IN THE SUPREME COURT OF VIRGINIA

At Richmond

Record No. 041180.

KATHERINE ANNE FISHER DAVENPORT, et al.

Plaintiffs - Appellants

v.

DEBORAH LITTLE-BOWSER, et al.

Defendants – Appellees

On Appeal from the Circuit Court of the City of Richmond

BRIEF OF *AMICUS CURIAE* PROFESSOR JOAN HEIFETZ HOLLINGER ON BEHALF OF APPELLANTS

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IN THE SUPREME COURT OF VIRGINIA

KATHERINE ANNE FISHER DAVENPORT, et al.,	)	
Plaintiffs - Appellants	)	**Appeal of Chancery No. HS-917-4 in the Circuit Court of the City of Richmond**
v.	)	
DEBORAH LITTLE-BOWSER, et al.	)	**Proposed Amicus Curiae Brief In Support Of Appellants**
Defendants - Appellees	)	

I. Statement of the Case

This case concerns a challenge to Virginia's practice of refusing to issue new birth certificates that list both legal parents of children born in Virginia and validly adopted by same-sex couples in other jurisdictions. *Amicus* adopts the description of the Nature of the Case and Proceedings Below presented in Appellants' Opening Brief.

II. Statement of Interest of Amicus Curiae

Professor Hollinger is a leading American scholar on adoption law and policy as well as on the psychosocial aspects of adoptive family relationships. As a faculty member at the University of California, Berkeley Boalt Hall Law School since 1993, and before that, as a Professor of Law at the University of Detroit in Michigan, she has been devoted to research, teaching, and advocacy on family law issues, especially as they affect the welfare of children.

Professor Hollinger is the editor and principal author of the standard national treatise Adoption Law and Practice 3 vols (Matthew Bender Co. 1988; Supplements 1989-2004), and has published numerous articles in law reviews and other professional

journals, including the The Future of Children, the Family Law Quarterly, and the Michigan Journal of Law Reform. She is an editor of the interdisciplinary journal, Adoption Quarterly. Her most recent book is Families By Law: An Adoption Reader (NYU Press, 2004), co-edited with Prof. Naomi Cahn.

Since 1989, Professor Hollinger has served as Reporter (research consultant and drafter) for the proposed Uniform Adoption Act (UAA) approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1994 and by the American Bar Association in 1994, and has also participated in the drafting of the revised Uniform Parentage Act of 2002 and regulations to implement the Hague Convention on Intercountry Adoption and the federal Intercountry Adoption Act of 2000.

Professor Hollinger is an honorary member of the American Academy of Adoption Attorneys and an active participant in the National Association of Counsel for Children and many other nonprofit child advocacy organizations. She has appeared as *amicus curiae* on behalf of children and their constitutionally protected familial relationships in a number of high-profile adoption and custody cases in state and federal courts.

Amicus seeks to submit its brief in support of Appellants, and presents the following position: Va. Code 32.1-261(A) requires the State Registrar to issue a new birth certificate when a child born in Virginia is validly adopted in another state. Virginia's refusal to apply this provision to children adopted by same-sex couples in other states is an unprecedented violation of the Full Faith and Credit Clause and needlessly compromises the safety and well-being of a subset of adopted children by depriving them of the one universally recognized means of proving their legal parentage.

By virtue of Professor Hollinger's background as an adoption scholar, she is well-suited to provide the Court with information about how other states have applied the Full Faith and Credit Clause to interstate adoptions, as well as about the legal, social, and practical importance to adopted children of being able to obtain a birth certificate that lists their legal parents.

III. Assignments of Error

Amicus adopts the Assignments of Error presented in Appellants' Opening Brief.

IV. Statement of Facts

Amicus adopts the Statement of Facts in Appellants' Opening Brief.

V. Argument

A. The Constitutional Mandate of Full Faith & Credit Requires States To Honor Adoption Decrees from Other States, Even Where the Adoption Statutes of One State Violate the Public Policy of Another State.

