

Board of Contributors: Dual maternity case to head to Florida Supreme Court

By Meaghan K. Marro



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The Florida Supreme Court will be hearing a controversial case today involving dual maternity.

When Florida Legislature first enacted statute 742.14, the case of *T.M.H v. D.M.T* certainly was not contemplated — nor were certain advancements in medical technology.

The facts in the case are undisputed. T.M.H and D.M.T. were involved in a committed same-sex relationship for a number of years and jointly decided to have a child together as equal paternal partners.

The biological mother, T.M.H., provided her ova to the birth mother, D.M.T. The ova was fertilized and then implanted into the birth mother.

The parties jointly raised the resulting child for a number of years, until the birth mother absconded with the child to Australia. The biological mother was eventually able to locate the birth mother, and sought to enforce her parental rights, ultimately resulting in this case.

At the trial court level, the birth mother successfully defended her position against the biological mother.

On appeal, the Fifth DCA disagreed and overturned the trial court's ruling, finding that the biological mother's rights should be recognized.

The case was then remanded to determine the issues related to maternity.

Donor or mother?

At the core of her argument, the birth mother largely relies upon Florida statute 742.14. She takes the position that, under the statute, Florida law does not recognize the maternal rights of egg donors or the biological mother's rights in a same-sex relationship.

In its pertinent part the statute states: "The donor of any egg, sperm, or pre-embryo, other than the commissioning couple or a father who has executed a pre-planned adoption agreement shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children."

The Fifth DCA rejected the birth mother's argument that the biological mother was a donor under the statute.

The court held that there was no donative intent since the parties intended for the biological mother to live with, care for, and love the child.

Mother's rights

Additionally, it held that an individual's rights to procreate and to parent one's child are fundamental rights under both the Florida Constitution and the U.S. Constitution.

Statutes that interfere with a fundamental right are presumptively unconstitutional and subject to strict scrutiny, meaning that the

proponent of the statute is required to demonstrate that the statute furthers a compelling government interest through the least intrusive means available.

After considering the parties' respective positions, the Fifth DCA held that the statute violated the biological mother's constitutionally protected rights, and that her maternity rights should be recognized just as the birth mother's rights are recognized under Florida law.

The Florida Supreme Court now has to decide whether the state's paternity statute is antiquated given our evolving society.

Outdated statute

Under the current paternity statute, if an unwed boyfriend and girlfriend created a child and cared for the child together until their relationship ended, the father's rights would be protected as the parent of the child in the same manner as the birth mother's.

But the plain language of Florida's paternity statute does not allow for a biological mother to establish maternity rights to her own biological child if she was not the birth mother.

Historically, Florida law has disfavored providing certain rights to people in same sex relationships, but that is not necessarily true anymore in light of a recent Florida case.

In *Florida Dep't of Children & Families v. Adoption of X.X.G.*, 45 So.3d 79 (2010), the Third DCA held that statutory provisions prohibiting same sex couples from adopting children was unconstitutional because it violated the Equal Protection Clause of the Florida Constitution.

If the Florida Supreme Court chooses to follow the Third DCA's lead, it may decide that statute 742.14 is unconstitutional as applied to the fundamental rights of same sex couples.

Ultimately, the Florida Supreme Court will be faced with many difficult questions when deciding this case, and will likely be mindful that any discussion of the constitutional

issues raised will have implications for same sex marriage in this state.

Not everyone may see eye to eye on these issues, but it is clear that this case reaches further than same sex marriage, inasmuch as it addresses the rights of a biological parent, whether that parent is a man or a woman.

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