Appellant is not a parent or a “person acting as a parent” for purposes of claiming a right to legal custody. Third, as with the PKPA, even if the Vermont court had properly exercised jurisdiction and properly made an initial custody determination, the Virginia court would still have jurisdiction to entertain and rule on Lisa’s *parentage* petition. Fourth, even if the Vermont order constitutes a valid visitation determination, and the Virginia order somehow constituted a custody determination, the Virginia courts have jurisdiction to modify the Vermont order.

The Virginia court also properly took jurisdiction of the parentage action because failure to do so would have resulted in Lisa's constitutional rights to raise her biological child as she sees fit being infringed.

The order of the Circuit Court of Frederick County ruling that Lisa Miller is her daughter's sole parent should be affirmed.

QUESTIONS PRESENTED

1. Whether the Virginia Court properly exercise jurisdiction under the PKPA or UCCJEA over a parentage action commenced by the sole biological parent of a child conceived and born in Virginia and currently residing in Virginia, where the child was born while the biological mother was a member of a Vermont Civil Union and the mother is currently seeking to dissolve that civil union in Vermont, which is the only state where the civil union can be dissolved?

2. Whether the Federal Defense of Marriage Act and Virginia's Marriage Affirmation Act authorizes the Virginia Court to take jurisdiction over a case to determine parentage of a mother over her biological child when the child was conceived in Virginia, the mother and child live in Virginia, and the out-of-state order at issue comes from a state which sanctions same-sex unions not recognized by Virginia and is issued by a court which did not issue a visitation determination, and even if it did, the order from the foreign jurisdiction did not adjudicate parentage and where parentage by the out-of-state party is admitted to lie with the Virginia resident and biological mother?

3. Whether the Vermont Court properly issue a "custody determination" or "custody order" within the meaning of the PKPA or UCCJEA?

4. Whether the Vermont Court order constitutes a visitation determination when the order never mentioned the term “visitation” or “custody”?

5. Whether Virginia should accord any validity or extend any full faith and credit to an out-of-state same-sex union which is expressly banned in Virginia and which is contrary to public policy?

STATEMENT OF FACTS

Lisa and Janet lived together for several years in Virginia in the late 1990’s. In December 2000, while still living in Virginia, they traveled to Vermont to enter into a “civil union.” (Joint Appendix “JA” at 1-2).¹ At that time, Virginia law prohibited same-sex marriages and refused to treat as valid same sex marriages entered into in other states. Neither Lisa nor Janet remained in Vermont, but instead, promptly returned to live in Virginia. (JA 334, 354). Lisa had always wanted children and in 2001 began medical preparations to receive artificial insemination in Virginia from a Virginia doctor. Janet did not provide any genetic material for the insemination. Lisa’s ovum was inseminated with sperm provided by an anonymous donor. (JA 1). Thus, under Virginia law, the child had only one parent – Lisa.

Lisa carried the baby to term and gave birth in April 2002 to a healthy baby girl. (JA 1). Lisa is listed as the sole parent of IMJ on the official Virginia birth certificate. In

¹ In response to the Vermont Supreme Court decision in *Baker v. State of Vermont*, 744 A.2d 864 (Vt. 1999), the Vermont legislature passed the Civil Union Bill on July 1, 2000. Vt. Stat. tit. 15 § 1201 *et seq.* *Baker* held that same-sex couples were entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. The *Baker* court did not mandate direct the legislature to authorize same-sex marriage; rather, the court allowed the legislature to fashion its own remedy, which could include same-sex marriage, domestic partnerships or some other “alternative legal status to marriage for same-sex couples.” *Baker*, 744 A.2d at 886. In response, the legislature passed the Civil Union Bill.

August 2002, Lisa, Janet and IMJ moved to Vermont. (JA 354). Although Lisa desired to have another baby, she was not able to get pregnant. Becoming fearful of Janet's abusive actions, Lisa eventually indicated she desired the relationship to end. Janet insisted Lisa leave immediately. Because Lisa did not have a car, on September 13, 2003, Janet drove Lisa and the child back to Virginia where Lisa's family lives. Lisa took up residence in Winchester, Frederick County, Virginia. Janet then returned to Vermont.

Wanting to dissolve her Vermont Civil Union, Lisa filed pro se in Vermont the necessary forms in November 2003. (JA 15-18). Significantly, Vermont was the only place she could seek dissolution of that civil union, as no other state recognizes the validity of a Vermont Civil Union. Although Janet relies heavily on the pro se forms as a basis for her argument that she is a parent of the child, a cursory look at the papers reveals that the pre-printed forms do not state that Janet is the child's parent. (*Id.*) The form, which provided no guidance to pro se litigants on how to answer the questions, contains questions to be check-marked. One of those questions asked whether the child was born during a civil union. (JA 16). Obviously, the child was born during the pendency of the Vermont Civil Union. Lisa's checking "yes" on the box does not indicate that she abdicated her rights as the child's sole parent, but rather, constituted a truthful response to the question. After Lisa completed the forms, she returned to Virginia.

On June 17, 2004, the Vermont court entered a "temporary order re: parental rights and responsibilities." (JA 19-22). That order awarded Lisa "legal and physical responsibility" of her child and granted Janet temporary "parent child contact." The June 2004 order does not contain the words "custody" or "visitation." Significantly, the Vermont court failed to comply with Vermont law insofar as it awarded temporary

parent-child contact, over Lisa's objections to the treatment of Janet as a parent, without first determining whether Janet was a parent. The Vermont court also failed to consider that the child was born in Virginia, where Lisa and Janet were living at the time. At a minimum, the Vermont court should have performed, which it did not, a choice of law analysis to decide whether Virginia or Vermont law should govern the question of parentage.

On July 1, 2004, Lisa filed a petition in the Circuit Court for Frederick County, Virginia, asking the court to establish her parentage of the child pursuant to Va. § 20-49.2 and Virginia's assisted fertilization statute, Va. Code § 158(A)(1). (JA 1-3). Her petition requested declaratory relief consistent with a finding of parentage. Thus, contrary to Janet's argument that Lisa's suit in Virginia was "undisputedly" a custody request, the thrust of Lisa's action was a parentage determination. Janet demurred on the basis of the UCCJEA (JA 4-10), and submitted unsubstantiated, meritless factual claims through an affidavit of a paralegal of Janet's lawyers. (JA 12-14). The demurrer did not raise the PKPA as a defense. Lisa moved for default judgment on the grounds that Janet had not asserted a proper demurrer, in response to which Janet filed a second brief asserting, without legal basis or support, that the Marriage Affirmation Act was unconstitutional. (JA 25-33). Janet still did not raise the PKPA as a defense.