Article IV, Section 1 of the United States Constitution requires that each state give full faith and credit to the judicial proceedings of every other state. *See Wright v. Eckhardt*, 267 Va. 24, 591 S.E.2d 668 (2004). It is well-settled that a state cannot refuse to give full faith and credit to a judgment issued by another's state court because of disagreement with the public policy basis for that decision. The United States Supreme Court recently addressed this very question and reiterated that its "decisions support no roving public policy exception to the full faith and credit due judgments." *Baker v. General Motor Corp.*, 522 U.S. 222, 233 (1998); *see also Coghill v. Boardwalk Regency Corp.*, 240 Va. 230, 396 S.E.2d 838 (1990) (holding that there is no public policy exception to the requirement that states must give full faith and credit to judgments from other states). Thus, even if Virginia's public policy on second parent adoption is contrary

to that of Washington, D.C. and New York, where the adoptions at issue in this case were granted, that difference in policy provides no basis for refusing to give those adoptions full faith and credit.

Adoption statutes differ from state to state in important aspects. Indeed, despite their common themes, state adoption laws are not and never have been uniform, nor have they been consistently applied by the courts, lawyers, or child welfare agencies. *See* Joan Heifetz Hollinger, Adoption Law, The Future of Children Vol. 3 • No. 1, 43-61 (1993). These differences include, among others, differences concerning: the availability of adult adoptions; requirements for obtaining parental consent; procedures and standards for assessing the suitability of prospective adoptive parents; whether to permit private adoption and if so, to what degree these placements must be supervised by the state; and whether and under what circumstances adopted children can obtain access to their original birth records. *See* Joan Heifetz Hollinger, ed. Adoption Law and Practice 3 vol. (Matthew Bender Co., 1988-2004) [hereinafter "ALP"]

Despite these differences, which reflect significant disagreements on important public policy issues, state courts consistently have recognized their constitutional obligation to honor adoptions validly granted in other states. *See, e.g., Delaney v. First Nat'l Bank*, 73 N.M. 192, 386 P.2d 711 (1963) (New Mexico must recognize adoption validly granted in Colorado, even though the adoption was contrary to the public policy of New Mexico); *Estate of Morris*, 56 Cal. App.2d 715 (Cal. App. 1943) (California must recognize adoption validly granted in Rhode Island, even though the adoption was

contrary to the public policy of California).[1] In fact, there appear to be no reported cases in which a state has refused to give full faith and credit to an adoption decree from another state on public policy grounds. *See* Herma Hill Kay, Adoption in the Conflict of Laws: The UAA, Not the UCCJA, Is the Answer, 84 Calif. L. Rev. 703, 741 (1996) (surveying interstate adoption case law and concluding that the requirement of full faith and credit "is noncontroversial as applied to a judgment granting an adoption"); *see also* Hollinger, ALP, at § 4.07 (noting that the Full Faith and Credit Clause requires interstate recognition of adoption decrees).

Another important policy matter on which states differ is the availability of adoptions by same-sex couples. Currently, such adoptions have been granted by trial courts in more than 25 states, approved by appellate courts in nine states,[2] and rejected

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1 *See also Wheeler v. Winters*, 134 S.W.3d 774 (Mo. App. 2004) (Missouri trial court properly gave full faith and credit to a Kansas stepparent adoption in a petition for grandparent visitation by the parents of the natural father); *Kugle v. Harpe*, 234 Ala. 494, 176 So. 1617 (Ala. 1937) (Alabama must give full faith and credit to adoption validly granted in Georgia); *Long v. Long*, 251 Cal.App.2d 732 (1967) (California must give full faith and credit to adoption validly granted in Colorado); *Hubbard v. Superior Court of Yuba County*, 189 Cal. App.2d 741 (1961) (refusing to grant request to open the adoption records of children adopted by decedent in California, for the purpose of attempting to attack the validity of the adoptions in New York, on the ground that New York would be required to give full faith and credit to the adoptions); *Wright v. Brown*, 1 So.2d 871 (Fla. 1941) (Florida must give full faith and credit to adoption validly granted in Michigan).

