

Custody and Same-Sex Marriage

Cheryl Howell
April 2017

Consider:

- Same-sex female couple who live together – Ann and Susan – decide Ann will have a child
- Ann becomes pregnant using an anonymous sperm donor
- Ann and Susan continue to live together following birth of the child, sharing living expenses and childcare responsibilities
- When child is 6 years old, Ann and Susan separate
- Susan files for custody when Ann restricts Susan’s time with the child

We have case law.....

- *Mason v. Dwinnell*, 190 NC App 209 (2008)
- *Estroff v. Chatterjee*, 190 NC App 61 (2008)
- *Boseman v. Jarrell*, 364 NC 537 (2010)
- *Heatzig v. MacLean*, 191 NC App 451 (2008)
- See SOG Bulletin “Third Party Custody”
 - <https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb25.pdf>

Mason, Estroff and Boseman

- The “nature of the relationship” between the parties is not relevant nor determinative
 - Court stated it is “immaterial” that parties could not marry or adopt a child together
- When custody dispute is between a parent and a non-parent *Price v. Howard*, 346 NC 68 (1997), controls
- Parent has constitutional right to exclusive custody

Mason, Estroff and Boseman

- Parent can waive constitutional protection by engaging in conduct inconsistent with her protected status
- Conduct inconsistent with protected status:
 - Creating a “parent-like” relationship between child and non-parent, and
 - Intending that relationship to be permanent, and
 - Ceding a portion of parent’s exclusive rights to the non-parent without intending that sharing of rights will be temporary
- *Cf. Mason* (waiver found) & *Estroff* (no waiver)

Custody rights are not parental rights

- When parent waives constitutional protection, court can apply best interest to determine *custody*
- Alternative theories – such as *de facto* parent and parent by estoppel - cannot be used to determine *custody*
 - *Seyboth v. Seyboth*, 147 NC App 63 (2001)
 - *Estroff v. Chaterjee*, 190 NC App 61 (2008)
- “District court in NC is without authority to confer parental status upon a person who is not the biological parent of a child. The sole means of creating the legal relationship of parent and child is [adoption].”
 - *Heatzig v. MacLean*, 191 NC App 451 (2008)

What about bio dad?

- There is no statute or case law addressing anonymous sperm donors in NC
 - *In re Guardianship of L.H.*, 834 A.2d 922, 927 (Me. 2003)(anonymous donor does not need to be served)
- There is no statute or case law indicating a parent is a 'necessary party' to a custody case
 - A parent must be provided notice before custody determination is made unless TPR.
 - GS 50A-205
 - *Mason, Estroff* and *Boseman* do not mention the bio father at all.
 - Dispute to be resolved is between the parties only

Consider:

- Same-sex female **married couple** – Ann and Susan – decide Ann will have a child
- Ann becomes pregnant using an anonymous sperm donor
- Ann and Susan are married when the child is born and continue to live together following birth of the child, sharing living expenses and childcare responsibilities
- When child is 6 years old, Ann and Susan separate
- Susan files for custody when Ann restricts Susan's time with the child

Obergefell v. Hodges, 135 US 2584 (2015)

- The right to marry is a fundamental liberty interest protected by the Due Process and Equal Protection Clauses of the 14th Amendment and couples of the same-sex cannot be deprived of the right to marry
- State marriage laws are invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples
- States must recognize a lawful same-sex marriage performed in another state

Custody and Parentage - Summary

- If both spouses are legal parents, custody is determined using best interest test
- If neither spouse is a legal parent, custody is determined using best interest test
- If one spouse is a legal parent but the other is not, parent has constitutional right to exclusive custody unless that parent has acted inconsistent with her/his protected status
 - See *Seyboth v. Seyboth*, 147 NC App 63 (2001)

Consider:

- Same-sex female **married couple** – Ann and Susan – decide Ann will have a child
- Ann becomes pregnant using an anonymous sperm donor
- Ann and Susan are married when the child is born and continue to live together following birth of the child, sharing living expenses and childcare responsibilities
- When child is 6 years old, Ann and Susan separate
- Susan files for custody when Ann restricts Susan’s time with the child

Is Susan a legal parent?

