



Whose Baby Is It?

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Stage 1

The following series of incidents is excerpted from articles that appeared in *The New York Times* in Spring 1999:

The mix-up began in April 1998 when Deborah Perry-Rogers and Donna Fasano arrived separately at the midtown offices of Dr. Lillian Nash to undergo embryo implant procedures, the follow-up to in vitro fertilization of their eggs. In the waiting room, Robert Rogers and Richard Fasano made the small talk of prospective fathers, while just down the hall a new approach to having babies proceeded without them.

One month later, Mrs. Fasano was pregnant with twins, but Mrs. Rogers had not conceived. In late May, the Rogerses were informed by Dr. Nash that a mistake had been made – some of their embryos had been implanted in another woman. At about the same time, she notified the Fasanos of a mishap in Mrs. Fasano's implantation procedure – that she was implanted not only with four of her eggs that had been fertilized by her husband, but with at least several of another couple's embryos.

Dr. Nash did not immediately reveal to the Rogerses the identity of the woman who may have received their embryos, nor to the Fasanos the identity of the biological parents of the embryos that were erroneously donated to them.

Questions for group discussion:

1. At this point, can the Fasanos find out if they are the genetic parents of the two fetuses? If so, how?
2. What implications does this mix-up have for the Fasanos? For the Rogerses?
3. What questions would you ask if you were the Fasanos? The Rogerses?
4. What recourse does each of the couples have?

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Stage 2

Subsequent press accounts (New York Daily News, March 3, 2000) highlighted another aspect of this case –Dr. Nash told the Fasanos, who are white, that they received embryos from “a woman of color.”

The Fasanos had DNA testing done on the developing fetuses, and the tests revealed that Donna Fasano is the genetic mother of one of the fetuses, but not the other. Meanwhile, the Rogerses hired a private investigator in an effort to find the woman who received their embryos.

On December 29, Donna Fasano gave birth to two healthy boys - Joseph, who is black, and Vincent, who is white. After their private detective successfully located the Fasanos, the Rogerses also had DNA testing, which revealed that they are the genetic parents of Joseph.

Questions for Group Discussion

1. What are the legal, social, ethical, and health related issues that need to be resolved to settle this issue?
2. In your collective opinion, how should this case be settled?

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Stage 3*

The Fasanos had earlier decided that if DNA testing did in fact establish that the Rogerses were the biological parents of one of their sons, then they would give the child to them. So, on May 10th, 1999, in an event that was "very emotional, very strained, very difficult" (The New York Times May 29, 1999; B, 10), a custodial change was made – the Fasanos gave up Joseph, now four months old, to the Rogerses. They hoped the visitation agreement would allow the boys to grow up knowing each other as brothers.

Prior to exchanging Joseph, the couples signed an out-of-court visitation agreement that stipulated twice-monthly visits, alternating holiday visits, and a week-long summer visit, all at the Fasano's home. The Rogerses signed the agreement "with some trepidation," according to their lawyer (Daily News, March 27, 1999, pg. 6), but they were joyful to gain custody of Joseph after trying for so long to have a child. Upon gaining custody, they changed Joseph's name to Akeil Richard Rogers.

Problems arose during the Fasano's early visits with Akeil when Donna called him "Joey," and referred to herself as "Mommy." (Bergen County Record, July 15, 1999, pg. A1). The Rogerses soon objected to the original visitation agreement as onerous and one-sided, and asked the court for total parental control with no right of visitation for the Fasanos.

The Fasanos fought the effort to remove their visitation rights, and filed a lawsuit to regain custody of Akeil (a.k.a Joseph). In October 2000 a state appeals court denied the Fasano's request for custody and for visitation. In May 2001 the New York State Court of Appeals denied the Fasanos permission for further appeals concerning visitation and custody. The court said the case was "akin to a hospital's mix-up of two newborns, which should just be corrected at once, rather than a case in which the birth mother might claim the same rights as the genetic mother.

Questions for Group Discussion

1. What role should gestational and genetic relationships have in determining custody disputes? How have the courts ruled in similar cases, such as those of surrogate mothers who refuse to give up children they have gestated?
2. What is Akeil's and Vincent's relationship? Are they brothers? Are they twins? Does Akeil have two mothers?
3. How did race affect how this situation unfolded and was experienced by the participants?
4. Do you agree with the court ruling? Explain.

* *If this problem were used in a PBL class, this stage would not be given to students, since they would be expected to do research to discover the information given in this stage. The questions would also be somewhat altered to reflect that.*