In the interim, Janet's lawyers sought, and received, a July 19, 2004 order from the Vermont court stating that "it has and will continue to have jurisdiction over this case including parent-child contact issues." (JA 24). The Vermont court did not raise the issue of the PKPA, but threatened to convene a hearing on the "need to change custody" if Lisa persisted with the Virginia cause. (*Id.*). That was the first order from Vermont mentioning

“custody” and was entered almost three weeks after Lisa filed her parentage suit, and after the Vermont court was made aware of the Virginia parentage proceeding.

On August 13, 2004, the Frederick County Circuit court wrote to the Vermont court (JA 47) advising it of the Virginia developments, and that based upon the stipulations of Janet and her counsel, it found Lisa and IMJ to be residents of Virginia since September 2003. The court, therefore, indicated that it would limit the visitation to in-state visitation in order to ensure stability of the proceedings and safety of IMJ until a later hearing on jurisdiction. (JA 48-51). An order dated August 18, 2004, states that “In order to protect the safety and well being of the child and to ensure stability . . . the child is not be removed from the Commonwealth of Virginia.” The Vermont court did not respond until the Frederick County Court convened a telephone consultation pursuant to UCCJEA with the Vermont court on August 19, 2004. (JA 51-61). At that time, the Vermont court agreed that Lisa “filed a complaint to dissolve a civil union” in Vermont, that Vermont has a presumption of “natural” parentage which the court believed it was required to apply to civil union partners, and agreed that the substantive laws of the two states appeared to be in conflict. (JA 58-59). The Vermont court did not raise the PKPA.

The PKPA was not raised until Janet’s third submission in support of her demurrer, on August 20, 2004. (JA 333). The submission relied on non-binding case law that was readily distinguishable from the present case. The affidavit submitted at that time by Janet contained plain factual errors, including the erroneous statement that the Vermont court issued a “Temporary Custody Order” (capitalization in original).

On August 24, 2004, the Virginia court heard oral argument on the demurrer. Janet argued that she had the status of a parent in Vermont law, but could not point to any

portion of the Vermont record where parentage had been determined in her favor, nor could she point to any Vermont law establishing her to be the parent. The Circuit Court entered an order confirming its jurisdiction, finding that nothing in the PKPA or UCCJEA precluded it from exercising jurisdiction over the parentage action. The parentage matter was set for trial. Janet made no appearance and the court entered judgment on October 15, 2004 in Lisa's favor after taking evidence. (JA 468-469).

SYNOPSIS OF THE ARGUMENT

Appellant's arguments that the trial court lacked jurisdiction are wrong for several reasons, the most significant of which is that the PKPA places no limit on the Virginia's court's exercise of jurisdiction when the proceeding pending in the foreign state is a civil dissolution proceeding.

The PKPA does not prevent Virginia from taking jurisdiction to determine a parentage action of a child born in Virginia and currently a Virginia resident. Nor does the PKPA prevent Virginia from exercising jurisdiction in light of the fact that the Vermont temporary order regarding parental rights and responsibilities is not a *properly* made visitation or custody determination. Regardless of how the Vermont proceeding is characterized, or what order it may have entered, Virginia's Marriage Affirmation Act precludes enforcement of any rights afforded to Appellant under the Vermont order.

The result is identical under the UCCJEA. In particular, the Vermont proceeding is not a "child custody proceeding" within the meaning under the UCCJEA. Nor is Appellant a parent, or a "person acting as a parent" that can assert a legitimate claim to custody or visitation. In addition, as with the PKPA, even if the Vermont court had properly exercised jurisdiction and properly made an initial custody determination, the

Virginia court would still have jurisdiction to entertain and rule on Lisa's *parentage* petition. Finally, even if the Vermont order constitutes a valid visitation determination, and the Virginia order somehow constituted a custody determination, the Virginia courts have jurisdiction to modify the Vermont order. In addition, every court confronted with the question of whether it would recognize a Vermont civil union has declined to do so.

The Virginia court also properly took jurisdiction of the parentage action because failure to do so would have resulted in Lisa's constitutional rights to raise her biological child as she sees fit being infringed.

ARGUMENT

I. THE PKPA DOES NOT PRECLUDE VIRGINIA FROM EXERCISING JURISDICTION OVER LISA'S PARENTAGE ACTION.

A. To The Extent The Vermont Order Constitutes A Visitation Determination, The Virginia Court Properly Exercised Jurisdiction Because The Vermont Order Was Not Properly Made.

To the extent the Vermont order constitutes a visitation determination, even though it does not mention the term visitation, but instead grants Janet "parent-child contact" – a term foreign to Virginia law – the Virginia court properly exercised jurisdiction because the Vermont court did not properly issue the order. In particular, at the time the Vermont Court issued its "temporary order re: parental rights and responsibilities," it had not made a parentage determination even though Lisa objected to the Court's treatment of Janet as a parent, and specifically requested a hearing on that issue prior to any temporary order regarding parental rights and responsibilities. It was plain error for the court to grant "parent child contact" without first making a determination that Janet was a parent.

The term “parent child contact”, as defined in Vermont law, requires the party requesting “parent-child contact” to be a parent. *See* V.S.A. section 664(2) (“Parent child contact’ means the right of a parent who does not have physical responsibility to have visitation with the child”). In fact, the Vermont Family Court Pamphlets available to litigants on the court’s website confirms that parentage must be decided before a court can award parent-child contact.

Once parentage is established either the mother or father can seek parental rights and responsibilities (custody) or ask for parent-child contact (visitation). . . . Once parental rights and responsibilities are established, child support will be determined.

Pamphlet #6 October, 2002 (available at www.vermontjudiciary.org/courts/family/Pamphlets/pamphlet6.htm). In other words, the law follows logic: a person is not entitled to “parent-child” contact until after it is established that applicant is a “parent.” Regardless of how parentage is established – i.e, through the presumption of “natural” parentage, other statutory provisions, or, an equitable theory, where recognized under the law – it must be established before a person can be awarded parent-child contact. *Cf. AEI v. JDM*, 758 P.2d 22, 24 (Wyoming 1988) (“in a child custody case in which paternity is contested, a putative father cannot be awarded custody unless he establishes paternity in accordance with the Wyoming parentage act”); *Beil v. Bridges*, 1993 WL 564237, at *2 (Ohio Ct. App. 1993) (“trial court found that parentage must first be determined before it could resolve custody, support and visitation issues”). The Vermont court ignored this requirement. The Vermont court purported to issue a temporary order granting Janet parent-child contact without first making a parentage determination or ruling on Lisa’s objections to treatment of Janet as a parent.

