IN THE
SUPREME COURT OF VIRGINIA

Record No. _____

MICHAEL ALLEN LUTTRELL,

Appellant,

v.

SAMANTHA MARY JO CUCCO,

Appellee.

On appeal from
the Court of Appeals of Virginia
Record No. 1768-14-4

_____

PETITION FOR APPEAL

_____

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ASSIGNMENTS OF ERROR

1. The Court of Appeals erred by holding that the term "cohabiting with another person in a relationship analogous to a marriage" as used in Virginia Code § 20-109 does not include cohabitation of same-sex couples. *Luttrell v. Cucco*, No. 1768-14-4, 2015 Va. App. LEXIS 135, at *12-16 (Va. Ct. App. Apr. 21, 2015).

2. The Court of Appeals erred by holding that the term "cohabitation" as used in the parties' property settlement agreement and divorce decree does not include cohabitation of same-sex couples. *Luttrell ,* 2015 Va. App. LEXIS 135, at *16-17.

3. The Court of Appeals erred by affirming the award of attorney's fees to appellee. *Luttrell*, 2015 Va. App. LEXIS 135, at *17-22.

STATEMENT PURSUANT TO RULE 5(17)(c)(2)

The Court of Appeals ruling is the first to interpret a statute containing the word "marriage" since October 6, 2014, when Virginia began issuing marriage licenses to same-sex couples and recognizing the marriages of same-sex couples lawfully performed in other jurisdictions. The court held that the term "cohabitation analogous to marriage" does not encompass cohabitation of two persons of the same sex because the General Assembly did not contemplate such an arrangement when it

added the cohabitation language in 1997. Broadly applied, the court's ruling has the potential to create confusion about the application of hundreds of statutes to same-sex couples. Therefore, the ruling involves matters of significant precedential value.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This case arises from a request by Appellant Michael Luttrell ("Michael") to terminate his spousal support obligation to Appellee Samantha Mary Cucco ("Samantha") under the couple's Property, Custody, and Support Settlement Agreement ("PSA") and Final Divorce Decree.

On July 10, 2014, Michael filed a "Motion for Adjustment and of Contempt" in Fairfax County Circuit Court pursuant to the PSA and Final Divorce Decree requesting the termination of his spousal support obligation to Samantha. App. at 37-39.[1] Under the PSA and the Final Divorce Decree, support could be terminated "as a result of action by the Court taken pursuant to § 20-109 of 1950 Code of Virginia, as amended, relative to cohabitation." Section 20-109, in turn, states that the Court must terminate spousal support "upon clear and convincing evidence that

[1] Citations to "App." refer to the Appendix filed in the Court of Appeals.

the spouse receiving support has been habitually cohabiting with another person in a relationship analogous to a marriage for one year or more. . ."

The circuit court denied the motion on August 28, 2014, finding that Samantha "lives with another woman and accordingly cannot 'cohabit' within the meaning of § 20-109." App. at 65. Michael filed a motion to reconsider on September 16, 2014, and timely filed a Notice of Appeal from the August 28, 2014 order on September 22, 2014. App. at 68-76. The circuit court denied Michael's motion to reconsider on September 29, 2014. App. at 77. The Court of Appeals of Virginia affirmed the circuit court's ruling on April 21, 2015. *Luttrell v. Cucco*, No. 1768-14-4, 2015 Va. App. LEXIS 135 (Va. Ct. App. Apr. 21, 2015). Appellant now appeals that decision.

STATEMENT OF FACTS

Michael and Samantha were married on January 6, 1992 in Richmond, Virginia. They executed a Property, Custody and Support Settlement Agreement on October 15, 2008,[2] which was later incorporated into the Final Decree of Divorce entered by the Fairfax County Circuit Court on November 6, 2008. App. at 5-16.

[2] The PSA is attached as an Addendum to the Brief of the Appellant filed in the Court of Appeals.

The Final Decree of Divorce ordered Michael to pay $2,450 each month to Samantha as spousal support. App. at 12. Support was to continue until November 1, 2016 or "until the death of either party, the remarriage of the wife, or as a result of action by the Court taken pursuant to §20-109 of 1950 Code of Virginia, as amended, relative to cohabitation." App. at 12.

In June 2013, Michael discovered that Samantha had been engaged to and cohabitating with a woman since at least November 24, 2012 – a fact that Samantha has not denied. App. at 45. Michael filed a motion in the circuit court on July 10, 2014 requesting the termination of spousal support pursuant to the Final Decree of Divorce and the PSA. App. at 37-39.

