

Securing Legal Parentage for Children Conceived through Assisted Reproductive Technology



Imagine a married couple, both women—we'll call them the IPs, for "intended parents," and name them Sarah and Elizabeth. The couple uses assisted reproductive technology (ART) to bear a child. Sarah is to carry, and the IPs use her eggs and the sperm of a close male friend (Nick) to create embryos, one of which is implanted successfully into Sarah's uterus. Sarah gives birth to the child. Who, in this scenario, are the legal parents?

Well, it depends.

Parents who use ART to create children face, in most cases, an important legal question: How to establish legal parentage in the individuals who intend to exercise the rights and bear the obligations of parenthood during the life of their child?

In the IPs' case, the answer to this question turns on the state in which they live. In at least one state—call it State 1—Sarah and Elizabeth would likely be recognized as legal parents simply by virtue of having a child while married, and

both their names would appear on the child's birth certificate, without further legal process. However, a birth certificate is only an administrative record of birth and parentage, and, as such, it may not be entitled to deference in other states under the "Full Faith and Credit" clause of the United States Constitution: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." Article IV, Section 1. For that reason, Sarah and Elizabeth also choose to pursue a confirmatory adoption in their state (so called because the adoption merely confirms what is already true under that state's law), whereby Elizabeth—who neither gave birth to nor is genetically related to the child—is declared by court order to be the child's adoptive parent. This court order, then, would receive the highest deference from other states.

In State 2, however, the IPs' marriage and intent might carry less weight. There, Sarah would be a legal parent, but Elizabeth would not, until she formally adopted her child

after birth. In such a case, the subsequent adoption is not merely confirmatory, but is essential to establishing Elizabeth's parentage in her home state.

What about Nick? In State 1, although Nick is not a legal parent, because he is a known (rather than an anonymous) donor, his rights still must be terminated prior to finalizing the confirmatory adoption. Presumably, as a friend who agreed to donate sperm in the first place, he would consent to the termination of his parental rights. But what happens in State 2, where Nick, and not Elizabeth, is the second legal parent, notwithstanding his donor status? What happens there when Nick reconsiders and decides he would like to be a parent after all? In a state without clear donor statutes or equivalent case law, Nick might be within his rights to do so.

We could introduce still other variables into this hypothetical. What results if the IPs use Elizabeth's eggs, instead of Sarah's own, and the child, delivered by Sarah, was not genetically related to her but to Elizabeth? What if they want to use donated embryos (see the recent Alabama Supreme Court case that considered embryos in cryogenic storage to be children)? What if the parties agree to Nick's donor status but achieve pregnancy through sexual intercourse (N.B.: Do not do this.)? Each of these fact patterns might create other uncertainties to be resolved via state law, which might affect how the IPs choose to pursue parentage.

Lesson #1, then, is that, when considering how best to pursue parentage of donor-conceived children, IPs must know how state law interplays with the facts of their case—ideally before taking steps to become pregnant.

In another hypothetical, our IPs are an opposite-sex couple—Lance and Kira—who arrange with Jennifer, a gestational carrier (or GC, aka a surrogate), to carry their child. This embryo is formed with Lance's and Kira's own gametes, but the IPs and the GC reside in different states, 3 and 4. State 3, where Jennifer lives and will give birth, has a detailed gestational surrogacy statute that sets forth the requirements of such an arrangement, from psychological evaluations to contracting to parentage. As long as the parties have complied with the statute, State 3 requires no court process to establish parentage, and the IPs will automatically be listed on the child's birth certificate to the exclusion of the GC.

State 4, however, while permitting gestational surrogacy per case law, has no relevant statute. There, the IPs must obtain a pre-birth order (PBO) from a State 4 court establishing parentage and instructing the State 4 Department of Vital Records to issue a birth certificate with their names. The PBO process begins at about 20 weeks' gestation and involves a set of individual affidavits signed by the IPs, the GC and her spouse, the physician who performed the embryo transfer, and counsel for Vital Records. Once those are assembled, the IPs' attorney files a joint petition asking the State 4 court to issue the PBO.

Fortunately, Lance and Kira consulted with attorneys in both states, retaining a State 3 attorney to draft a gestational carrier agreement setting forth, among many other particulars, a choice-of-law provision specifying that State 3's laws are to govern the arrangement. Lance and Kira understood that, aside from the absolute necessity of a detailed contract, they would need guidance from experienced legal professionals. Moreover, they had the foresight to involve attorneys early in the process, as soon as Jennifer agreed in principle to carry their child.

So, Lesson #2 is that IPs should involve attorneys early in the planning of an ART pregnancy to ensure that their process comports with state law. This is true not just for gestational surrogacy, but for any ART-related arrangement. Especially when working with sperm donors, some IPs try to economize, for example, by connecting with donors through social media groups and drafting or downloading contracts themselves. This is not recommended. Even the savviest IPs may not know what they don't know, and such homemade arrangements can turn out to be more expensive and troublesome in the end.

This article concerns choices intended parents using assisted reproductive technology (ART) face in establishing legal parentage over their children. Because statutes and court decisions concerning ART are almost exclusively a matter of state (as opposed to federal) law, and because ART law varies widely among states, this article cannot cover or reflect the law of any particular state, and certainly not of all of them. Rather, it is a brief introduction to this topic, and is no substitute for knowing your own state's law nor for consulting an attorney with expertise in ART. FA

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