The Vermont court clearly lacked authority to grant temporary parent-child contact to Janet. Under Vermont law, a Family Court is only authorized to issue in a temporary order that which it is authorized to issue in a final order. 15 V.S.A. § 594a. Under Vermont law, the court cannot grant parent-child contact to a woman who concedes she is *not* the biological or adoptive parent, where no other statute exists in Vermont law granting her parental status, and the biological mother contests treating the other party as a parent. In particular, Janet cannot claim “parent” status by virtue of the “natural” parent presumption found at 15 V.S.A. § 308, given that she admits she is not the “natural”, biological parent. Section 308 states that a “person alleged to be a parent shall be rebuttably presumed to be the natural parent of the child if . . . the child is born while the husband and wife are legally married to each other.” Vermont civil union law contains a blanket provision that the “rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.” 15 V.S.A. § 1204(f). Thus, all that Vermont civil union law affords Janet is that contained in section 308 – a rebuttable presumption that a child born to Lisa during the civil union is the “natural parent.” Arguably, if Lisa did not challenge the presumption the law would permit Janet to defy logic, nature and science, and be presumed to be the “natural” parent. However, Lisa *did* object, and her objection creates an insurmountable barrier for Janet, who admits, as she must, that she is not a “natural” biological parent to IMJ. To afford Janet irrebuttable parent status, rather than a rebuttable presumption of “natural” parentage under section 308, over the objections of Lisa, would be granting a civil union partner special treatment

not accorded to civil marriage (over the treatment afforded a non-biological opposite sex partner whose partner gave birth). The Vermont law affords Janet equal treatment, which under these circumstances, does not afford her natural parent status. *See, e.g., Lawrence v. Limoge*, 546 A.2d 802, 804 (Vt. 1988) (act conferring parental rights, not existing in common law, “must be strictly construed”).

Nor does anything else under Vermont law help Janet on her quest for parent status. Unlike Virginia, Vermont has no statute setting forth how to determine the parentage of a child resulting from assisted conception. *See* Va. Code Ann. § 20-158. That is a question that has not yet been addressed by the Vermont legislature.² Plainly, under Vermont law, Janet has no basis to claim parent status of IMJ. Janet is not identified on the Virginia birth record as a parent and Janet did not choose to adopt IMJ.

Nor can Janet claim to be a parent under Virginia law. It bears emphasis that the Vermont court should have, at a minimum, performed a choice of law analysis to determine whether Vermont or Virginia law would apply to any parentage determination. The Vermont court failed to do so. That fact alone raises serious questions concerning the validity of any order determining parentage or granting parent-child contact because Virginia is the state in which Lisa was artificially inseminated, in which IMJ was born

² On November 17, 2004, the Vermont trial court issued an order declaring Janet a parent. In order to accomplish this task, the court, after recognizing that Vermont has no statutory or case law to determine how parentage should be determined for those individuals whose partners become pregnant through artificial insemination, created new law. Significantly, the court created new law to be applied in the context of a married couple, and then indicated he was required by virtue of the civil union statute, to apply that same, newly created law, to civil union partners. Significantly, the law the court created holds simply that if the non-biological partner desired the pregnancy, then he/she is conclusively determined to be the parent. Not only did the court exceed its authority in creating new law (rather than properly leaving the task to the Legislature), the law the court created plainly infringes upon the constitutional rights of the biological parent. Permission to appeal has been requested. This order is presently on appeal to the Vermont Supreme court.

and in which Janet and Lisa resided for several years. Under Virginia law, Janet has no basis for claiming parent status.

Pursuant to Va. Code § 20-49.1, a parent and child relationship is established in one of five ways when the child is conceived naturally – i.e., by male-female contact. None apply here. Pursuant to Va. Code § 20-158, parentage can be determined for a child resulting from assisted conception. None of the ways identified in that statute apply to confer parent status upon Janet. In particular, she is not the gestational mother of the child, she was not the husband of the child’s mother, and Janet did not contribute the sperm. Janet plainly has no claim to parent status under Virginia or Vermont law.

Because the Vermont court would not have been authorized to make a final order granting Janet parent-child contact without first determining that she was a parent, which it cannot do under current Vermont or Virginia law, it lacked authority to issue the temporary order. Absent a valid visitation determination, nothing precluded Virginia from exercising jurisdiction over this case, regardless of whether the Virginia action is construed as parentage action – which it should be – or a custody matter. *See, e.g., Meade v. Meade*, 812 F.2d 1473, 1477 (4th Cir. 1987) (the effect of the PKPA is “to limit custody jurisdiction to the first state to properly enter a custody order, so long as the two sets of requirements are met”).

B Even If The Vermont Court Properly Made An Initial Custody Determination Within The Meaning Of The PKPA, The Virginia Court Properly Exercised Jurisdiction Over The Parentage Action Filed In Virginia.

The PKPA requires a state to enforce according to its terms, and not modify, a *valid* custody or visitation determination of another state, except under certain exceptions provided for in the statute. “Custody determination” means “a judgment, decree, or other

order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications.” 28 U.S.C. 1738A(b)(3). “Visitation determination” means “a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications.” The PKPA plainly does not prohibit a second state from determining *parentage*.

Several courts have held that where the PKPA does not include certain proceedings within the definition of “custody determination” or “visitation determination” it indicates a deliberate choice by Congress to omit them from those actions a second court is precluded from taking. For example, in *L.G. v. People of the State of Colorado*, 890 P.2d 647 (Col. 1995) (en banc), the court had before it the question of whether Colorado had jurisdiction to enter orders on a petition in dependency and neglect filed by the State when an effect of the court’s orders was to alter the father’s visitation rights previously granted by an Oklahoma court. *Id.* at 653. The Colorado Supreme Court reversed the Court of Appeals conclusion that the PKPA applied to dependency and neglect proceedings. The Supreme Court explained that

[t]he definition of “custody determination” provided by the PKPA conspicuously omits any reference to child dependency and neglect proceedings. . . . [W]e find that Congress’ omission of dependency and neglect proceedings in the definitional section of the PKPA can only mean that Congress made a deliberate choice not to include those proceedings within the coverage of the statute.

Id. at 661. *See also Sheila L. v. Ronald P.M.*, 465 S.E.2d 210, 221 (W. Va. 1995) (“The parentage action in Ohio was not a ‘custody determination’ as defined by the PKPA”); *Dep’t of Human Servs. v. Avinger*, 720 P.2d 290, 292 (N.M. 1986) (custody determination made within context of a child dependency or neglect proceeding is not a

custody determination); *Sayeh R. v. Monroe County Dep't of Soc. Servs.*, 693 N.E.2d 724, 727 (N.Y. 1997) (“child protective proceeding is not a ‘custody determination’ within the meaning of the PKPA or New York’s UCCJA”).³

Thus, even if the Vermont interim order is construed to be a valid custody or visitation determination – which it is not – the PKPA does not preclude Virginia from exercising jurisdiction to determine parentage.