2 Appellate decisions approving adoption by same-sex couples include: *Sharon S. v. Superior Court of San Diego,* 31 Cal. 4th 417, 73 P.3d 554 (Cal. 2003); *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. App. 1995); *K.M. and D.M.*, 274 Ill. App.3d 189, 653 N.E.2d 888 (Ill. App. Ct. 1995); *In re Adoption of M.M.G.C.*, 785 N.E.2d 267 (Ind. App. Ct. 2003); *Adoption of Tammy*, 416 Mass. 205, 619 N.E.2d 315 (Mass. 1993); *In re Adoption of Two Children by H.N.R.*, 285 N.J. Super. 1, 666 A.2d 535 (N.J. Super. 1995); *In re Jacob*, 86 N.Y.2d 651, 660 N.E.2d 397 (N.Y. 1995).

by appellate courts in 4 states.[3] *See* Hollinger, ALP, at § 3.06[6]. Even in states that do not permit such adoptions, however, courts have affirmed that an adoption validly granted in one state must be recognized in all others. In *Russell v Bridgens*, 264 Neb. 217, 647 N.W.2d 56 (2002), the Nebraska Supreme Court held that Nebraska must give full faith and credit to an adoption granted to a lesbian couple in Pennsylvania, even though Nebraska would not have granted the adoption under its own adoption statutes. *Russell*, 264 Neb. at 220, 647 N.W.2d at 59 ("A judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as in the state rendering judgment.").

This Court must not become the first in the country to disregard this clear constitutional mandate and to permit Virginia to deny full faith and credit to valid adoptions from other jurisdictions. Such a decision would impair the integrity of interstate adoptions, inviting other states to withold recognition of adoptions that contravene their own public policy on other grounds. The result of a such a breach would be devastating for adopted children, who deserve the same security and stability in their family relationships as other children.

B. Refusing To Provide An Adopted Child With A Birth Certificate That Lists The Child's Legal Parents Compromises The Child's Safety and Well-Being

Adoption creates the legal status of parent and child between the child and the adoptive parents; adoption literally provides the child with a new legal identity that is in

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[3] Appellate decisions rejecting adoption by same-sex couples include: *In the Matter of the Adoption of T.K.J.*, 931 P.2d 488 (Colo. Ct. App. 1997); *B.P. v. State (In re Luke)*, 263 Neb. 365, 640 N.W.2d 3742 (2002); *In re Adoption of Jane Doe*, 130 Ohio App.3d 288, 719 N.E.2d 1071 (1998); *In re Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994).

all respects equivalent to the relationship between other children and their biological parents. In order to verify and recognize this new legal identity, every state is under a mandate, and has been since the early and middle years of the twentieth century,[4] to issue a new birth certificate to an adopted child, born within the state, upon submission of a certified copy of the adoption decree. The new certificate retains the information concerning the date and place of the child's birth from the original certificate and substitutes the names of the new adoptive parents for the names of the child's original parent or parents. Once the new certificate is issued, it has the same legal function as any other valid certificate of birth.

A birth certificate is universally recognized as reliable proof of child's identity and parentage. This is true in every state. Every state has enacted a version of Article 3, Part 8 of the proposed Uniform Adoption Act of 1994, which provides that upon receipt of a certified decree of adoption from another jurisdiction, the state registrar shall issue a new birth certificate for an adoptee born in that state.[5] There is no discretion under the laws of the states to refuse to enter a new birth certificate with the names of the adoptive parents as set forth in the adoption decree.

Because every state issues new birth certificates for adopted children, public officials and others require the submission of a birth certificate to verify a child's legal parentage in virtually every circumstance in which parentage must be shown. By

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4 *See* Elizabeth Samuels, The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records, 53 Rutgers L. Rev.367, 376-77, 386-87 (2001).

5 In Virginia, of course, this rule is codified at Va. Code § 32.1-261(A). As noted in the comments to this section of the Uniform Adoption Act, these state statutes follow the Revised Model State Vital Statistics Act, as drafted by the U.S. Dept. of Health and Human Services and a committee of State Registrars of Vital Records. See Comment to Section 3-802 of the Uniform Adoption Act.

refusing to provide some adopted children with legally accurate birth certificates, Virginia has placed these children in a difficult and stigmatizing situation. In addition to violating the constitutional mandate of full faith and credit, this policy is harmful to children. It disrupts their secure relationships with peers and third parties, including public officials, and needlessly complicates their proof of identity.

