

## Decision on artificial insemination ambiguous

*Implications for single women remain unclear*

BY CYNTHIA CUMFER

Let's say you and your partner have decided to have a child by artificial insemination. You're unmarried because you're both women. You decided to inseminate privately because you can't afford the expense of the Medical School or clinics. You believe that because you become pregnant by artificial insemination the donor will not have paternity rights. Right? Not necessarily, says the Oregon Court of Appeals.

On September 13, 1989, the Oregon Court of Appeals rendered a major decision interpreting Oregon's artificial insemination statutes. The case will have important implications for all lesbians (and women) who conceive by artificial insemination, especially those who do so without the supervision of a physician. Each member of the three-judge panel wrote his or her own opinion, creating some intriguing implications about future interpretations under the artificial insemination statute.

In order to understand the Court of Appeals' opinion, some background understanding of the Oregon statutes on paternity and artificial insemination is necessary. Oregon statutes provide that, once paternity of a child is established, the father has the same rights as a father who is married to the mother of the child. The Oregon statutes also provide that any contract between the mother of a child and the father of a child born out of wedlock is a legal contract. More recently, Oregon statutes have been enacted to cover the artificial insemination situation. The statutes provide that if the donor of semen used in artificial insemination is not the mother's husband, the donor shall have no right, obligation or interest with respect to the child born as a result of artificial insemination and the child shall have no right, obligation or interest with respect to the donor. The Oregon statutes also provide that only licensed physicians and persons under their supervision may select artificial insemination donors and perform artificial insemination.

In the case decided by the Court of Appeals, the mother was an unmarried woman who used a known donor. The donor claimed that he donated his semen to her in reliance on an agreement with her that he would remain active in the child's life and participate in all important decisions concerning the child, and that he would have certain visitation rights. For purposes of making this decision, the Court of Appeals assumed that these statements were true.

Judge Jonathan Newman wrote the majority opinion in the case. Judge Newman held that the artificial insemination statute that

provided that the donor does not have parental rights applied in this case. The judge held that it applied even though insemination occurred without the supervision of a physician, the donor was known to the mother, the mother was unmarried, and the donor gave the mother his semen in reliance on an agreement he had with her.

Judge Newman also ruled against the donor on a number of the donor's constitutional claims. However, Judge Newman held that the artificial insemination statute does violate the due process clause of the U.S. Constitution, if the donor can establish that he and the mother agreed that he should have the rights and responsibilities of fatherhood and that in reliance on this agreement he donated his semen. Judge Newman cited a case decided by the United States Supreme Court, in which the Court held that a state statute (in a case in which the child was conceived by sexual intercourse) could not bar biological fathers from asserting the rights and responsibilities of fatherhood. Judge Newman reasoned that the donor in this case had a biological connection with the mother's child, although it was a result of artificial insemination rather than sexual intercourse. A father who makes efforts to assert the rights and responsibilities of fatherhood must be given the opportunity to do this.

Judge Mary Deits wrote a concurring opinion. She agreed with Judge Newman that the donor should have an opportunity to prove in a trial that the parties had an agreement as to his rights and responsibilities. However, her reason was different.

Judge Deits reasoned that the donor in this case was not a "donor" within the meaning of the Oregon statute. She believed that the Oregon statute was not intended to apply to "this unique fact situation[!]" She believed that the artificial insemination statute was only intended to apply to women who go through a licensed physician, and that the purpose of the statute was to establish a legal obligation for a husband to support a child born to his wife by means of artificial insemination and to relieve the sperm donor and child of any rights or obligations towards one another when neither the donor nor the mother intended that the donor be the legal father. According to Judge Deits, the only difference between the known donor in this case and one involving an ordinary out-of-wedlock pregnancy is that the mother and donor did not engage in intercourse. She did not consider that to be a significant factor. She also felt that a donor is a person who makes an unconditional, no-strings-attached donation, and that that did not occur in this case. In her view, if the donor established that an agreement existed between the mother and

himself, she would hold it enforceable.

Presiding Judge William Richardson wrote the dissenting opinion in the case. Judge Richardson agreed with Judge Newman's reasoning, except that Judge Richardson did not believe that the statute was unconstitutional. Judge Richardson noted that the cases that Judge Newman relied on to hold the Oregon statute unconstitutional involved children who were conceived through sexual intercourse. Judge Richardson felt that the state had a substantial and compelling interest in regulating artificial insemination, and that this was a different situation than conception by sexual intercourse. Judge Richardson noted the flaw in Judge Newman's reasoning: that is, that an anonymous donor who had second thoughts could obtain the mother's identity and institute a filiation proceeding under the due process clause. Judge Richardson felt that the Oregon artificial insemination statute contemplated that the ultimate relationship between the child and the parties needed to be defined before the child was conceived and that the need to assure stability of all the parties' lives in the aftermath of those decisions required that the artificial insemination statute be upheld. Judge Richardson would have denied the father any paternity rights.

Because of the conflicting opinions issued by each of the judges in this case, the implications for single women engaged in artificial insemination remain unclear. However, it would appear from the reasoning expressed by all the judges that the parties who had a contract prior to the sperm donation that provided that the donor was to have no rights with respect to the child, should be protected. The opinions do not guarantee this, because this was not the issue before the judges, and they always have the right to decide this issue differently later when they are confronted with that fact circumstance.

One encouraging feature of the opinions is that two of the three judges (Judge Newman and Judge Richardson) believe that the artificial insemination statutes intend to cut off paternity claims on inseminations that occur without doctor supervision and on inseminations of unmarried women. Judge Deits' opinion is the most alarming, because she seems to interpret the statute to apply only to women who go through a doctor and indicates that the statute's purpose is to protect married women.

Women who are considering artificial insemination without the supervision of a doctor, or who are considering artificial insemination under a doctor's supervision with a known donor, should talk to an attorney prior to the insemination in order to best protect themselves. ▼

*Cynthia Cumfer is an attorney in private practice with offices located in downtown Portland.*

## FALL & WINTER SPECIALS

### PALM SPRINGS

- \$357 ppdo RT AIR
- 3 nights at the beautiful Alexander Resort
- Extra nights \$60 per couple
- Single rates available

### NEW YORK CITY PHANTOM HOLIDAY

- 4 nights Hilton Hotel
  - Tickets to "Phantom of the Opera"
  - Jerome Robbins Broadway Show
  - Radio City Music Hall Christmas Show
  - Thanksgiving Yacht cruise celebration
  - Brunch at Windows of the World Restaurant
- \$684 ppdo Plus Air.

### CALL FOR BROCHURES

- RSVP CRUISES
- WOMANTREK TRIPS



Wayne Boulette  
Travel Counselor



## VISTA TRAVEL SERVICE

224-5000

200 SW MARKET • PORTLAND, OR

TOLL FREE USA

1-800-245-5557

FAX: 503-299-6831

**Just out**

Oregon's complete lesbian and gay connection.

## WHEEL ALIGNMENT

TIRES

*Ferguson*  
AUTOBODY & PAINT

2454 E. Burnside  
232-3600

FAMILY OWNED SINCE 1952

Reach for a  
crayon and  
"Draw Yourself  
Out!"

274-9591

ANN HINDS art medium