C. Even If The Vermont Court Properly Made An Initial Custody Determination Within The Meaning Of The PKPA, And The Virginia Order Is Somehow Construed As A Visitation Or Custody Determination, The Virginia Court Properly Exercised Jurisdiction Of The Matter By Virtue Of The Federal Defense of Marriage Act And The Marriage Affirmation Act.

At the time Lisa and Janet entered into their Vermont Civil Union, they were residents of Virginia. Pursuant to the Vermont Civil Union statute,

Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.

15 V.S.A. § 1204. Under Vermont law, civil unions are not the equivalent of marriage, as the term “marriage” is reserved only for a union between a man and a woman. However, the law requires that most of the benefits available to married couples be granted to civil union partners. The Vermont Supreme Court required the legislature to “extend all or

³ *In re Paternity of M.R.*, 778 N.E.2d 861 (Ind. Ct. App. 2002), which is cited by Appellant to support her argument that a Virginia parentage action is a custody determination for purposes of the PKPA, is readily distinguishable. In that case, an unwed father filed a petition to establish paternity. Under Indiana law, he also requested a custody decree once paternity was established. The court, there, held that because the paternity action would also have resulted in a custody decree, it fell within the definition of “custody determination” of the PKPA. Here, on the other hand, Lisa filed a parentage action to declare herself the sole parent of IMJ. She did not seek a custody decree, nor did she receive a custody decree. The nature of this action, as well as the ultimate relief granted to Lisa, is not analogous to that at issue in *In re Paternity of M.R.*

most of the same rights and obligations provided by the law to married partners.” *Baker v. State of Vermont*, 744 A.2d 864, 886 (Vt. 1999).

It is plainly against express Virginia public policy to recognize for *any purposes* a Vermont Civil Union. For example, Va. Code § 20-45.2, which was enacted in 1997, prohibits same-sex marriages and treats them as void in all respects in Virginia. The Marriage Affirmation Act, Va. Code § 20-45.3, which became effective July 1, 2004, provides that

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. *Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.*

(emphasis added).⁴ There is no dispute that under Virginia law, the Vermont Civil Union is void in all respects, and any rights created thereby are void and unenforceable. As a result, the Virginia court properly refused to recognize any rights created or conferred upon Janet by virtue of the Vermont Civil Union. Simply put, the court had no choice but to disregard any rights conferred upon Lisa and Janet as a result of the civil union. In the first case to ever address the validity of a Vermont Civil Union outside of Vermont, the court in *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002), ruled that (1) a Vermont

⁴ In her opening brief, Appellant states in footnote 15 that the Marriage Affirmation Act is irrelevant to the jurisdictional question before the court, and that in any event, Appellant believes the law is unconstitutional. She then requests permission to brief the constitutionality of the Marriage Affirmation Act if the court were to decide that the Marriage Affirmation Act was relevant to the jurisdictional question. Significantly, the exact same footnote appears in Appellant’s final submission to the court below. If Appellant wanted to raise as a defense the unconstitutionality of the Marriage Affirmation Act, she has had ample time to do so, and at a minimum, should have fully briefed the issue in her opening brief. The Court has nothing properly submitted to it upon which it could determine that the Marriage Affirmation Act is unconstitutional.

Civil Union is not marriage even in Vermont, (2) even if it were marriage, Georgia, which has a Defense of Marriage Act prohibiting same-sex marriage, does not have to give full faith and credit to a Vermont Civil Union, and (3) the federal Defense of Marriage Act permits Georgia to establish its own marriage policy by refusing to recognize out-of-state same-sex unions. Mr. Burns and Mrs. Burns dissolved their marriage in Georgia and where Mr. Burns was awarded custody and Mrs. Burns visitation.⁵ They entered into a court ordered visitation agreement whereby neither party was to have overnight stays with the children during such times as they were cohabitating with a person with whom they were not marriage or related to within the third degree. In July 2000, the same month the Vermont Civil Union law became effective, Mrs. Burns traveled to Vermont and entered into a Vermont Civil Union with her lesbian partner. She then traveled back to Georgia and requested the Georgia courts to recognize her Vermont Civil Union so that she could exercise visitation while she cohabited with her lesbian partner. The Burns court refused to recognize the validity of the Vermont Civil Union in Georgia. *See also Rosengarten v. Downes*, 802 A.2d 170 (Conn. Ct. App. 2002) (refusing to recognize the validity of and refusing to afford full faith and credit to a Vermont Civil Union, the court ruled is lacked jurisdiction to dissolve this out-of-state civil union).

In response to a 1993 opinion by the Hawaii Supreme Court that questioned whether the state's refusal to grant marriage licenses to same-sex couples potentially violated the state constitutional guarantee of equal protection, the Congress passed the Georgia DOMA on September 21, 1996.⁶ The federal Defense of Marriage Act

⁵ Mr. Burns was represented by Liberty Counsel, which is counsel of record for Lisa.

⁶ The case is known as *Baehr v. Lewin*, 852 P.2d 44, reconsideration granted in part, 875 P.2d 225 (Haw. 1993). The court did not rule that the equal protection rights of the parties were

(“DOMA”) makes clear that Virginia has the right to refuse to recognize or treat as valid the Vermont Civil Union or any rights allegedly created out of that union. The federal DOMA states as follows:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or right or claim arising from such relationship.

28 U.S.C. §1738C. “Congress was intended to have broad power to create statutes like DOMA under the Effects Clause” of the Full Faith and Credit Clause. Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 392 (1988) (hereafter “Original Understanding”). The Full Faith and Credit Clause in Article IV, Section 1, of the United States Constitution, states the following:

