

This case concerns two women, Kimberly and Jeanne, who are in a committed relationship with each other, including registration as domestic partners and legal marriage in Canada, and have also dedicated themselves to raising a family.¹ After jointly planning the process by which they would become parents, Kimberly became pregnant through artificial insemination under the supervision of a licensed physician. Jeanne and Kimberly are expecting the birth of their child (a daughter to be named Vivian) in May 2005. They bring this suit to ensure that, pursuant to the Artificial Insemination Statute, N.J.S.A. 9:17-44(a), their expected child receives the statute's intended benefits of being acknowledged as having two parents at birth.

Kimberly and Jeanne have established the indicia of commitment to their relationship and to the raising of their expected child that is consistent under the statute with a declaration that Jeanne be named a parent of the expected child upon the child's birth. Indeed, an order adjudicating Jeanne's parentage of the expected child is not only appropriate under the Artificial Insemination Statute, but is consistent with recent New Jersey Supreme Court case law.

Further, the denial of recognition of Jeanne's and her expected child's relationship would violate state statutory and constitutional discrimination protections.

¹Although Kimberly and Jeanne registered as domestic partners in New York City, the New Jersey domestic partnership statute expressly recognizes that partnership to be valid. N.J.S.A.26:8A-6 (c).

STATEMENT OF FACTS

As set forth in the complaint and their certifications, Jeanne and Kimberly committed to each other through registering as domestic partners and becoming legally married in Canada. They also determined that they wanted to create a family and parent a child. They carefully planned the process by which they would become parents. Both parties acted jointly in all decisions about the child. Both of them provided financial resources to realize the resulting pregnancy.

Kimberly and Jeanne entered into an agreement with Dr. Caryn Selick to artificially inseminate Kimberly with sperm from an anonymous donor purchased by Jeanne and Kimberly.

Jeanne and Kimberly purchased anonymously donated sperm from Fairfax Cryobank. Under Dr. Selick's supervision, Kimberly was fertilized with that sperm. Kimberly is now pregnant and due to deliver in May 2005. Through amniocentesis, Kimberly and Jeanne have found out that the child will be a girl. The child will be named Vivian. Vivian is being named after Jeanne's and Kimberly's maternal grandmothers who both happen to share that name. Both Kimberly and Jeanne see themselves as joint parents of the child about to be born and their families and friends recognize and support their decision. It is their intention to give Vivian Jeanne's last name of LoCicero.

In order to avoid confusion and to protect their child about to be born, Jeanne and Kimberly come before this Court requesting a pre-birth order declaring both of them as the parents of the child.

Plaintiffs urge this Court to protect the integrity of their family as well as the best interests of their expected child. Jeanne and Kimberly seek a court order legally recognizing them both as parents when their child is born and allowing both partners'

names to appear on the child's birth certificate so that from the moment of birth their child will have the benefits and protections of having two legally recognized parents.

LEGAL ARGUMENT

I

NEW JERSEY'S STATUTE CONCERNING ARTIFICIAL INSEMINATION SHOULD BE CONSTRUED AS APPLYING TO PETITIONERS.

N.J.S.A. 9:17-44(a) in pertinent part, states:

a. If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man other than her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.

Thus, under this statute, the spouse of a woman who consents to artificial insemination under the supervision of a licensed physician, is treated in law as if he were the natural parent of a child conceived. As a result, a child born to such a couple receives the security and benefits of having two legal parents from the time she or he is born. Here, it is consistent with the purpose of the statute, prior New Jersey case law, and the best interest of the petitioners' expected child to afford her the security and benefits provided under the statute.²

A. Well Established Public Policy Considerations Favor Construing N.J.S.A. 9:17-44 to Cover the Situation before this Court.

In N.J.S.A. 9:17-44(a), the Legislature intended to protect the interests of children born through artificial insemination and to protect the unity of the family by recognizing the spouse of a woman who gives birth using artificial insemination as the parent of the child from birth. This objective of recognizing and protecting the family relationships of children not living in conventional families made up of a wedded biological mother and

² If this Court holds that the cited statute does not apply to petitioners, petitioners will challenge the constitutionality of the statute. Therefore, consistent with R. 4:28-4 (a), notice of pendency of this action has been given to the New Jersey Attorney General.

biological father is a consistent and important theme in the area of New Jersey family law.

