



A Well-Planned Family

How LGBT People Don't Have Children by Accident

by Debra E. Guston and William S. Singer

It is obvious that members of the LGBT community do not have children by accident. For the LGBT community, family building is a well-thought-out decision, sure to impose considerable costs and legal hurdles on the couple or individual. As the number of children available for adoption diminishes and the uncertainty of proceeding from foster care to adoption pushes viable foster parents away, assisted reproductive technology (ART) becomes a more certain avenue for creating a family for members of non-traditional families.

ART allows at least one member of the couple to have a genetic connection with the child, and in some cases, both 'intended parents' may be recognized as legal parents from the birth of the child. Where immediate recognition of

parentage is not available, post-birth adoptions are available to complete the process.

Complications arise from state laws that conflict with each other or do not contemplate the science and medicine of the 21st century. Participants in the use of ART also must deal with insurance coverage regulations and the potential for disputes between known donors and recipients when unregulated donations are utilized. These thorny legal issues make the practice of ART law exciting, as lawyers work to stay current with the rapidly changing environment.

Assisted reproductive technology covers a range of medical, social and legal processes that assist infertile individuals or couples, or those who cannot procreate by sexual intercourse because of the gender of their spouse or partner. Dis-

Discussing the interaction between current intricacies of ART and the legal landscape first requires a review the ART methods available to LGBT individuals and couples, and the current New Jersey law governing these processes. The definitions set forth below will focus on the meanings of the processes in the context of their use by gay, lesbian and transgender individuals. A discussion of the legal issues arising from the utilization of these procedures will follow.

Given the complexity of the legal issues involved, all participants to an ART arrangement need legal representation. Legal research alone cannot build the requisite body of knowledge in this emerging area of the law because science and society are far ahead of legislatures and courts in this area.

In New Jersey, there are few statutes regulating ART. In the rare New Jersey ART cases, judges have agreed on one common theme—the Legislature has done little to help bring the state's laws into the 21st century of family building.¹

ART Procedures

Artificial Insemination

Sometimes referred to as alternative insemination or AI, artificial insemination is a procedure used by lesbian women as a means of procreating. The woman (and a partner) may select a known donor or an anonymous donor through the services of a cryobank. Insurance coverage is generally not available to lesbians to cover AI procedures, as state insurance regulations allow insurers to provide coverage only in the case of medical infertility by using standards only applicable to heterosexual women. This allows the insurer to deny coverage where the woman seeking to become pregnant has not become pregnant after engaging in unprotected intercourse for a period of time. Therefore, while AI is the least costly of the ways a lesbian couple can 'get pregnant,' the procedure still has significant costs.

Egg Retrieval and Use

Physicians can prescribe fertility drug treatment for women patients in order to produce one or more eggs ready for fertilization. These eggs may also be made available to others for use. The cost of an egg will depend on many features, including ethnicity and religion of the donor, as purchasers seek to match their own religious or ethnic background (or that of their partner's) to that of the donor's.

These eggs can then be used in a variety of ways.

1. Lesbians often use this process to retrieve viable eggs for use in *in vitro* fertilization when needed to become pregnant themselves or to use their own genetic material to create embryos for implantation into their female spouse/partner as the carrying or gestational mother, known as co-maternity.
2. Intended parents can acquire this genetic material by purchase or donation from a known 'compassionate' donor to help build a family.
3. Transgender men (assigned female at birth and transitioning to male gender) may seek to retrieve and store eggs prior to commencing male hormone therapy in order to have genetically related children by a spouse or carrier in the future.

Sperm Retrieval and Use

Cryobanks are highly regulated by federal laws that require testing and quarantine of all sperm donations. These requirements substantially increase the cost of the sperm. As a result, intended parents can seek to acquire this genetic material by purchase or donation from a known compassionate donor. Transgender women (assigned male at birth and transitioning to female gender) may also store sperm prior to female hormone therapy in order to have genetically related chil-

dren. Often, gay male couples will mix their sperm together for use in *in vitro* fertilization, so they will not know who the genetic father will be.