violated, but instead remanded the case to the trial court for further consideration. During the remand, the people of the state of Hawaii passed a constitutional referendum by a margin of almost 70% wherein the state Constitution was amended to permit the state legislature to define marriage. The legislature then defined marriage as between one man and one woman. The Hawaii Supreme Court thereafter vacated its decision. *See Baehr v. Miike*, 994 P.2d 566 (Haw. 1999). Over 40 states have passed state Defense of Marriage Acts since 1996. *See* Ala. Code § 30-1-19; Alaska Stat. § 25.05.013; Ariz. Rev. Stat. § 25-101; Ark. Code § 9-11-107, 109 and 208; Cal. Fam. Code § 308.5; Colo. Rev. Stat. § 14-2-104; Del. Code tit. 13 § 101; Fla. Stat. § 741.212; Ga. Code § 19-3-3.1; Haw. Rev. Stat. § 572-1, 1-3 and 1.6; Idaho Code § 32-209; 750 Ill. Comp. Stat. § 5/212 and 5/213.1; Ind. Code § 31-11-1-1; Iowa Code § 595.2; Kan. Stat. § 23-101; Ky. Rev. Stat. § 402.020, 040 and 045; La. Civ. Code Art. 89 and 3520; La. Rev. Stat. § 9:272, 273 and 275; Me. Rev. Stat. tit. 19-A § 701; Md. Code Fam. § 2-201; Mich. Comp. Laws § 555.1 and 271; Minn. Stat. § 517.01 and .03; Miss. Code § 93-1.1; Mo. Rev. Stat. § 451.022; Mont. Code § 40-1-401; Nev. Rev. Stat. § 122.020; N.H. Rev. Stat. § 457:1-2; N.C. Gen. Stat. § 51-1.2; N.D. Cent. Code § 14-03-01; Ohio Rev. Cod Ann. § 3101.01; Okla. Stat. tit. 43 § 3.1; 23 Pa. Const. Stat. § 1102 and 1704; S.C. Code § 20-1-15; S.D. Codified Laws § 25-1-1 and 1-38; Tenn. Code § 36-3-113; Tex. Fam. Code § 2.001; Utah Code § 30-1-2; Va. Code § 20-45.2; Wash. Rev. Code § 26.04.010 and 020; W. Va. Code § 48-2-104 and 603. In addition to these laws enacted between 1996 and 2004, in 2004, thirteen states passed state constitutional amendments preserving male-female marriage and banning same-sex unions. These states include: AK, GA, KY, LA, MI, MS, MO, MT, ND, OH, OK, OR and UT.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the effects thereof.

Under the Full Faith and Credit Clause, the Constitution gives Congress the power to determine the “effects” of an act, record, or judicial proceeding of another state. During the Constitutional Convention the “effects clause” became the subject of controversy. The issue was whether the Full Faith and Credit Clause would include the power to govern the effects not only of state court judgments, but also of the legislative acts of the states. *See* Max Farrand ed., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 488 (1911) (statement of William Samuel Johnson, September 3, 1787). Justice Joseph Story noted in his commentary that the “effects” are “expressly subjected to the legislative power.” Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §661 (1833) (Ronald D. Rotunda & John E. Nowak, eds. 1987).

The First Congress enacted the Full Faith and Credit Act to “prescribe the mode in which the public Acts, Records and judicial Proceedings in each State, shall be authenticated so as to take effect in every other state.” Act of May 26, 1790, ch. 11, 1 Stat. 122. The Act went on to state that the “records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from which the said records are or shall be taken.” *Id.* Today the Full Faith and Credit Act remains essentially unchanged and states the following: “Such Acts, Records and judicial Proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by

law or usage in the courts of such State, Territory or Possession from which they are taken.” 28 U.S.C. §1738.

Pursuant to authority granted by the Constitution to determine the “effects” of acts, records, or judicial proceedings in another state, Congress passed the Federal DOMA.

Prima facie, every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute or another state by the Full Faith and Credit Clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum. It follows that not every statute of another state will override a conflicting statute of the forum by virtue of the Full Faith and Credit Clause. . . .

Alaska Packers Ass’n. v. Industrial Accident Comm’n. of California, 294 U.S. 323, 547-48 (1935). *See also Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (Full Faith and Credit Clause does not compel one state to substitute statutes of other states for its own statutes dealing with subject matter within which it is competent to legislate); Herman, *The Fusion of Gay Rights and Feminism: Gender Identity and Marriage After Baehr v. Lewin*, 56 Ohio State L. Rev. 985, 991 n.25 (1995) (observing that in family law questions the United States Supreme Court seems to balance the forum state’s public policy interests against the interests of comity).

One commentator stated that the historical evidence “makes it clear that the first sentence of the Full Faith and Credit Clause should not be interpreted to contain broad choice of law commands to the states.” Whitten, *Original Understanding*, 32 CREIGHTON L. REV. 255, 392 (1998). Professor Whitten argues that “the evidence is compelling that Congress was intended to have broad power to create statutes like DOMA under the Effects Clause” and the historical evidence of the Full Faith and Credit Clause indicates

that DOMA may not even be necessary, but is certainly within Congress's authority. *Id.* In *Baker v. General Motors Corporation*, 522 U.S. 222 (1998), "the United States Supreme Court affirmed the constitutionality as well as the continuing vitality of the public policy doctrine and choice of law." L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 30 (1998). Indeed, the Supreme Court stated that the "Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with the subject matter concerning which it is competent to legislate.'" *Baker*, 522 U.S. at 232 (quotation and citations omitted). Professor Hogue of the Georgia State University College of Law, commenting on Georgia law, stated that "[h]omosexual unions will likely be held violative of the state's public policy...." Hogue, *State Common-Law Choice-of-Law Doctrine*, 32 CREIGHTON L. REV. at 30. Recognizing that a number of states have adopted statutes prohibiting the recognition of same-sex unions, Professor Hogue noted that these "statutes will control in states which have them. In instances in which a state lacks a statute, the common law (through the public-policy exception) will continue to supply the appropriate rule." *Id.* at 36-37.

The public policy exception, which protects states against the application of foreign laws are repugnant to the principles upon which the forum state is grounded, is rooted in the principles of federalism and the protection of sovereignty which inheres in the Tenth Amendment.

Id. at 37. The United States Supreme Court noted in the case of *Williams v. North Carolina*, 325 U.S. 226, 232 (1945) ("Williams II") the following:

No State can assume comprehensive attention to the various and potentially conflicting interests that several States may have in the institutional aspects of marriage [because] to do so would impair "the

proper functioning of our federal system.” The necessary accommodation between the right of one State to safeguard its interest in the family relation of its own people and the power of another state to grant divorces [or recognize marriage] can be left to neither State.

Professor Hogue correctly notes that in “states which have adopted [same-sex] anti-recognition statutes such as Virginia’s,” the state courts will lack jurisdiction to adjudicate rights arising as a result of or in connection with out-of-state same-sex unions.

Hogue, *State Common-Law Choice-of-Law Doctrine*, 32 CREIGHTON L. REV. at 42-43.

Professor Lynn Wardle, who testified before Congress during the adoption of the Federal DOMA, stated the following:

There is no serious doubt that Congress has the power to enact legislation defining the “effect” of one state’s laws, records and judgments in other states. Sentence two of the Full Faith and Credit Clause of the Constitution (Article IV, 1) explicitly provides that: “The Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” The Congressional Research Service of the Library of Congress has stated: “Congress has the power under the Clause to decree the effect that the statutes of one State shall have in other States.” A host of scholarly authority for many decades concurs with this assessment.

Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187, 223 (1998).

The Supreme Court has noted that Congress has a “substantial interest” in “balancing the interests” of the several states by preventing one state’s policy from dictating what the legal policy of other states will be. *See United States v. Edgebrood Co.*, 509 U.S. 418 (1993).

