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Battle over birthright: Case raises questions about role of sperm donors in children's lives

Presented by

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When a lesbian couple from Terrace, B.C., decided they wanted a child of their own, they were overjoyed that a good friend agreed to donate his sperm.

They were going to have a family.

Before the child was born in October 2006, the donor signed an agreement stating that the female couple would be the parents and that he would consent to an adoption of the child. But since the child's birth, things haven't gone according to plan. The donor began making frequent visits to the female couple's home and referring to the child as "his son" in the community. He also allowed his family to send him congratulations and gifts on the birth of the child.

These are the allegations set out in a statement of claim filed in the Supreme Court of British Columbia. The lesbian couple is now suing the donor for willful infliction of mental suffering and breach of contract, and is asking the court for a restraining order against their former friend. The couple and the sperm donor cannot be named to protect the identity of the child. The parties in the lawsuit declined to be interviewed.

The case has raised questions about the rights of sperm donors across the country and whether adults should have the power to contract away the rights of children before they are born.

Observers say conflicting provincial legislation and a dearth of case law makes those questions difficult to answer.

"Most provinces have not amended their family law to clarify the rights and responsibilities of donors, so you can get into these murky situations," said Diane Allen, executive director of the Infertility Network. "It's a very grey area."

Ms. Allen says her organization often hears from donor offspring at conferences who say they should have a right to know who their parents are and that nobody should be able to withhold information

about their genetic origins.

"For the lesbian couple, I can certainly understand why they feel threatened and that their parenting is being interfered with," she said. "But what are they going to tell that child down the road? Are they going to say they didn't want the child's father in his life? What about what the child's needs and wants?"

Another element adding to the confusion is the six-year-old Assisted Human Reproduction Act, which makes paying for sperm illegal. As a result, couples are increasingly turning to friends and acquaintances to act as donors, creating a legal and ethical quagmire, says Saskatoon fertility specialist Dr. Roger Pierson, spokesman for the Canadian Fertility and Andrology Society.

"When the act was brought into law and no compensation was allowed, in essence, it closed all but one sperm bank in the country," said Dr. Pierson, referring to Toronto's Institute for Reproductive Medicine. "So if friends start doing things on their own, and you have a female from one province and a male from another, it can be problematic."

There are still some agencies in Canada that import sperm from other countries, but the \$35-a-sample sperm banks are a thing of the past.

To the relatively small extent that courts have heard cases involving the rights of sperm donors and donor offspring, judges have tended to rule with the best interests of the child in mind, according to Margaret Somerville, director of the McGill Centre for Medicine, Ethics and Law.

"They're going to look at public policy and whether what's being done is contrary to that. There are just some obligations that you can't contract away," she said. "They are also going to look at what's in the best interests of the particular child. In effect, what they're doing is looking at these cases both at a general societal level and what impact the ruling will have on societal values and rights of kids, and how the ruling will affect the child in question."

In 2007, the Supreme Court of Canada upheld a decision by the Alberta Court of Appeal that is considered by many observers to be precedent setting. The case involved a woman who wanted to be a mother while her common-law husband had no interest in fathering a child but wanted to stay in the relationship. The couple signed an agreement whereby the woman would have a baby -- using sperm from a donor -- but the man would have no parental responsibilities. The court found that such a non-parent contract contradicted the Alberta Family Law Act and that the man, even though he wasn't the sperm donor, would have parental responsibilities if he continued to live in a relationship of interdependence with the mother.

"The 'settled intention' to remain in a close, albeit unmarried, relationship thrust [the man] from a practical and realistic point of view, into the role of parent of this child," said the ruling. "Can it seriously be contended that he will ignore the child when it cries? When it needs to be fed? When it

stumbles?"

The lesson is clear: parents cannot sign away a child's right to a father and mother.

In a case with echoes of the B.C. matter, the Irish Supreme Court ruled last December that a gay man who donated his sperm to a lesbian couple should be allowed to see his three-year-old son regularly. The Irish Constitution does not permit gay marriage and defines parents as a married man and woman. Because Irish law identified the 47-year-old man as the father, the court ruled he had a right to have a relationship with his son, who was born in 2006, even though it acknowledged that the female couple provided a stable and loving home for the child.

The man told the court he had agreed to donate sperm to the lesbian couple, who were his "good friends" at the time, on the basis that he would be treated like an uncle when the child was born. However, after the birth, the man's relationship with the couple deteriorated.

As for whether the B.C. couple will likely find a favourable ruling in that province's Supreme Court, opinion is uncertain.

Vancouver family lawyer Kathleen Walker says because the non-biological mother did not go through the formal adoption process (for reasons unknown), the father of the child is "still in the grey area of being a parent."

"From a practical point of view, I think that it's a good thing the father has an interest in the child," said Ms. Walker. "I think the more people that love a child, the better off the child is. If the child has been adopted, then I think the issue is privacy. If the lesbian couple don't want the father around, he's got no right to be around or interacting with that child."

Still, the child should have the right to know his biological father, says Wendy Kramer, director and co-founder of the Colorado-based Donor Sibling Registry, a website she created for individuals conceived as a result of sperm, egg or embryo donation who are seeking to make mutually desired contact with others with whom they share genetic ties.

She says the legal systems in both Canada and the United States have not kept pace with how donors and their offspring are redefining parenting when they mutually consent to meet, an increasing trend. Her registry has more than 26,000 members worldwide and has helped connect more than 7,000 donor offspring with their half-siblings and their own egg or sperm donors. More than 1,000 members are donors curious to find out who their biological offspring are.

"There are many recipients of donor sperm who don't tell their kids about where they came from, but for the donor offspring, it might be very important for them to connect to their biological parents," Ms. Kramer said, whose own 19-year-old son was conceived using donor sperm. "The one voice that's always missing from the conversation is the voice of the children who are being born. It's not just about

getting pregnant. It's about realizing the rights of the children being born."

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