ARGUMENT

The Court should grant this appeal because the Court of Appeals' ruling is inconsistent with Virginia's current marriage laws allowing same-sex couples to marry and treating marriages of same-sex couples as equal to those of different-sex couples. If allowed to stand, the Court of Appeals' reasoning is likely to impede Virginia's compliance with the marriage equality mandate of *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied* 135 S. Ct. 308 (Oct. 6, 2014), and create

unnecessary confusion for government officials, courts, and private parties.

The Court of Appeals held that Virginia Code § 20-109 – which requires judges to terminate spousal support when the supported ex-spouse "cohabit[s] with another person in a relationship analogous to a marriage for one year or more" – does not apply if the ex-spouse is living with someone of the same sex. The sole basis for this holding is that, according to the Court of Appeals, the General Assembly was presumably aware of court decisions defining cohabitation as "a status in which a man and a woman live together," and must therefore have intended the word to have that meaning in the statute. This reasoning is unsound in the context of the change in Virginia's marriage laws. Now that same-sex couples have legally valid marriages in Virginia, virtually every statute pertaining to marriage has applications that are different from those envisioned by the General Assembly at the time of enactment. Taking the reasoning of the Court of Appeals to its logical end, each of those statutes would need to be reenacted or challenged in federal court in order to ensure full compliance with *Bostic.*

Moreover, the Court of Appeals' highly disruptive interpretation of

§ 20-109 was unnecessary because under settled principles of statutory construction, the word "cohabit" as used in the statute means to live with a person of either sex. The plain language and purpose of the statute and the doctrine of constitutional avoidance compel this interpretation, and the court's characterization of the prior case law and its effect on the presumed knowledge of the General Assembly is simply incorrect.[3]

I. THE COURT SHOULD GRANT THE APPEAL IN ORDER TO ENSURE THAT STATUTES ARE INTERPRETED CONSISTENTLY WITH VIRGINIA'S CURRENT MARRIAGE LAW.

As described in detail in Part II, a straightforward application of the rules of statutory construction should have led the Court of Appeals to conclude that § 20-109 requires termination of spousal support when the spouse receiving support cohabits with a person of either sex. But the court's erroneous reasoning has serious implications that extend far beyond this particular case or this particular statute.

On February 13, 2014, the United States District Court for the Eastern District of Virginia held that "Va. Const. Art. I, § 15-A, Va. Code

[3] As the Court of Appeals correctly noted, this appeal deals with the construction of a statute and the construction of a PSA, both of which are reviewed *de novo. Lutrell*, 2015 Va. App. LEXIS 135, at *13, *18 (citing *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007); *Stacy v. Stacy*, 53 Va. App. 38, 43, 669 S.E.2d 348, 350 (2008) (en banc)).

§§ 20-45.2, 20-45.3, and any other Virginia law that bars same-sex marriage or prohibits Virginia's recognition of lawful same-sex marriages from other jurisdictions [is] unconstitutional." *Bostic v. Rainey*, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014). The Fourth Circuit affirmed, *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), and the U.S. Supreme Court denied *certiorari*. *Rainey v. Bostic*, 135 S. Ct. 286 (Oct. 6, 2014). For over seven months, Virginia has issued marriage licenses to same-sex couples and has recognized the marriages of same-sex couples married in other states.

Government agencies in Virginia have begun to revise their practices to ensure that statutes are enforced consistently with the federal injunction requiring recognition of the marriages of same-sex couples. The Virginia Department of Taxation announced that "same-sex marriages that are valid under the law of any state will now be recognized for Virginia income tax purposes." Va. Dep't of Taxation, Tax Bull. No. 14-7 (Oct. 7, 2014), available at http://www.tax.virginia.gov/laws-rules-decisions/tax-bulletins/14-7-0 (last visited May 20, 2015). The Governor instructed social services agencies that married, same-sex couples may jointly adopt children. Press Release, Office of the Governor, McAuliffe Administration to Local Divisions of Social Services: Same-Sex Spouses

can now Legally Adopt (Oct. 10, 2014), available at https://governor.virginia.gov/newsroom/newsarticle?articleId=6827 (last visited May 20, 2015). The Registrar of Vital Records instructed hospitals that "when there are two female spouses in a legal marriage both spouses can be listed on their child's birth certificate when one of the spouses is the gestational mother." Letter from Janet Rainey, Dir. and State Registrar, Div. of Vital Records to Virginia Hospitals (Jan. 22, 2015). In taking these actions, government agencies correctly interpreted Virginia tax laws (Va. Code § 58.1-324), adoption laws (Va. Code § 63.2-1225), and parentage laws (Va. Code §§ 20-158 (A)(2), 32.1-257(D)) to apply to married same-sex couples, even though the General Assembly did not contemplate such an application at the time the statutes were enacted.

The Court of Appeals' reasoning in this case has the potential to introduce chaos into this careful state response to the *Bostic* decision. This Court should grant this appeal to prevent the disorder that would ensue.