Indeed, the New Jersey courts have an unflagging record in recognizing the rights of non-traditional families, including lesbian and gay families, when the best interest of the child dictates recognition of a different approach. See V.C. v. M.J.B., 163 N.J. 200, 221 (2000), cert. denied 531 U.S. 926, 121 S.Ct. 302, 148 L.Ed.2d 243 (2000) (“At the heart of the psychological parent cases is the recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them”); H.N.R., 285 N.J. Super. at 12 (App. Div. 1995) (recognizing right of same-sex partner to adopt partner’s biological child stating, “we think it is plain that the best interest of the twins will be served by according them the full range of legal and financial benefits attendant upon a legally cognizable parental relationship”); Sorentino v. Family and Children’s Soc. of Elizabeth, 74 N.J. 313, 323 (1977) (recognizing that an important policy of the Adoption Act is “the protection of the stability and permanence of the new familial grouping”); Sees v. Baber, 74 N.J. 201, 222 (1977) (“the psychological aspect of parenthood is more important in terms of the development of the child and its mental and emotional health than the coincidence of biological or natural parenthood”); Matter of Adoption of Child by J.M.G., 267 N.J. Super. 622, 627 (Ch.Div.1993) (construing “stepparent” exception in adoption statute to apply to same-sex partner seeking to adopt child and finding “the public policy of New Jersey is to protect the best interest of the child above rigid construction of the term ‘family’”).

In all of the cases above, New Jersey courts have recognized the legal rights of families in circumstances outside the traditional mode of a heterosexual, married union and biological parenthood. In no uncertain terms, the Appellate Division has held that

there is no State interest to justify burdening or withholding gays and lesbians from being declared parents and being able to lovingly raising children: “To deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest.” H.N.R., 285 N.J.Super. at 10. Indeed, it is in the best interest of children born into these families to afford them the benefits and security of having two legal parents and the courts have interpreted New Jersey statutes to further that important interest. In H.R.N., the Appellate Division noted just such an obligation on the part of the judiciary, in terms that fully convey the sentiment and concern that should guide this court in its determination of the matter at bar:

[O]ur paramount concern should be with the effect of our laws on the reality of children's lives. It is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore legal, connection is no longer the sole organizing principle.

H.N.R., 285 N.J. Super. at 11 (quoting Adoption of B.L.V.B., 628 A.2d 1271, 1276 (Vt. 1993)).

Plaintiffs in this case ask for this recognition. Rather than having to face months of insecurity and legal uncertainty while waiting for an adoption, Jeanne and Kimberly seek recognition of their family from the moment their child is born.

Although the language of the statute specifically refers to a “husband” who has consented to his wife’s artificial insemination, applying the statute in cases such as the one before the Court would serve the statute’s purpose of providing secure family units for children to be born into. Both petitioners participated in and consented to the artificial insemination procedure, and while Jeanne will not be biologically related to the

couple's child, both petitioners intend for her to be a joint parent and to help provide for and raise the child. This is no different than when a heterosexual married couple conceives a child using artificial insemination. There, the husband would not be the biological parent of the child anymore than Jeanne will be. However, the Legislature has recognized the importance of protecting the unity of the family and providing the child with the security of having two legally recognized parents. Here, Jeanne has shown the same exact indicia of commitment to her family and the child being born to Kimberly as has any other marital partner seeking to be declared a natural parent under the Artificial Insemination Statute. No rational purpose is served by putting a child in a less secure position because she was born to a committed lesbian couple using artificial insemination rather than to a committed heterosexual couple using artificial insemination.