A birth certificate is generally required, for example, in order to register a child in for school and to establish who has a right to be listed as an emergency contact or to pick a child up from childcare or school.[6] A birth certificate is also required to establish who is authorized to sign for medications distributed by the school nurse or to make emergency medical decisions for a child. Particularly where the parent listed on the birth certificate is not available in an emergency, any difficulty or delay in being able to verify the other parent's legal status may place the child at risk. Indeed, this risk is present in all situations in which parental consent for medical treatment of a child is required. Like school officials, doctors, nurses, and other health care personnel have been trained to expect and accept birth certificates as proof of legal parentage.

A birth certificate also is generally required in order to conduct legal or financial transactions for a minor child, such as setting up an account in a child's name or for the benefit of a child. A birth certificate is required if a child inherits personal or real property from grandparents or other extended family members. Because adopted children inherit from their adoptive parents as well as through their adoptive parents in most states, their birth certificate is especially important in avoiding uncertainty about

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[6] *See, e.g.*, Va. Code § 22.1-3.1 (2004) ("[N]o pupil shall be admitted for the first time to any public school in any school division in the Commonwealth unless the person enrolling the pupil shall present, upon admission, a certified copy of the pupil's birth record.").

their status as intestate distributees or as members of a class of children or heirs named in someone's will.

Similarly, a child must produce a birth certificate when applying for social security benefits as a surviving child or for other types of surviving child benefits.[7] A birth certificate is generally required to collect on insurance policies naming a child as a beneficiary or to verify a child's entitlement to a parent's pension or other retirement benefits. It is also generally required to obtain a passport for a child under fourteen years of age, and many countries require a parent traveling with a minor child to provide the child's birth certificate as well as a passport. Conversely, an adult child may have to produce a birth certificate to verify that the child is entitled to act on behalf of an incapacitated parent.

In sum, failing to provide adopted children with legally accurate birth certificates compromises their safety and well-being, while serving no legitimate purpose. In every situation in which legal parentage must be established, a birth certificate is the document that is universally known and accepted to prove parentage. Although alternative means of proving parentage are available, these are less convenient and are more likely to result in delays and bureaucratic hassles. A subset of adopted children should not have to bear the burden of proving who they are in the wide variety of circumstances where everyone else simply produces a birth certificate. Any other document, although it may provide an alternative means of proof, is an inadequate and inferior alternative. At a minimum,

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[7] In fact, federal law specifically provides that "In the administration of any law involving the issuance of a birth certificate, each State shall require each parent to furnish to such State . . . the social security account number (or numbers, if the parent has more than one such number) issued to the parent." *See* 42 U.S.C. § 405. *See also* Va. Code § 32.1-257.1 (2004) (requiring parents to report their social security numbers, pursuant to 42 U.S.C. § 405).

relying on another document will add an additional administrative burden. In some circumstances, no alternative document will be accepted. At worst, the inability to produce an accurate birth certificate may delay or even prevent a child from receiving needed medical treatment or otherwise being properly cared for in an emergency.

In addition, requiring some adopted children to bear this extra burden of proof is embarrassing and stigmatizing. Particularly for school-age children, the experience of having their parentage repeatedly questioned may be particularly upsetting. Children want to be treated the same way as their peers. By having a birth certificate that accurately lists their legal parents, children are protected from public embarassment; there is no need to explain who their parents are or the circumstances of their adoption. Adopted children deserve the same respect for their personal and familial privacy as everyone else, regardless of who their adoptive parents may be. There is no justification for Virginia's policy of discriminating against some adopted children in this regard; it does not serve any legitimate goal, and it is contrary to Virginia's well-established public and statutory policy of treating adopted children as legally equivalent to biological children.

V. Conclusion

For the reasons stated above, Amicus respectfully requests this Court reverse the decisions of the Circuit Court and direct the Circuit Court to grant Summary Judgment for Plaintiffs/Appellants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2004, I served three (3) true and correct copies of the foregoing brief to by U.S. Mail, postage pre-paid, to the following:

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