

Custody Battle May Clarify Same-Sex Parental Rights

Who has custody rights in a gay or lesbian relationship that dissolves shortly after a child is born? An ongoing custody battle between two women in Ontario may determine how intended versus biological parents are treated when partners are of the same-sex.

In 2002, the women, who have only been identified as L.K. and C.L., were living together when they agreed that C.L. would be artificially inseminated. L.K. is not listed as a parent on the “statement of live birth” document. She now seeks to be acknowledged as a parent to their child. Part of L.K.’s argument is that the choice of birth mother was arbitrary and based on convenience.

A joint application for adoption was made prior to the couple’s separation and was not upheld by a judge due to alleged assaults on C.L. by L.K., as well as financial disputes.

The custody battle was re-ignited when the Ontario Court of Appeal decided, last year, that a court can declare a child to have two legal mothers.[1] Prior to this change, same-sex couples often had to adopt their children in order to have both partners considered parents. According to Toronto lawyer Kelly Jordan, many women found it offensive to be forced to adopt their own children.[2]

C.L. argued that the case had already been fully decided in 2004 when a judge ruled that it was in the “best interests” of the child to stay with her.[3] A trial will likely ensue, however, because the Ontario Superior Court Justice George Czutrin found that the “best interests” of the child are contextual and may change over time.

Some provinces, including British Columbia and Ontario, have made it possible to register same-sex couples on birth certificate documents. Despite these changes, heterosexual men who are not a biological parent still have an advantage over a lesbian woman who is not the biological mother of her child. Court rulings have held that if a heterosexual couple chooses to use a sperm bank, then the male partner is presumed to be the father. L.K., on the other hand, will be required to prove why she ought to be considered a parent to the child in dispute.

[1][A.A. v. B.B., 2007 ONCA 2.](#)

[2] Shannon Kari, “Lesbian couple battle in court for custody of child” *The National Post* (24 July 2008).

[3] Ibid.