Even Professor Mark Strasser, who is an advocate of same-sex marriage, has conceded the following:

Both the First and Second Restatement of Conflict of Laws suggest that a marriage which would be treated as void in the domicile at the time of the

marriage need not be recognized, notwithstanding its being valid in the state of celebration. Section 132(d) of the Restatement (First) of Conflict of Laws suggests that a “marriage which is against the law of the state of domicile of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere” if it involves a “marriage of a domiciliary which a statute at the domicile makes void even though celebrated in another state.” The Second Restatement suggests a similar policy, as a marriage need not be recognized if “it violates the strong public policy of ... [the] state which had the most significant relationship to the spouses in the marriage at the time of the marriage.”

Mark Strasser, *DOMA and the Two Faces of Federalism*, 32 CREIGHTON L. REV. 457, 464 (1998).

The Supreme Court has explained that “marriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the State where entered into, be recognized as valid in every other jurisdiction.” *Loughran v. Loughran*, 292 U.S. 216, 223 (1934). It is clear therefore that one state does not have to recognize an out-of-state same-sex union or same-sex marriage recognized by another jurisdiction if (1) the out-of-state union is contrary to the state’s public policy or (2) the out-of-state union is prohibited by the domicile state’s statute and the domicile state has the jurisdiction to enact its own legislation on the matter. In this case, both the Virginia public policy and Virginia statutes prohibit out-of-state recognition of same-sex unions or same-sex marriages. Therefore, as DOMA explicitly provides, Virginia does not have to recognize Vermont’s civil union for any purposes. Indeed, Virginia cannot recognize the Vermont civil union or any rights created or conferred as a result of that relationship.

Professor Mark Strasser, quoted above, in a 2001 article conceded that in a case precisely as that before this Court, there was a real risk that a state with a defense of

marriage act (like Virginia), would refuse to recognize someone in Janet's position as a parent of the child.

[T]here is a potential risk for these families that should at least be acknowledged, namely, that a different state will refuse to recognize the presumption or declared parental rights of the partner who is not biologically related to the child. If, for example, a state through which the family is traveling or to which the family moves has passed a Defense of Marriage Act, then that state may refuse to recognize the rebuttable presumption of parenthood that has been established by virtue of the existence of the civil union established in Vermont. Indeed, even a judicial declaration of the civil union partner's parental status may not suffice to ensure recognition of that status in other states. One might suggest to such parents that they simply not move to or even travel through those states. Yet, couples have a different option which will not severely limit them in their travels within their own country and which will nonetheless afford them increased protection. They can take advantage of Vermont's second-parent adoption provision, since the parental relationship would then have been established without having relied on the legal recognition of a same-sex marriage or marriage-like relationship.

Mark Strasser, *When is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 CARDOZO L. REV. 299, 299-300 (Nov. 2001).⁷ Thus, far

⁷ The difficulty in other jurisdictions recognizing a Vermont Civil Union has been acknowledged even by the proponents of same-sex marriage. Professor Greg Johnson of the Vermont Law School stated that the "weakest case would be out-of-state couples who come to Vermont for a civil union and then go back to their home states seeking not so much the benefits or protections of marriage but simply judicial recognition of their union." Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 55 (2000). Professor Barbara Cox, who has been an advocate of same-sex marriage, concedes that the portability of Vermont Civil Unions is highly questionable. See Barbara Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113, 118, 137 (2000). Professor Cox writes that "the portability" of a Vermont Civil Union is "uncertain" because "civil unions come without the cultural and legal understanding of marriage, which may make it more difficult for same-sex couples to argue that these relationships deserve recognition", and this uncertainty makes "it more difficult for [same-sex couples] to use prior marriage recognition cases that would have supported the portability of their marital status" *Id.* at 136-37. "By requiring same-sex couples to enter into civil unions instead of marriages, Vermont has increased the uncertainty that out-of-state same-sex couples would face concerning the interstate recognition of their marriages." *Id.* at 137. Professor Cox further recognizes that even if Vermont had recognized same-sex marriages, "the portability of their marriages still would have been more uncertain than the marriages of opposite-sex couples due to the ... public policy exception which permits courts to refuse to recognize marriages that they find to be 'odious.'" *Id.* at 140. She concludes that "even if Vermont had provided its citizens with the right to marry, their legal

from the characterizations by Appellant that the trial court engaged in a miscarriage of justice in manifest proportions – the trial court did exactly what advocates of same-sex unions warned members of a Vermont Civil Union would happen when confronted with a claim to parentage by the non-biological partner.

Nothing in the PKPA requires a different result. Significantly, the PKPA cannot be read in isolation from the sections immediately before and after it in the U.S. Code. In particular, the Full Faith and Credit Act is codified at 28 U.S.C. § 1738. The PKPA is codified at 28 U.S.C. § 1738A. The Full Faith and Credit for Child Support Orders Act is codified at 28 U.S.C. § 1738B. DOMA, enacted *after* the PKPA, is codified at 28 U.S.C. § 1738C. In other words, the Full Faith and Credit Act, PKPA and DOMA must be read in conjunction with each other.

The Full Faith and Credit Act, as discussed above, generally obligates states to accord the same force to judgments in the forum state as would be accorded by the courts of the state in which the judgment was entered. A state, however, is not obligated to accord full faith and credit to another state’s act, if doing so would violate the public policy of that state. Because some courts were not treating custody or visitation orders as *judgments* to be accorded full faith and credit, but rather, temporary orders subject to later modification, Congress enacted the PKPA. *See, e.g., Thompson v. Thompson*, 484 U.S. 174, 181 (1988) (“The context of the PKPA therefore suggests that the principal problem Congress was seeking to remedy was the inapplicability of full faith and credit requirements to custody determinations.”).

status would have been unclear once they left the state’s borders. With civil unions that status is all the more indefinite.” *Id.* at 142.

DOMA was enacted several years after the *PKPA*. It deals with a very specific issue – the authority of each State to determine whether or not it will give any effect to rights or claims arising out of a same-sex union that is treated like a marriage under the laws of another State. Pursuant to canons of statutory construction, the later, more specific statute must be given its full effect. *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (“the implications of a statute may be altered by the implications of a later statute”) (citation omitted). In addition, it must be presumed that Congress was aware of the language it enacted in the *PKPA*, and yet deliberately chose *not* to except from the coverage of *DOMA*, any custody or visitation rights granted to a same sex couple by another state. Indeed the *PKPA* appears at 28 U.S.C. § 1738A and *DOMA* appears at 28 U.S.C. § 1738C, the very next section. Congress would have to be blind to be unaware that the *PKPA* and *DOMA* appear in the same statute side-by-side.

Therefore, when read together,

- the Full Faith and Credit Act generally requires a state to accord full recognition to the judgment of a sister State, subject to the public policy exception;
- the *PKPA* clarifies that a custody or visitation order is encompassed within those judgments or acts that must be afforded full faith and credit, and that a state cannot refuse to enforce the order, regardless of that state’s public policy, if the first state properly exercised jurisdiction; and
- *DOMA* further clarifies that no State will be required to give full faith and credit to rights created in another state by virtue of a same-sex union, and, as is most

relevant to the question at hand, does *not* carve out any custody or visitation rights granted by virtue of a same-sex union.