The Court of Appeals found that *Bostic* was not pertinent to the present case because "[w]e have not been asked here to assign a legal status to the relationship between wife and her partner, but only to

determine the bargain struck by the parties as expressed in their PSA." *Luttrell* at *15 n.5. This understanding of *Bostic*'s significance is too narrow. As the government actions described above illustrate, all Virginia statutes containing words such as "marriage," "spouse," "husband," or "wife," must be understood in light of the legal and factual reality that some married couples in Virginia are of the same sex, and that a married couple is not always a husband and wife, but may be a husband and husband or a wife and wife. This is true even though the General Assembly did not foresee these applications of the statutes at the time they were enacted. Indeed, as discussed below, any other interpretation would raise grave constitutional concerns.

III. THE COURT SHOULD GRANT THE APPEAL IN ORDER TO CORRECT THE COURT OF APPEALS' ERRONEOUS INTERPRETATION OF CODE § 20-109.

A. The Plain Meaning of "Cohabit" is to Live with a Person of Either Sex.

"[U]nder settled principles of statutory construction, we are bound by the plain meaning of the statutory language." *Ramsey v. Comm'r of Highways*, 770 S.E.2d 487, 2015 Va. LEXIS 43, at *5 (Va. 2015) (quoting *Hale v. Bd. of Zoning Appeals*, 277 Va. 250, 269, 673 S.E.2d 170, 179 (2009)). The term "cohabit" means "to live together as or as if a married couple," or "to live together or in company." Merriam-Webster Dictionary,

www.meriam-webster.com (last visited May 19, 2015). Absent statutory language to the contrary, there is no reason to import the limitation "with a person of the opposite sex" to the word "cohabit."

Accordingly, in states with statutes similar to Virginia's, courts have interpreted the word "cohabit" to apply to two persons who live together, regardless of sex. For example, in *Garcia v. Garcia*, 60 P.3d 1174, 1176 (Utah Ct. App. 2002), the court considered a statute providing that "alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person." Reversing the trial court's holding that a "'same sex' relationship cannot, as a matter of law, amount to 'cohabitation,'" the court noted that "[t]he plain language of the statute requires only that the alimony payee cohabit 'with another person,' and contains no requirement that the other person be a member of the opposite sex." *Id.* *See also In re Marriage of Weisbruch*, 710 N.E.2d 439, 442, 445 (Ill. App. 1999) (statute terminating spousal maintenance "if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis" applied to cohabitation with person of the same sex).

Similarly, in an opinion interpreting the then-pending constitutional amendment prohibiting recognition of any marriage or similar relationship

between same-sex couples, the Attorney General found that the word "cohabit," as used in Virginia's domestic violence statute, applied to any two people sharing a household, regardless of sex. Therefore, "passage of the amendment . . . would not prevent prosecution of an individual in a same-sex or other unmarried relationship for assault and battery of the other individual pursuant to § 18.2-57.2." 2006 Op. Va. Atty. Gen. No. 06-003 (Sep. 14, 2006).

B. The Court of Appeals' Interpretation of the Word "Cohabit" Defeats the Purpose of the Statute.

This Court "will not apply an unreasonably restrictive interpretation of the statute that would subvert the legislative intent expressed therein." *Brown v. Commonwealth*, 284 Va. 538, 542, 733 S.E.2d 638, 640 (2012) (quoting *Armstrong v. Commonwealth*, 263 Va. 573, 581, 562 S.E.2d 139, 144 (2002)) (internal quotation marks omitted). The purpose of spousal support is to ensure that a person who was previously dependent upon his spouse for support is not impoverished after a divorce. The purpose of § 20-109(A) is to terminate that responsibility when the spouse receiving support is no longer dependent on the former spouse because he is sharing a financially interdependent household with another person. For purposes of this statutory function, it is immaterial whether the spouse is now living with a person of the same sex or different sex.

Because the Court of Appeals' interpretation of the statute is inconsistent with its purpose, it leads to absurd results. If an ex-wife receiving spousal support joins the household of a man who pays for all the household expenses and ensures the ex-wife's continued financial wellbeing, the court must terminate any support she receives from her former spouse. If, however, she enters into exactly the same personal and financial relationship with a woman, her husband must continue paying her support, even though it is no longer needed. Essentially, a woman receiving spousal support realizes a windfall if she moves in with a woman instead of with a man. The General Assembly could not have intended such a result.

C. The Doctrine of Constitutional Avoidance Requires an Interpretation of "Cohabitation" That Includes Living with a Person of the Same Sex.