Indeed, it is extremely important to note that the language of the Artificial Insemination Statute was adopted over 20 years ago. It was adopted prior to the recognition that gay and lesbian families would use the new medical procedures. It pre-dates the inclusion of sexual orientation as a protected class under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. It pre-dates the ability of gay and lesbians couples to establish the same indicia of commitment to their partner and family, which now exists via domestic partnerships, civil unions, religious marriage ceremonies, and, as here, civil marriage in Canada or Massachusetts. Most importantly, it was adopted prior to the numerous New Jersey court decisions cited above, acknowledging the right of gays and lesbians to raise children, adopt children, or be recognized as "psychological parents."

Finally, the New Jersey Parentage Act itself (of which the Artificial Insemination

Statute is a part) stresses that the “parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parent.” N.J.S.A. 19:17-40. This non-discriminatory approach to families embodied in the statutes themselves supports an interpretation of the artificial insemination statute to cover same-sex partners.

B. The Best Interest of the Child Would be Served by Construing the Artificial Insemination Statute to Apply to this Case.

Any child is benefited by having two legal parents responsible for his or her well being. C.M. v. C.C., 152 N.J. Super. 160, 167 (Juv.& Dem. Rel. 1977) (“It is in a child’s best interests to have two parents whenever possible.”)

1. Benefits to the child.

The benefits to a child of having two legal parents, rather than just one, are probably too numerous to list. However, these benefits would certainly include additional economic security such as the right to support and the right to inherit by intestacy from Jeanne and her family and to inherit free of a 15% New Jersey inheritance tax. N.J.S.A. 54:34-2(a). Additionally, the child would be eligible for health insurance as a dependent of Jeanne and would be entitled to insurance and social security benefits in the event of Jeanne’s death. The child would also have two parents who could consent to needed medical treatment. Perhaps most importantly, the child’s relationship with Jeanne would be protected in the event that Kimberly died or became incapacitated. See J.M.G. Super. at 625.³

By contrast, if this petition is denied Jeanne would have no clear legal obligation to

³ Additionally, the court in J.M.G. noted that in allowing a woman to adopt the biological child of her lesbian partner “[t]he court’s recognition of this family unit through the adoption can serve as a step in the path towards the respect which strong, loving families of all varieties deserve.” J.M.G. N.J. Super. at 626. Obviously, the benefit to a child of growing up in a recognized family unit is just as important here.

support the child, despite the fact that she planned, consented to, and helped finance the use of artificial insemination to conceive this child with the intent of raising her as her own. Also, if Kimberly were to die or become incapacitated, the child would have no right to a continued relationship with Jeanne. Even if Kimberly were to provide that Jeanne should be the child's guardian, this would not be dispositive. Third parties, such as grandparents, aunts, or uncles, could challenge the will, asserting that they have standing to challenge the guardianship on the basis of their biological relationship with the child.

While it would certainly be possible for Jeanne to adopt the child at some point in the future, see H.N.R., 285 N.J. Super. at 1, to do so would involve a sometimes long and expensive process, during which time the child would be without the security and benefits of having two parents. Obviously the most dire potential consequence of such a situation would be if Kimberly were to die or become incapacitated during childbirth, leaving the child without a legal parent to care for her. Additionally, the child would be left without the benefit of Jeanne's insurance during the period of time between his birth and when the adoption was completed and then would be subject to restrictions concerning pre-existing conditions.

Finally, petitioners jointly chose to conceive this child and to both be the child's parents. If the child is to have a second legally recognized parent at all it will be Jeanne; this relationship and this family should be recognized from the time the child is born just as it is among heterosexual families that use artificial insemination.

2. No government interest would be served by denying the plaintiffs' request.

There is no government interest served by denying children born to same-sex couples using artificial insemination the same security that is afforded to children born to heterosexual married couples who have used the same technology. As noted, the Appellate Division has held:

“To deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest.” H.N.R., 285 N.J. Super. at 10 (quoting B.L.V.B. 628 A.2d at 1275).

Moreover, since Jeanne would be able to adopt the child at some point in the future under H.N.R., there is no purpose in requiring the delay of an adoption procedure and thus leaving the child without the benefits and protection of having two legal parents from the time of her birth. Thus, denial of the petition serves no purpose but to delay affording numerous benefits and protections to an innocent child. Such a result is not consistent with, and certainly not required by, the public policy of New Jersey.

