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The Honorable Claire Ayer, Chair
Senate Committee on Health & Welfare
115 State Street
Montpelier, VT 05633

S.28, Gender Neutral Nomenclature on Birth Certificates

Dear Senator Ayer and Members of the Committee:

Thank you for the opportunity to address the Committee on this important bill. The Human Rights Commission became interested in the issue upon receipt of a complaint. Because the complaint is still pending, I am not able to discuss the particulars of it but would like to address the issue generally from a civil and human rights perspective.

While Vermont has led the nation in providing civil rights to same sex partners, 18 V.S.A. §5071, which S.28 seeks to amend, appears to be a throw-back to another time. I believe it is a relatively simple fix to amend the bill to provide equal treatment for non-married heterosexual parents, and non-married same-sex parents. The statutory language at issue, primarily subsection (d), was added in 1997 presumably to address the increase in unmarried individuals having children. It has not been amended to address issues related to same-sex couples since State v. Baker, 170 Vt. 194, 744 A.2d 864 was decided in 1999.

The language of 18 V.S.A. §5071 is inconsistent with the provisions of the Vermont Fair Housing and Public Accommodations Act, (public accommodations act), 9 V.S.A. §4502, in that it permits a place of public accommodation (a hospital and/or the Department of Health), to withhold or deny advantages and privileges based on sex and/or sexual orientation. Court interpretations of conflicting statutes generally attempt to read the statutes to be internally consistent with one another. It is impossible to do so in this case given that 18 V.S.A. § 5071 presently permits only a "father" to be included on the birth certificate if the "father and mother" sign a voluntary acknowledgement of parentage.

In Vermont, the male in an unmarried couple can be designated the father simply by signing an acknowledgement of parentage. The man does not have to "prove" that he is the father. If he is willing to accept responsibility for the child and the mother agrees, he can be deemed the father. Biology or genetics is not necessarily required with an acknowledgement though that may have been the original intention. Viewed through today's lens the language reflects an outmoded definition and concept of a family being a man and a woman. A Connecticut court, in analyzing a similar statutory provision stated, "on almost a daily basis, in our Magistrate Court and in our Superior Court, men and women are declared to be parents of children without a genetic test. While it is true that such tests can be ordered, it is not always the case that they are ordered and often an acknowledgment of paternity will suffice." Griffiths v. Taylor, 45 Conn. L. Rptr. 725 (Conn. Sup. Ct. 2008). An unmarried, non-biological father is not prohibited from signing a voluntary acknowledgment form, but an unmarried, non-birth mother is unable to do so, on the basis of her and her partner's sex or sexual orientation. Allowing this for unmarried men while adhering to a different standard for similarly situated unmarried women is discriminatory.

To add insult to injury, the same-sex couple's only remedy is to go to probate court and file a step-parent adoption in order to add the non-birth mother's name to the birth certificate. This added burden compounds the initial discrimination. Interestingly, it took a Vermont Supreme Court case, to permit the step-parent adoption by a same-sex partner without automatically terminating the parental rights of the birth mother. In re B.L.V.D., 160 Vt. 368 (1993). As Justice Johnson observed in that case, "[w]hen social mores change, governing statutes must be interpreted [or in this case changed] to allow for those changes in a manner that does not frustrate the purposes behind their enactment. . . . [O]ur paramount concern should be with the effect of our laws on the reality of children's lives." *Id.* at 375.

And while the VHRC does not have jurisdiction to raise a constitutional claim, the statute most likely in violates the Common Benefits Clause of the Vermont Constitution. That issue was raised in a very similar situation in Iowa. In Gartner v. Iowa Department of Public Health, 830 N.W.2d 335 (Iowa 2013), the Iowa Supreme Court determined that a statute, similar to 18 V.S.A. §5071, violated the equal protection clause of the Iowa Constitution. In that case, one of two partners in a married lesbian relationship was impregnated by artificial insemination. The couple completed a form at the hospital on the day their child was born but was issued a birth certificate bearing only the birth mother's name. Despite a request by the parents, the Department of Health refused to issue a corrected birth certificate.


The Iowa Supreme Court noted that while "ensuring the accuracy of birth records for identification of biological parents is a laudable goal," Iowa's system [like Vermont's], "does not always accurately identify the biological father." Id. at 352. The court wrote that, "[b]y naming the non-birthing spouse on the birth certificate of a married lesbian couple's child, the child is ensured support from that parent and the parent establishes fundamental legal rights at the moment of birth. Therefore, the only explanation for not listing the non-birthing lesbian spouse on the birth certificate is stereotype or prejudice." Id. at 353.

Changing the statute to the gender-neutral words parent or parents will resolve this problem and make it consistent with the requirements of the public accommodations act.

The final issue I would like to address is whether the legislation can provide some means for same-sex couples who have experienced this discrimination to remedy it short of going to probate court and filing a step-parent adoption. One way to do this might be to allow individuals in this situation (during some specified period of time) to file a petition in probate court to correct a birth certificate under 18 V.S.A. §5075 rather than filing a step-parent adoption. This would give same-sex couples a simple, less expensive remedy for the discrimination they have experienced while at the same time ensuring that a judge reviews the evidence and circumstances.

Thank you for your time and attention to this matter.

Respectfully submitted,



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Executive Director