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**FROM PETRI DISH TO PATERNITY:
WHO'S ENTITLED TO CUSTODY?**

BY LAURA A. KELLEY

Imagine raising newborn twins for six months and then being told you have to give one of those babies away. This is what happened to the Fasanos. The couple was forced to make an extremely difficult decision if they should relinquish custody of one of their sons. The Fasanos ultimately decided to give up one son only after insisting on visitation rights. It now appears that the

¹¹ *Fighting Rape With Science*, New York Post, Feb. 11, 2000 available in 2000 WL 3902129.

¹² Sheldon Silver, Speaker of the Assembly and Joseph Lentol Chair, Assembly Codes Committee, *The Toughest Crime Laws in a Generation: A summary of recent significant criminal justice laws passed by the New York State Assembly February 2000*.

courts may tell Mrs. Fasano that she will never have the legal right to see the baby she carried inside of her for nine months. Is this justice for all?

Donna and Richard Fasano, a white Staten Island couple, tried desperately to conceive a child over the course of their sixteen-year marriage.¹ As a last resort, they invested thousands of dollars for in-vitro fertilization at a midtown Manhattan clinic. Eggs were extracted from Mrs. Fasano, fertilized, and then re-implanted. A month later the couple learned that the procedure was successful and they were expecting a child. In a sick twist of fate, the Fasano's happiness turned into outrage.

Three weeks into her pregnancy, it was unclear whether the baby she was carrying was her genetic offspring.² The clinic's doctor, Lillian Nash, revealed that there was a strong possibility Mrs. Fasano had been implanted with somebody else's embryo. Dr. Nash also revealed that the embryo probably belonged to a black woman who had come to the clinic the same day Mrs. Fasano did; it was possible that a doctor had mistakenly put the black woman's embryos into a catheter used to implant the Fasano's embryos. The clinic was unable to tell the Fasanos who the baby belonged to. Dr. Nash recommended terminating Mrs. Fasano's pregnancy. If this was done, Dr. Nash would not be able to tell them until after the procedure if the baby was indeed their biological child or not. The Fasanos refused to

terminate the pregnancy. Three weeks later, a sonogram revealed two heartbeats - evidence that Mrs. Fasano was carrying twins. After conducting a myriad of tests, it was revealed that one of the twins was genetically theirs, but the other was not. The Fasanos did not care that one of the babies living inside Mrs. Fasano was not her biological child. The couple vowed to raise him as their son. Mrs. Fasano continued her pregnancy.

On December 29, 1998, Mrs. Fasano gave birth to "twin" boys of different races. Vincent, their biological child, was delivered first. Three minutes later baby Joseph followed. The Fasanos took the children home and lived quietly for three months until they were served with court papers claiming that a couple the Rogers were Joseph's biological parents.³

The Rogers had simultaneously undergone the same in-vitro fertilization procedure as the Fasanos. On April 24, 1998, both Mrs. Fasano and Mrs. Perry-Rogers stored test tube fertilized eggs and went into the clinic to have the embryos implanted in their uteri.⁴ Mrs. Perry-Rogers received her own fertilized eggs and did not become pregnant.⁵ Mrs. Fasano, having received Mrs. Perry-Rogers's embryos along with her own, became pregnant with two boys.⁶ After the treatment failed, Dr. Nash told the Rogers that as a result of some confusion, three of their embryos that had been slated for disposal were accidentally implanted in another

¹ 20/20, *Embryo Mix-Up Stirs Controversy* (visited March 15, 2000) <http://more.abcnews.go.com/o.../2020_000303_embryo_feature.htm>

² Dareh Gregorian, *Scrambled-Egg Parents Need Wisdom of Solomon*, New York Post, July 6, 1999.

³ *Id.*

⁴ *Couple in Embryo Mix-Up Who Gave Up Child Sue to Enforce Visitation Pact*, New York Times Abstracts, June 25, 1999.

⁵ *Id.*

⁶ *Id.*

woman.⁷ Due to confidentiality, the clinic was unable to tell the Rogers the whereabouts of the woman carrying their embryos. Frustrated, they hired an investigator to find the Fasanos.⁸ The investigator served the Fasanos with court papers that initiated a lawsuit to determine if the baby was theirs.⁹ At the insistence of the Fasanos's lawyer, the Rogers underwent DNA testing that proved they were the Joseph's genetic parents.¹⁰ Two babies, two races, one womb, and four parents made for a very complicated situation.¹¹ The custody issue began to rear its ugly head.

Initially, the Fasanos insisted on keeping Joseph. Mrs. Fasanos said it was in the best interest of the boys to avoid a protracted court fight.¹² Setting a goal to keep it out of the media, the couples agreed to work privately on a solution that would protect the children. After a few meetings, both couples reached consensus on a liberal visitation agreement that gave custody to the Rogers in exchange for visitation rights for the Fasanos. It was a hard decision to make, but the Fasanos agreed to it only after receiving a promise that the boys would be raised as brothers. The day after Mother's Day, the Fasanos handed Joseph to the Rogers. They made the greatest sacrifice any parent could make.¹³ Unfortunately, the Rogers failed to live up to the visitation arrangement.

The Rogers now claim that they

signed the custody agreement under duress so they could get their child.¹⁴ Although they appreciate what the Fasanos have done for them, they maintain that it was not their fault that their embryos were put into the wrong woman.¹⁵ After the Rogers reneged on their agreement, the Fasanos began seeking greater visitation saying the babies born to her need to stay close to one another.¹⁶ The Rogers say Mrs. Fasanos is asking for too much.

Whether or not the two couples realize it, they are pushing the courts into relatively uncharted territory at a time when the law and medical ethicists are struggling to keep up with scientific advances in fertility treatment.¹⁷ Who is the mother? Will genetics dictate the maternity of the child? Are the baby boys brothers in the eyes of the law? In June, a five-judge panel will hear arguments from both sides to determine these issues. Until then, the question of motherhood is now in the hands of the legal system.

⁷ See *supra* note 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ See *supra* note 1.

¹¹ Jim Yardley, *Sharing Baby Proves Rough on 2 Mothers*, *New York Times Abstracts*, June 30, 1999.

¹² See *supra*

¹³ See *supra* note 2.

¹⁴ See *supra* note 5.

¹⁵ *Id.*

¹⁶ Samuel Maull, *Tests Set for Babies in Embryo Mishap*, *The Boston Globe*, June 30, 1999.

¹⁷ See *supra* note 12.