The Virginia trial court, therefore, properly determined that nothing in the PKPA precluded it from exercising jurisdiction for purposes of the parentage action. Indeed, the PKPA would not preclude a Virginia court from exercising jurisdiction to make a custody determination – which is not the case at hand.⁸

II. UNDER THE UCCJEA, THE VIRGINIA COURT PROPERLY EXERCISED JURISDICTION OVER THIS ACTION.

A. The Vermont Action Is Not A Child Custody Proceeding.

Section 20-146.17 of the UCCJEA provides, in part: “a court of this Commonwealth may not exercise jurisdiction under this article if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been previously commenced in a court of another state having jurisdiction substantially in conformity with this act.” Janet incorrectly argues that the commencement of a civil union dissolution proceeding in Vermont divests the Virginia courts of jurisdiction under the UCCJEA. “Child custody proceeding” is defined in Va. Code § 20-146.1 as “a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse,

⁸ That is why many of the cases cited by Appellant are irrelevant. For example, in *Coghill v. Boardwalk Regency Corp.*, 240 Va. 230, 396 S.E.2d 838 (Va. 1990), the Supreme Court of Virginia explained that it was required to afford full faith and credit to a money judgment based on gambling debts, even though Virginia law prohibited legal enforcement of gambling debts. There, the Court explained that all that was before it was the money judgment, not the underlying issue of gambling debt. As a result, the Court did not exercise the public policy exception to the Full Faith and Credit Act. However, here, DOMA and the Marriage Affirmation Act make clear that the state’s public policy dictates the conclusion reached by the trial court. Similarly, in *Clausen v. Schmidt*, 502 N.W.2d 649, 676 (MI 1993) the court found that it was obligated to afford full faith and credit to the Iowa custody determination, even though the order violated state public policy. DOMA and the Marriage Affirmation Act, however, dictate a contrary result.

dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under Article 3 of this chapter.” Dissolution of same-sex civil unions is not on the list of proceedings included in the definition. Nor could any of the proceedings included in the list reasonably be construed to encompass same-sex civil union dissolution proceedings, particularly where Virginia law precludes recognizing any rights arising from the same-sex civil unions.

B. Janet Is Not A Parent Or A “Person Acting As A Parent.”

In order for the UCCJEA to preclude exercise of jurisdiction by the Virginia court in favor of the Vermont proceeding, Janet must be a parent or a “person acting as a parent.” As discussed in detail above, *see* section IV.A.1, Janet is not a parent under Virginia (or Vermont law). Nor can she be treated as a “person acting as a parent” under Virginia law. The UCCJEA defines a “person acting as a parent” as “a person, other than a parent, who (i) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding *and* (ii) has been awarded legal custody by a court or *claims a right to legal custody under the laws of this Commonwealth.*” Va. Code § 20-146.1 (emphasis added). It is undisputed that Janet has not been awarded legal custody.

Janet cannot be considered a person acting as a parent. Appellant has not brought to this Court’s attention, and counsel is unaware of any law in Virginia, that would permit Janet visitation with IMJ, by virtue of her prior same-sex relationship with the biological

mother, over that mother's objections. Janet cites this Court's decision in *Thrift v. Baldwin*, 23 Va. App. 18, 473 S.E.2d 715 (Va. Ct. App. 1996) and Va. Code § 20-124.2(B) for the proposition that under Virginia law she is a "person with a legitimate interest" who may seek custody. Although Va. Code § 20-141 explains that a "person with a legitimate interest" is to be broadly construed, it cannot trump the specific instructions contained in the Marriage Affirmation Act that any rights conferred by virtue of the same-sex relationship are void. In other words, even if somehow the term "person with a legitimate interest" could be read to encompass an individual with whom a biological parent resided with the child for a little over a year, the Marriage Affirmation Act dictates that the interest is a nullity. *Cf. Garcia v. Rubio*, 670 N.W.2d 475, 483 (Neb. Ct. App. 2003) ("The fact that a parent confers temporary custody of the child upon a nonparent does not give rise to a colorable claim of right of the nonparent to custody") (quoting *Mazur v. Mazur*, 621 N.Y.S.2d 817 (NY 1994)). Janet, therefore, is not a "person acting as a parent."

C. Even If Janet Could Somehow Be Construed To Be A Person Acting As A Parent, Which She Cannot, The UCCJEA Permits The Virginia Trial Court To Exercise Jurisdiction Over The Parentage Action.

To the extent this Court were to determine that the Vermont proceeding is a "child custody proceeding", nothing in the UCCJEA would preclude the Virginia courts from making a parentage determination. Under Va. Code § 20-146.12, the Virginia courts are precluded from making an initial custody determination or modifying a child custody determination of another court, if another court is properly exercising jurisdiction in a "child custody proceeding" in conformity with the UCCJEA. A "child custody proceeding" is defined in Va. Code § 20-146.1 as

a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for a divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violation, in which the issue may appear.

The definition does not include an action to establish parentage. Specifically, although it includes paternity actions – a claim that can only be brought by a person claiming to be the *father* of the child – it does not broadly encompass parentage actions. Indeed, Va. Code § 20-158, which is the means by which to establish parentage of a child resulting from assisted conception, refers to parentage, but not paternity. Parentage and paternity have distinct concepts under Virginia law.

The UCCJEA, therefore, did not preclude the trial court from exercising jurisdiction over Lisa’s parentage action.

D. Even If The Vermont Order Constitutes A Valid Visitation Determination, And The Virginia Order Constituted A Custody Determination, The Virginia Courts Have Jurisdiction To Modify The Vermont Order.

Even assuming that the Vermont order were a valid custody determination, and the Virginia order were somehow construed as a custody proceeding, under the UCCJEA, the Virginia court properly exercised jurisdiction over the matter. Pursuant to Va. Code § 20-146.14, a Virginia court has jurisdiction to modify a custody determination of another state if (1) the Virginia court can properly exercise jurisdiction under Va. Code section 20-146.12, and (2) a Virginia court determines that neither the child, the child’s parents, nor any person acting as a parent presently resides in the other state. All of these conditions are satisfied.

The trial court had jurisdiction under Va. Code § 20-146.12(A)(1) because Virginia was the home state of the child on the date of the commencement of the July 1, 2004 parentage action. Lisa and IMJ had been living in Virginia since September 2003.

