

5. The Gift that Keeps on Giving

Joel McKiernan donated sperm to his friend (and former lover) Ivonne Fergusson for in vitro fertilization performed in a clinical setting. They agreed that his role would be anonymous, that he would not be held financially responsible, and that he would not seek visitation or any other parental rights. Fergusson conceived twins, fathered by McKiernan's sperm, but listed her husband as their father on the twins' birth certificates.

Five years later, following her divorce, Fergusson sued McKiernan for future and retroactive child support. The county court and the superior court both contended that the oral agreement between Fergusson and McKiernan was unenforceable because it violated Pennsylvania's policy barring parents from bartering their children's rights to support. Although the trial court rebuked Fergusson for her deception, it ruled that the best interests of the children were the primary factor in ruling against McKiernan.

In December 2007, the Pennsylvania Supreme Court ruled that the oral agreement between the parties would stand, overturning lower court rulings that would have held McKiernan to both retroactive and future child support. In response to the argument that these children have the same rights as those born of a sexual union, Supreme Court Justice Max Baer, writing for the majority, pointed out, "This analogy, however, is unsustainable in the face of the evolving role played by alternative reproductive technologies in contemporary American society. It derives no authority from apposite Pennsylvania law, and it violates the commonsense distinction between reproduction via sexual intercourse and the nonsexual clinical options for conception that are increasingly common in the modern reproductive environment. The inescapable reality is that all manner of arrangements involving the donation of sperm or eggs abound in contemporary society, many of them couched in contracts or agreements of varying degrees of formality [940 A.2d 1236, (Pa. 2007)]." The decision also noted that requiring sperm donors to financially support their progeny would discourage sperm donation for couples unable to conceive.