- **§ 49A-1. Status of child born as a result of artificial insemination.**
 - Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique. (1971, c. 260.)
 - ***heterologous insemination is a medical procedure where sperm from donor who is not the husband or regular partner of the mother is inseminated into mother

Similar statutes in other states

- Artificial insemination statutes similar to GS 49A-1 have been interpreted to make mother's same-sex spouse the child's parent
 - *Della Corte v. Ramirez*, 961 NE2d 601(Mass. Appellate Court 2012)
 - *Shineovich and Kemp v. Shineovich*, 214 P.3rd 29 (Oregon Appellate Court 2009)("There appears to be no reason to allow heterosexual couples to bypass adoption by mutually consenting to artificial insemination but not permitting same-sex couples to do so.")

Susan and Ann??

- Used heterologous artificial insemination
 - If we assume we treat same-sex married couples the same as opposite-sex married couples, then Susan is a parent
 - Custody determined using best interest test
- What if Susan and Ann did not use a medical procedure?

When GS 49A-1 is not available....

- **Common law presumption**
 - When a child is born to a married woman, the law presumes the child to be legitimate
 - *Wright v. Wright*, 281 NC 159 (1972)
 - *Eubanks v. Eubanks*, 273 NC 189 (1968)
 - Legitimate means child is the biological child of the husband (spouse?)
 - This presumption is rebutted by facts and circumstances – including blood tests – that show presumed parent is not the natural parent

Common law presumption

- Will it apply when mother's spouse obviously is not a biological parent?
- Consider birth certificate cases:
 - *Henderson v. Adams, unpublished*, S.D. Indiana, (June 30, 2016, supplemented Dec. 30, 2016)
 - Same-sex spouses entitled to same presumption as opposite-sex couples
 - Spouse must be listed on birth certificate even if not a husband
 - However, presumption of parentage is rebutted in same way
 - *Robicheaux v. Caldwell, unpublished*, E.D. Louisiana (2015)(same)
 - *Cf. Smith v. Pavan*, 505 SW3rd 169 (2016)(Arkansas)
 - Birth certificate simply "acknowledge biological truths"

Assume the presumption applies...

- Susan and Ann are presumed to be the parents of the child
- Best interest applies to determine custody
- Can Ann rebut the presumption by showing Susan is not biologically related to the child?
 - *See Jones v. Patience*, 121 NC App 434 (1996)

If Susan is not a parent.....

- No best interest test to decide custody unless Ann has waived her constitutional right to custody
- Did Ann act inconsistent with her protected status?
 - *See Boseman*
 - *See Mason*
 - *Cf. Estroff*

Consider.....

- Child born to Ann while Susan and Ann are married
- Ann dies
- Ann’s mother files action seeking custody and/or visitation
- ?????

Is Susan a parent?

- If so, grandmother must prove Susan waived her constitutional right to exclusive custody
 - Did GS 49A-1 make Susan a parent ???
 - If not, common law presumption may apply but can easily be rebutted by grandmother
- If Susan is not a parent, court can apply best interest test to determine whether grandmother should have custody and/or visitation

Adoption

- GS 48-4-100 *et. seq.* authorizes step-parent adoptions
- “Step-parent”:
 - “an individual who is the spouse of a parent of a child but is not the legal parent of the child.”
 - GS 48-1-101
 - See 2 blog posts:
 - <https://canons.sog.unc.edu/same-sex-marriage-and-adoptions-of-a-minor-by-a-stepparent/>
 - <https://civil.sog.unc.edu/adoptions-and-sperm-donors/>
- Adoptive parent is a legal parent for all purposes
 - In custody dispute between biological parent and an adoptive parent, best interest test applies

Consider

- Andrew and Samuel are married when they decide Andrew will father a child

- Can Samuel ever be a parent?
 - GS 49A-1 will not apply
 - No common law presumption
 - Adoption is possible

- If no adoption, Samuel is a non-parent
 - Apply *Mason, Estroff* and *Boseman* to resolve custody dispute between Andrew and Sam