The trial court properly concluded that neither the child, her parent, or any person acting as a parent reside in Vermont. IMJ and Lisa reside in Virginia, and have resided there since Janet drove them to Virginia in September 2003 at the end of Janet and Lisa's relationship. No parent of IMJ's resides in Vermont. As discussed above, Janet cannot be considered a parent of IMJ and there is no person acting as IMJ's parent residing in Vermont.

For this reason, even if the trial court's decision is construed as a modification of a valid Vermont custody determination, the trial court correctly exercised its jurisdiction in modifying that order.

III. AN AWARD OF PARENTAGE, CUSTODY OR VISITATION IN FAVOR OF JANET OVER LISA'S OBJECTIONS VIOLATES LISA'S CONSTITUTIONAL PARENTAL RIGHTS.

The United States Supreme Court has long recognized the rights of a parent to direct the upbringing of her child. There are certain liberties guaranteed by the Fourteenth Amendment to the United States Constitution.

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. State of Nebraska, 262 U.S. 390, 399 (1923). A parent's Fourteenth Amendment rights include "the liberty of parents . . . to direct the upbringing and

education of children under their control.” *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). “The child is not the mere creature of the state” *Id.* at 535. “It is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944).

In subsequent cases, the United States Supreme Court also recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children, and that the parent-child relationship is a higher priority than any other party’s relationship to the child. “It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.’” *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (dealing with rights of an unwed father). The State’s interest in caring for the child of a natural or adoptive parent is de minimis if that parent is shown to be a fit parent. *Id.* at 657-58.

The Vermont Supreme Court has similarly recognized that the rights of a parent to custody and the liberty interest of parents and children to relate to one another in the context of the family, free from governmental interference, are fundamental rights protected by the due process clause of the Fourteenth Amendment to the United States Constitution. *See Paquette v. Paquette*, 146 Vt. 83, 92 (Vt. 1985); *Glidden v. Conley*, 820 A.2d 197 (Vt. 2003) (discussing constitutional right of natural parent in the “custody, care, and control of his child”). *See also Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)

(“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”).

The importance placed upon the relationship between the child and a fit, legal parent, has been emphasized by the higher standard of proof required before the State can substantially interfere with the parent’s constitutional rights. *See Santosky II v. Kramer*, 455 U.S. 745, 766-67 (1982) (a “clear and convincing evidence” standard of proof is the minimal standard of proof required to satisfy due process in a termination of parental rights hearing); *Garcia v. Rubio*, 670 N.W.2d 475, 483 (Neb. Ct. App. 2003) (“A court may not, in derogation of the superior right of a biological or adoptive parent, grant child custody to one who is not a biological or adoptive parent unless the biological or adoptive parent is unfit to have the child custody or has legally lost the parental superior right in a child.”). The due process clause of the Fourteenth Amendment provides heightened protection against government interference with certain fundamental rights and liberty interests, including the right to have children and to direct the education and upbringing of one’s children. *See Washington v. Glucksburg*, 521 U.S. 702, 720 (1997).

Lisa’s Fourteenth Amendment right to the care and control of her biological child includes the decisions as to whom her daughter will spend time. As Justice Stevens observed in his concurring opinion in *Troxel v. Granville*, 530 U.S. 57 (2000).

The strength of a parent’s interest in controlling a child’s associates is as obvious as the influence of personal associations on the development of the child’s social and moral character. Whether for good or for ill, adults not only influence but may indoctrinate children, and a choice about a child’s social companions is not essentially different from the designation of the adults who will influence the child in school. Even a State’s considered judgment about the preferable political and religious character of schoolteachers is not entitled to prevail over a parent’s choice of private school. *Pierce*, supra at 535 It would be anomalous, then, to subject a parent to any individual judge’s choice of a child’s associates from out of

the general population merely because the judge might think himself more enlightened than the child's parent.

Troxel, 530 U.S. at 78-79.

Nothing in Vermont or Virginia law changes the fact that Appellant is *not* the biological or adoptive parent of the child. Accordingly, as between Lisa and Janet, it is Lisa (Appellee) who has the constitutional right to direct the upbringing of her child.

Rejecting a claim brought by grandparent seeking visitation with their grandchildren, *Troxel* stated that, "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68-69. Here, there is no reason for the state to inject itself into Lisa's decision on how to raise her child where Lisa challenges any determination of parentage in Janet's favor and Lisa is a fit parent. Janet did not avail herself of the statutory opportunity in Vermont to adopt the child. Having failed to do so, Janet cannot now usurp the parental rights of Lisa and obtain a child by taking one from the biological mother. Under these circumstances, it is Lisa who has the fundamental constitutional right to parent the child without interference from Janet – a woman with no legal or biological ties to the two-year old child.

"[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions." *Id.* at 72-73. To the extent the Vermont statutes are construed so as to award parental rights and responsibilities to Janet over the objection of Lisa, a fit, biological parent, the statutes are unconstitutional. If the Virginia court declined to exercise jurisdiction where it properly could have done so, such action

would have permitted Lisa's parental rights to be trampled. The exercise of jurisdiction was eminently proper.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that Appellant's appeal be dismissed, that the orders of the Circuit Court of Frederick County, Virginia be affirmed in all respects, together with all such further relief as the Court shall deem proper.

Respectfully submitted,

Mathew D. Staver*

(Lead Counsel)

Rena M. Lindevaldsen*

Scott E. Thompson (VSB# 45033)

LIBERTY COUNSEL

210 East Palmetto Avenue

Longwood, Florida 32750

Tel: (407) 875-2100

Fax: (407) 875-0770

Phillip S. Griffin, II, Esquire (VSB# 34576)

Peter Thos. Hansen, Esquire (VSB # 34819)

Phillip S. Griffin, II, P.C.

102 South Kent Street

Winchester, VA 22601

Tel: (540) 667-4647

* Pro hac applications to be filed.

Counsel for Appellee Lisa Miller-Jenkins

CERTIFICATE PURSUANT TO RULE 5A:21(g)

(1) The undersigned does hereby certify that in compliance with Rule 5A:19(f), on this 3rd day of January, 2005, a copy of the foregoing brief was sent to each counsel of record by United States mail, postage pre-paid and addressed as follows:

Joseph R. Price, Esquire
Arent Fox PLLC
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339

Rebecca Glenberg, Esq.
ACLU of Virginia
6 North Sixth Street, Suite 400
Richmond, VA 23219

Gregory R. Nevins, Esq.
LAMBDA Legal
1447 Peachtree Street NE #1004
Atlanta, GA 30309

John L. Squires, Esq.
Equality Virginia Education Fund
6 North Sixth Street, Suite 401
Richmond, VA 23219

Counsel for Appellant

Thomas M. Wolf, Esq.
LeClair Ryan, PC
707 East Main Street, Suite 1100
Richmond, VA 23219

Counsel for Amici Curaie

(2) Counsel does not wish to waive oral argument.

Scott E. Thompson