An interpretation of the statute that conditions spousal support on whether the former spouse cohabits with a man or a woman is not only absurd, it is constitutionally untenable. Regardless of whether one views the law as a classification based on sex, or one based on sexual orientation, such discrimination is unconstitutional without sufficient justification. And there is simply no reason to treat a person living with someone of the same sex differently from a person living with someone of

the opposite sex for purposes of spousal support. As this Court has repeatedly recognized, "courts have a duty when construing a statute to avoid any conflict with the Constitution." *Commonwealth v. Doe*, 278 Va. 223, 229, 682 S.E.2d 906, 908 (2009) (citing cases). Along with the plain language and the statutory purpose, this duty compels the Court to interpret "cohabitation" to mean living with a person of either sex.

D. At the Time the Statute was Enacted, the General Assembly Would Have Understood the Term "Cohabit" to Mean Living With a Person of Either Sex.

Despite the plain statutory language, the absurd results that follow from its interpretation, and the need to avoid constitutional issues, the Court of Appeals held that same-sex couples cannot cohabit within the meaning of Code § 20-109 because the General Assembly would have been aware at the time of enactment of this Court's and the Court of Appeals' precedents defining the phrase "cohabitation, analogous to marriage" to mean "a status in which a man and woman live together. . ." *Luttrell*, 2015 Va. App. LEXIS 135, *16 (quoting *Frey v. Frey*, 14 Va. App. 270, 275, 416 S.E.2d 40, 43 (1992)). In fact, however, no such precedent exists.

The Court of Appeals cites two cases to support its view of the General Assembly's understanding of the phrase "cohabitation,

analogous to marriage." In *Schweider v. Schweider*, 243 Va. 245, 415 S.E.2d 135 (1992), the Court interpreted a property settlement agreement providing that spousal support would cease upon the wife's remarriage, which "shall include the wife's permanent cohabitation *with a male* as if to all appearances they were otherwise married. . ." 243 Va. at 246 (emphasis added). Similarly, in *Frey*, the Court of Appeals interpreted a PSA in which spousal support terminated upon the "cohabitation, analogous to a marriage, *with another man*." 14 Va. App. at 271 (emphasis added). Since the PSAs in both cases referred specifically to cohabitation with a male, the cases have no bearing on whether the word "cohabit," by itself, is limited to different-sex cohabitation. Nor do these cases provide any reason to believe that the General Assembly understood the term so narrowly. If anything, the existence of precedent interpreting "cohabitation with a man" to mean only cohabitation with a man suggests that the General Assembly purposely chose the language "cohabit[] with another *person*" to ensure that it would apply to cohabitation with *any* other person.

E. Because the Court of Appeals Erroneously Interpreted Va. Code § 20-109, it Also Erroneously Interpreted the Parties' Property Settlement Agreement.

As the Court of Appeals noted, "the parties' 'PSA permits the termination of spousal support only upon an '*action by the Court taken pursuant to [Code] § 20-109 . . . relative to cohabitation*.' In other words, the parties agreed that Code § 20-109 would govern in any proceeding where husband alleged cohabitation as a basis to terminate wife's spousal support award." *Luttrell*, 2015 Va. App. LEXIS 135, at *17 (emphasis in *Luttrell*) (citation omitted). Because § 20-109 requires termination of spousal support when the supported spouse cohabits with a person of either sex, the PSA requires termination of the wife's support because of her cohabitation with another woman. *Cf. Mack v. Mack*, 217 Va. 534, 537, 229 S.E.2d 895, 897 (1976) (PSA stating father would provide payments for support of "minor" children must be interpreted based on change in law lowering age of majority from 21 to 18); *Meredith v. Meredith*, 216 Va. 636, 638, 229 S.E.2d 895, 897 (1976) (same result when PSA required payments until child reached "age of majority").

In sum, under ordinary rules of statutory construction, the term "cohabiting with another person in a relationship analogous to a marriage" is not limited to cohabitation with a person of a different sex, and,

accordingly, the PSA requires termination of spousal support if Samantha lives with a person of either sex. This Court should grant the appeal in order to correct this error.[4]

CONCLUSION

For the reasons stated herein, Appellant requests this Court grant his Petition for Appeal and reverse the judgments of the Circuit Court and Court of Appeals.

Respectfully submitted,

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[4] Because the Court of Appeals erroneously affirmed the circuit court ruling, its affirmance of the award of attorney's fees was also erroneous and should be reversed.

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CERTIFICATE PURSUANT TO RULE 5:17(i)
OF THE RULES OF THE SUPREME COURT OF VIRGINIA

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(2) On this 21st day of May, 2015, a copy of this petition has been mailed to counsel for appellee.

(3) This petition for appeal contains 3,300 words.

(4) Appellant desires to state orally to a panel of this Court the reasons why the petition for appeal should be granted. Appellant may do so in person or by conference telephone call, at the convenience of the Court.

_____
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Counsel for Appellant