II

SHOULD N.J.S.A. 9:17-44 BE DEEMED NOT APPLICABLE TO JEANNE BECAUSE OF HER SEXUAL ORIENTATION, IT MUST BE STRUCK DOWN AS VIOLATIVE OF NEW JERSEY STATUTORY AND CONSTITUTIONAL PROTECTIONS.

Should this court affirm that Jeanne is entitled to be named a parent at birth under the Artificial Insemination Act, that would render the constitutional and statutory challenges to the Act moot. However, should this court hold otherwise, it must then determine whether the statute violates the New Jersey Constitution and the Law Against Discrimination.

A. Differential Treatment Under the Artificial Insemination Act Would Violate the Right to Equal Protection Under the New Jersey Constitution.

Article I, paragraph 1, of the New Jersey Constitution guarantees equal protection for New Jersey citizens, Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 79 (1978), thus ensuring that persons will not be subject to unjustified discrimination. The right to Equal Protection of the Laws has long been regarded as one of the most powerful and important principles of the New Jersey Constitution. See Greenberg v. Kimmelman, 99 N.J. 552, 567-68 (1985). It has been interpreted to offer a very broad standard of protection to the civil liberties of the citizens of this state. Id.

As the New Jersey Supreme Court explained in Caviglia v. Royal Tours of America, 178 N.J. 460, 472-73 (2004):

When evaluating substantive due process and equal protection challenges under the New Jersey Constitution, this Court applies a balancing test....That test weighs the "nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Greenberg, supra, 99 N.J. at 567... We require that the means selected by the Legislature "bear a real and substantial relationship to a permissible legislative purpose." Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., 80 N.J. 6, 44, 364 A.2d 1016 (1976), cert. denied, 430 U.S. 977, 97 S.Ct. 1672, 52 L.Ed.2d 373 (1977). Here, the nature of the affected right involves a fundamental privacy interest – that of familial relationships and raising a child. See Snyder v. Mekhjian, 125 N.J. 328, 342, 593 A.2d

318 (Pollock, J., concurring) (“The protection of autonomy is limited to a few ‘fundamental’ areas, including marriage, procreation, contraception, family relationships, child rearing, and education”). As such, the State’s burden to justify the differential treatment and infringement of this fundamental area of autonomy is heightened.

The government is placing a significant burden on Jeanne’s relationship with the child she will be raising by denying her the right to be deemed a parent to that child upon the child’s birth. As noted, without the right to parentage at birth, Jeanne’s relationship with her child will be in legal limbo in numerous respects and can result in serious hardships. Her and her child’s right to their familial relationship is being burdened solely because of her gender and sexual orientation. Indeed, she has committed herself to her relationship with Kimberly and to the rearing of her child in the exact same way as would a male heterosexual married partner of a woman who has been artificially insemination.

Finally, there is no rational need, much less heightened need, for the sex-based and sexual-orientation-based restriction. While the marital requirement might have been put in place by the legislature to ensure the commitment of the non-biological couple to the raising of the child, Jeanne and Kim are in fact married.⁴ Simply put, they have met every indicia of commitment contemplated under the statute and there is therefore no reason to deny Jeanne the same rights to which a male heterosexual would be entitled. Additionally, their child is due the same rights as the child of a heterosexual couple. Indeed, as explained above, it furthers the State’s interests to ensure that their child has her parental relationships with Jeanne attach at birth.

⁴ That the marriage occurred in Canada is of no moment. The Artificial Insemination Statute presumably does not treat out-of-state or international marriages any differently than it does marriages that occur within the state.

B. Differential Treatment Under the Artificial Insemination Act Would Violate the Law Against Discrimination (“LAD”).

“New Jersey governmental entities are, of course, bound by the LAD.” [Dale v. Boy Scouts of America](#), 160 N.J. 562, 593(1999) overturned on other grounds, 530 U.S. 640 (2000). As such, they are prohibited from withholding or denying benefits or privileges “to any person on account of the race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation or nationality of such person.” N.J.S.A. 10:5-12 (emphasis added). Should the Artificial Insemination Statute be read and applied so as to discriminate against Jeanne because of her sex and her sexual orientation, such an application would violate the LAD.

