



Written by [Raven Clabough](#) on March 5, 2012

Same-Sex Custody Battle in Florida Could Change Law

A same-sex custody battle may prompt Florida state lawmakers to reconsider a 19-year-old law regarding the rights of sperm and egg donors. Likewise, the court case could provoke national debate on the definition of motherhood.

Two women in the Sunshine State, identified only by initials, had been engaged in a relationship together for nine years when one of them donated an egg to be fertilized and implanted in the other. The two women had their child in 2004, but separated two years later. The birth mother left Florida with the child without informing the other woman. After hiring a private detective, the woman finally discovered her ex-lover and child in Australia.



Now there is debate as to which of the women is the actual biological mother of the child (now eight years old), with the woman who donated the egg contending that she is.

The custody battle may be on its way to the state Supreme Court, though that court has yet to announce whether it will consider the case.

A trial judge has already ruled in favor of the birth mother and said that the biological mother has no parental rights under state law, though that judge added that he would like to see his decision overturned.

The case then went to the 5th District Court of Appeal in Daytona Beach, which took the side of the biological mother (the egg donor) and declared both women to have parental rights.

Fox News explains:

At issue is the 1993 state law meant to regulate sperm and egg donation. Scholars debate whether the constitutional right to procreate includes outside-the-body technologies used to conceive.

Also at issue are constitutional questions about gay people's right to raise children and claim equal protection under law. Another appellate court ruled Florida's ban on gays being able to adopt unconstitutional in 2010.

The biological mother has asserted she is not attempting to serve as a "pioneer" for the gay rights movement, but that she simply wants rights to her child.

"She hasn't seen her daughter in years, and it's been terribly, terribly difficult for her," maintained Robert A. Segal, a family law attorney in Melbourne.

Court records show that the two women agreed to use "reproductive medical assistance," have a child, and raise the child as a couple.



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Though the reasons for the separation are unknown, the decision of the appellate court determined that “their separation does not dissolve the parental rights of either woman, nor does it dissolve the love and affection either has for the child.”

To assert her rights, the birth mother is using a Florida law which declares that sperm and egg donors “relinquish all maternal or parental rights.” Based on that law, the trial judge was compelled to rule in favor of the birth mother, but admitted he did not agree that the law was a fair one in this case. He said upon making his determination, “If you appeal this, I hope I’m wrong.”

Upon appeal, the appellate judges overturned the decision of the trial judge, two to one, finding that the biological mother is not in fact a “donor” as defined by the law because she and her partner made a conscious decision to be parents together. “We can discern no legally valid reason to deprive either woman of parental rights to this child,” said the majority opinion by Judge Thomas Sawaya, who ruled the donor law to be unconstitutionally applied in this case.

According to Fox News, “That law was passed 15 years after Louise Brown, the world’s first ‘test tube’ baby, was born. But Judge David Monaco, in a concurring opinion, said the statute ‘was not designed to resolve the problem of how to treat children born by in vitro fertilization to a same-sex couple.’”

Brian Rush, one of the original sponsors of the law, agrees with Monaco. “I think it’s unlikely we discussed this kind of fact situation,” he said, adding, “We were trying to facilitate assisted reproduction technologies ... and eliminate litigation.” Monaco concluded his opinion by writing, “We still ought to come to grips with what is best for the child. Here, having two parents is better than one.”

Judge Alan Lawson’s dissent of that decision indicates vehement disagreement, asserting that a child can have only one mother. According to Lawson, the court should not recognize two mothers “unless we are also willing to invalidate laws prohibiting same sex marriage, bigamy, polygamy or adult incestuous relationships on the same basis.”

Lawson also contends that permitting a donor to plead intent in this case could set a precedent that would allow any donor to “make an after-the-fact claim” for parental rights.

Both Monaco and Lawson agree that the Florida legislature needs to pass a new law on human reproduction to reflect the change in times.

“We think we’re solving problems with technology, but it just leads to more problems,” said Alan Williams, a health law professor at Florida Coastal School of Law in Jacksonville. “Moral and ethical dilemmas arise that laws were never made to deal with.”

The debate has attracted a great deal of attention, with gay rights groups and conservative groups both asserting their views.

Florida Family Policy Council president John Stemberger contends that the appellate court’s decision is in violation of Florida’s law and constitution and “redefines the legal nature of families.” Stemberger points to the 2008 ban of same-sex marriage adopted by Florida voters.

Shannon McLin Carlyle, one of the attorneys representing the biological mother in the case, contends that the issue is not about gay rights, but parental rights. “But it does solidify gay couples’ right to retain a relationship with their child,” she said. “If it goes the other way, parenthood could be subject to risk on the whim of the other partner.”

Three states in the country have [laws](#) explicitly prohibiting both homosexual individuals and homosexual couples from adopting children: Florida, Mississippi, and Utah. Other states do not



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necessarily explicitly prohibit same-sex adoption, but may require that only married couples adopt, which in turn would restrict many same-sex couples from doing so.

Still, the situation in Florida does not quite fall under the consideration of Florida's adoption laws because it involves an egg donor and a surrogate and the consensual decision to become parents.

Similar cases are playing out elsewhere. In Virginia, for example, Lisa Miller has been hiding with her daughter since 2009, after Miller renounced her homosexuality and a court ordered that her former partner, Janet Jenkins, receive custody. Miller and Jenkins had entered into a civil union in Vermont in 2000, and Miller donated one of her eggs to be artificially inseminated and she gave birth to her child. The Virginia Supreme Court agreed with the decision of a Vermont judge on custody.

Similarly, North Carolina State Senator Julia Boseman, the first openly lesbian member of that state's legislature, is currently involved in a custody battle for her two-year-old son born to a woman that Boseman called her spouse.

These cases being hashed out in states throughout the country prove what Texas Congressman Ron Paul [asserts](#) to be the best approach to these complicated matters: that decisions of this nature belong to the states as outlined in the Constitution.

And Paul seems to propose a simple solution. In his book [Liberty Defined](#), he argues, "In a free society...all voluntary and consensual agreements would be recognized...If an agreement or contract is reached by the participants, it would qualify as a civil contract if desired."

Though Paul's argument was not in reference to same-sex marriage, one can certainly see how his philosophy could be applied to these cases involving the voluntary and consensual decision of same-sex couples to have a child together. Paul contends that a major role of government, in particular state government, is to protect contractual rights.

Another consideration is that most family law is based on a system of common law that is based on traditional Judeo-Christian ethics and predates unnatural reproductive technologies. Can contractual arrangements supersede the common law? And what is the legal status of children born without the common-law protections offered only by the traditional marriages that existed as that law was being developed?

Whether states will see the agreements entered into by these same-sex parents as contractual rights worthy of protection remains to be seen.



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