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Verdict

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[Joanna L. Grossman](#)

Do Lesbian Co-Parents Have Rights? A Recent Ohio Ruling Offers an Unusual Answer



There are many vexing legal questions that have arisen in the age of the new family. And certainly, whether and under what circumstances a lesbian co-parent—a woman who participates in the planned conception, birth, and/or rearing of her partner’s biological or adopted child—has parental rights is one such question.

In a recent ruling, *In re Mullen* (<http://law.justia.com/cases/ohio/supreme-court-of-ohio/2011/2011-ohio-3361.html>), the Ohio Supreme Court took a somewhat unique approach to defining the rights of lesbian co-parents. The court’s approach leaves the door open for the recognition of such rights, but also makes them relatively difficult to establish in each individual case.

In this column, I will discuss the *Mullen* ruling, as well as the complicated and ever-changing general legal landscape for lesbian co-parents’ rights.

The Facts, and the Claim at Issue in *Mullen*

Three years into their relationship, Kelly Mullen and Michele Hobbs decided that they would like to have a child. A friend donated sperm, and Mullen became pregnant via in vitro fertilization (“IVF”). Mullen and the donor signed an agreement providing that while the donor’s name would be listed on the birth certificate, he would not retain any parental rights, nor would he be obligated to support the child.

Hobbs, meanwhile, shared the expense of IVF with Mullen. Mullen also executed documents such as a will and a health-care proxy, in which she gave Hobbs the authority to act as Mullen’s agent with respect to the child. In these documents, Mullen stated that she was the legal parent of the child, but that Hobbs was her “child’s co-parent in every way.”

Eventually, however, the relationship between Hobbs and Mullen broke down, and the sperm donor became involved in the child’s life.

Hobbs then filed a complaint for shared custody, alleging that Mullen had “created a contract with Hobbs to

permanently share legal custody of the child.”

The juvenile court ruled against Hobbs’s claim, concluding that Mullen was a legal parent by virtue of biology; the sperm donor was a biological father, with some potential to gain parental rights; and Hobbs was a non-parent, “despite her active role in raising and caring for the child.” The appellate court then affirmed this decision.

Parents v. Non-Parents: A Fundamental Dichotomy

The trial and appellate rulings in this case are premised on a basic dichotomy between parent and non-parent that has been fundamental in family law. As a general matter, a legal parent is someone who, by virtue of a recognized tie to a child, is endowed with constitutionally protected rights, and subjected to potentially onerous obligations. A non-parent, by contrast, typically has none of those rights or obligations. This dichotomy is reinforced by the U.S. Supreme Court’s precedents on parental rights, which require states to grant great deference to the wishes of fit parents as against any claim by a third party.

Who is a legal parent? A woman who gives birth to a child outside of an enforceable surrogacy arrangement is a legal parent unless and until her parental rights are voluntarily or involuntarily terminated.

A biological father is a legal parent if he marries the child’s mother or if some other basis for fatherhood exists—such as an adjudication or voluntary acknowledgment of paternity, or the man’s openly holding out the child as his own. (Notably, a man can be the legal father of a child born to his wife even if he is not the biological father, although the law on this point is leaning away from conclusive presumptions of marital paternity.)

An adult can also become a legal parent through adoption—a legal process that creates a full parent-child relationship where one did not otherwise exist.

Given this generally unforgiving dichotomy between parent and non-parent, the question in most lesbian co-parent cases has been whether the co-parent, who typically has functioned as a social parent, is a legal parent with rights, or a non-parent with no rights.

But the path to legal parenthood for a lesbian co-parent can be difficult and, in some jurisdictions, that path is simply not open. It is difficult to concisely (or even accurately) describe the legal landscape for lesbian co-parents because the law in different jurisdictions is so varied and still in flux. However, some general statements can be made, as follows:

In some states, the lesbian co-parent is a legal stranger to the child of her partner, regardless of any steps that may have been taken to establish a parent–child relationship. But in others, the lesbian co-parent can gain full “legal parent” status, by virtue of a so-called “second-parent adoption.” (A handful of states expressly disallow such adoptions, however, and, in many others, courts have simply never considered the question.)

In states that allow or recognize same-sex marriages or civil unions, a lesbian co-parent can gain legal parent status by virtue of being married to a child’s biological mother. She is, at least presumptively, the legal parent of children born to her spouse or civil union partner—in the same way that a husband is often considered to be the legal father of children born to his wife during their marriage, regardless of whether he possesses or lacks a genetic tie to them.

Where adoption or marriage are the only paths to legal parenthood, a lesbian co-parent can find herself fully protected by the law as a parent—or fully unprotected by the law, and subjected to exclusion by the legal mother—based on whether a legal adoption or marriage occurred. And a lesbian co-parent who lives in a state that does not recognize any path at all to legal parentage for same-sex partners is always vulnerable to exclusion, regardless of the nature of the relationship she has, or had, with the legal mother or the child.

Is There a Middle Ground for Lesbian Co-Parents’ Rights?

Despite the conventional wisdom about the hierarchy between parents and non-parents, there are rulings in a handful of jurisdictions that blur the distinction.

For example, some states recognize the doctrine of de facto parentage (others, like New York, as I have described in a [previous column \(http://writ.news.findlaw.com/grossman/20100511.html\)](http://writ.news.findlaw.com/grossman/20100511.html), have rejected it outright). That doctrine allows a co-parent to be recognized as a quasi- or de facto parent, even without a second-parent adoption or marriage, based on the functional parent-child relationship.