The Artificial Insemination Statute was passed prior to the inclusion of sexual orientation in the LAD. As noted earlier, that fact should provide guidance regarding the reading of the earlier statute (i.e., that its use of the male spousal term “husband” should not now be read in gender-specific or sexual-orientation-specific terms). In addition, when two statutes conflict, the one passed later in time governs. [Woodhull v. Manahan](#), 85 N.J.Super. 157, 204 (App. Div. 1964).

III

THE DECISION AS TO PARENTAGE SHOULD BE MADE NOW

Determining parentage before birth is preferable for many reasons that affect the child’s welfare and well-being. In cases dealing with children, New Jersey courts have consistently held that the best interests of the child are paramount. [MCDSS v. R.K.](#), 334 N.J. Super. 177, 194-95 (Ch. Div. 2000)(“in any determination regarding parentage, the child’s best interest must always remain in the forefront.”)(citations omitted).

The timing of a decision as to parentage is important in protecting those interests. In [H.N.R.](#), *supra*, the Court observed:

It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which biological, and therefore a legal, connection is no longer the sole organizing principle. But it is the courts that are required to define, declare and protect the rights of children raised in these families, usually upon dissolution.... It is surely in the best interest of children, and the state, to facilitate [matters, here dealing with adoption,] so that legal rights and responsibilities may be determined now and any problems that arise later may be resolved within the recognized framework of domestic relations law.

H.N.R., 285 N.J. Super. at 10-11 (quoting Adoption of B.L.V.B. and E.L.V.B., 628 A. 2d 1271, 1276 (Vt. 1993)).

New Jersey public policy strongly favors the immediate establishment of legal parenthood, with its concomitant responsibilities. That is in fact one of the main purposes of the New Jersey Parentage Act. The State wants parents to care for and maintain their child and to alleviate the taxpayer from that duty. Declaring both women as parents of their child fulfils the State's goal of promoting parenthood and supports the stability of the parent-child relationship.

In a case concerning a gestational pregnancy, the Massachusetts Supreme Judicial Court in Culliton v. Beth Israel Deaconess Hosp., et al, 435. Mass. 285; 756 N.E2d 1133 (2001) explicitly affirmed the practice of issuing pre-birth court orders declaring intended parents the legal parents of their child when there is no dispute between any of the parties. Those orders permit the intended parents' names to appear on a birth certificate. The court found that through exercise of its equitable powers, it could issue such orders.

Additionally, it is better to determine parentage sooner rather than later to remove any uncertainty, confusion or anxiety about legal rights. Instead, Jeanne and Kimberly can concentrate on the customary issues surrounding birth and delivery. It will also eliminate any confusion by hospital personnel, government officials and others who are required to obtain consent for medical procedures or to report the birth.

In sum, a decision by this court finding both women to be the parents of the child about

to be born would promote the stability of the parent-child relationship and will serve the best interest of that child. That is the purpose of the Artificial Insemination Statute and of the numerous prior New Jersey court precedents applicable hereto.

IV

IT IS NOT NECESSARY TO SERVE
THE SPERM DONOR

Kimberly was fertilized with sperm from an anonymous donor. The parties purchased anonymously donated sperm from Fairfax Cryobank and had it shipped directly to their physician.

N.J.S.A. 9:17-44 (b) provides that unless the sperm donor and a woman enter into a written contract to the contrary, a sperm donor who provides a physician with sperm to inseminate a woman who is not his wife has no parental rights or duties.

Therefore, the sperm donor in this case has no rights or duties and does not need to be served or made a party to this lawsuit.

CONCLUSION

For the foregoing reasons, this Court should issue a prebirth order that New Jersey's artificial insemination statute, N.J.S.A. 9:17-44 (a), applies to this situation such that Jeanne LoCicero is deemed the legal parent, along with Kimberly Robinson, of the child they conceived using artificial insemination.

Respectfully submitted,

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