This doctrine was first recognized in a 1995 Wisconsin case, *In re Custody of H.S.H.-K* (http://scholar.google.com/scholar_case?case=9444398073080790210), and has been adopted in a few other jurisdictions since then. In its typical formulation, the doctrine requires not only that the co-parent function as a parent, but also that the legal mother consented to the creation of the functional parent-child relationship and actively fostered its growth.

De facto parentage does carve out a kind of middle ground. Although one or two states treat a de facto parent as being in parity with a full legal parent, most do not. Most treat a de facto parent as a quasi-parent, who has more rights than a stranger, but fewer rights than a legal parent. Thus, such states tend to allow de facto parents to seek visitation, but not custody (either sole or shared). Courts in these states justify the intrusion into the legal mother's constitutionally protected parental rights by pointing to her role in creating and fostering the relationship with the co-parent.

De facto parentage seems not to be the only middle ground in this area. The highest courts in North Carolina and Ohio have issued opinions in which they deny the co-parent's claim to legal parentage and, yet, allow for the possibility of joint custody between a "parent" and a "non-parent."

In 2009, in *Boseman v. Jarrell* (<http://law.justia.com/cases/north-carolina/court-of-appeals/2009/080957-1.html>), the North Carolina Supreme Court overturned a second-parent adoption, ruling that state law did not permit such adoptions, but it nonetheless awarded joint custody to a lesbian co-parent. The court held that the co-parent was not a legal parent, and yet was entitled to seek joint custody because the biological mother had acted inconsistently with her initial, legally endowed "paramount status" vis-à-vis the child. This was not, in other words, a typical parent-versus-non-parent dispute (which the parent typically wins). There was only one legal parent, but the court held that there were two women who were entitled to share custody of the child in question.

The Ohio Supreme Court's Ruling in *Mullen*: Recognizing Shared-Parenting Agreements as Valid

Let's return, now, to the Ohio case with which this column began—which involved the dispute between Mullen and Hobbs. Recall that the trial and appellate courts had ruled that because Hobbs was a "non-parent," she had no rights vis-à-vis the child.

The Ohio Supreme Court affirmed the ruling that denied Hobbs any rights as a parent or co-parent to Mullen's child. There was not sufficient evidence, in the court's view, to prove that Mullen had voluntarily agreed to share custody with a non-parent.

Hobbs thus lost the right to maintain any relationship with the child she had helped raise, an outcome that seems devastatingly unjust both for Hobbs and the child—and one that is clearly contrary to the biological mother's initial intent to raise her child with two mothers. As one judge wrote in dissent, "Is filial love something to be dangled and then snatched away, promised and then reneged upon? Once a natural parent promises a coparenting relationship with another person and acts on that promise, she has created a relationship between the coparent and the child that has its own life. The natural parent cannot simply declare that relationship over." A doctrine that allows such unilateral exclusion of a social parent is not only harmful to the co-parent and the child, but an offense against "common decency."

But even though Hobbs lost this case, the court made clear that while a parent cannot confer legal parent status on a third party such as a lesbian co-parent, she can confer custodial rights by virtue of an enforceable shared-custody agreement.

The court confirmed that a "parent may voluntarily share with a nonparent the care, custody, and control of his or her child through a valid shared-parenting agreement," the essence of which "is the purposeful relinquishment of

some portion of the parent's right to exclusive custody of the child." Such an agreement, the court explained, "recognizes the general principle that a parent can grant custody rights to a nonparent and will be bound by the agreement."

A valid shared-parenting agreement is enforceable as long as (1) the co-parent is a "proper person to assume the care, training, and education of the child," and (2) the agreement serves the child's best interests.

Thus, the problem for Hobbs was not that she could not have acquired custodial rights under law, but that, on the facts, she did not show sufficient evidence of a shared parenting agreement. Although Mullen had granted Hobbs some rights and responsibilities relating to parenting through various legal documents, those rights, the court found, were both revocable and revoked. And there was evidence to suggest that Mullen had "consistently refused to enter into or sign any formal shared-custody agreement when presented with the opportunity to do so."

Are Middle-Ground Approaches Sufficient? A Possible Need to Take a New Approach Entirely

Although this approach disregards de facto parenting in many cases, the Ohio Supreme Court felt that "the best way to safeguard both a parent's and a nonparent's rights with respect to children is to agree in writing as to how custody is to be shared, the manner in which it is shared, and the degree to which it may be revocable or permanent. . . ."

This opinion, like the North Carolina ruling in *Boseman*, takes a middle-ground approach to recognizing at least the potential rights of a lesbian co-parent. Hobbs was not a legal parent, and yet could have been awarded quintessential parental rights—the right to shared custody—had the requisite proof existed that Mullen had irrevocably consented to such an arrangement in advance.

It may well be that these middle-ground approaches are not entirely satisfying to any party—nor faithful to the relevant principles of parentage—and that the *Mullen* standard may be so exacting as to never be met in an individual case. But these approaches do break out of the parent/non-parent mold that has both constrained the analysis and dictated some very harsh results in lesbian co-parent cases, with women who had played significant parental roles in children's lives being essentially exiled later on.

Ultimately, the new questions raised by the modern family may simply require a new approach. Lesbian co-parents should be given full recognition as legal parents when they have been invited into that role by a biological or adoptive mother, and carried it out to its fullest. But when courts are not willing to embrace such recognition, the middle-ground approaches may effectively protect co-parents and the children they have been raising.



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