In Vitro Fertilization

The process by which an egg (either from the woman who will carry the child, from a donor or from the carrier's female spouse/partner) is fertilized in a laboratory by sperm from a known or anonymous donor is *in vitro* fertilization. The resulting embryos are screened, and those found viable are transferred to the woman who will carry them in hopes of implantation and resultant pregnancy. Other embryos created at this time will be stored for future use, donation or destruction.

Traditional Surrogacy

In traditional surrogacy, the surrogate becomes pregnant as a result of artificial insemination by introducing either donor sperm or sperm from the intended father for fertilization with the carrier's own egg(s).

Gestational Surrogacy

In gestational surrogacy, the surrogate becomes pregnant through the transfer of embryo(s) created with either third-party donor genetic material, genetic material from intended parents, or a mix of each. Most states with surrogacy statutes envision gestational surrogacy only.

Legal Issues

Once a gay or lesbian couple or individual decides how they want to build their family, the legal issues and complications begin to become apparent.

Sperm Donor Issues

Only one New Jersey statute covers the donation of male gametes.² For those intended parents able to purchase sperm from a cryobank and utilize the services of a licensed physician to complete the

insemination, they can, by law, terminate the sperm donor's parental rights to any child so conceived. This statute was originally contemplated by the Legislature to protect the interests of married, heterosexual couples, but New Jersey courts have given it a gender-neutral reading, allowing the termination of parental rights of the sperm donor, where the recipient of the sperm was a woman in a registered domestic partnership.³ The biological mother's partner was determined to stand in the shoes of a husband for the purposes of the termination of parental rights of the donor.

There is no case law, however, on whether this expansion of the AI statute would be appropriate for a single woman. It is unknown whether a judge would determine that a child had a right to two parents, even though the parties contemplated the donor being only a donor and not a father.

The statute would also apply to a known donor and the use of a licensed physician. However, medical malpractice issues and federal or state law governing the quarantine and testing of sperm donations make the use of a known donor difficult, if not impossible.⁴

Totally outside the ambit of the statute is the common situation of a known donor and a do-it-yourself insemination. Use of this path to parenthood can leave the gestational mother's spouse/partner without legal ties to the child, as the child will already have two legal parents (gestational mother and donor father). Lesbian women and couples who ignore the law may find themselves with few choices when a known donor asserts his right as a parent.⁵ Similarly, a known donor may find himself responsible for child support, as his parental rights have not been terminated.⁶

After the birth of a child conceived by AI, current practice and legal realities across the country mandate obtaining a judgment from a New Jersey court finding the second mother to be a legal parent. The parents can institute pre-birth

proceedings or a confirmatory adoption after the birth of the child (see discussion below). There are plenty of families across the country where two women are the primary parents of a child and the donor does indeed act as a father. Some courts have recognized families with more than two parents.⁷

Unfortunately, there are also a significantly increasing number of families where one or more parties to an ART birth abandon the original intent of the arrangement, causing confusion regarding legal parentage, giving courts Solomonic conundrums to resolve and leaving devastated families in their wake.

Egg Donor Issues

Unlike the sperm donation statute, there is no similar law in New Jersey governing the termination of maternal rights of an egg donor. At present, the only assurance a purchaser of ovum has is the contract for donation and purchase executed by the donor and purchaser. In some of these contracts, donors sell their ovum to the medical practice, which in turn sells the material to the recipient, and in doing so the donor agrees to relinquish any claims she may have going forward to maternal rights to any child conceived or to any embryos created. In other contracts, the arrangement is made directly between the donor and donee.

Unfortunately, there is neither case law in New Jersey nor any statutory authority that states with certainty that an egg donor can legitimately end her parental rights by contract. One could assert that the New Jersey Parentage Act can be applied to resolve this ambiguity. Under that statute, the gestating female is designated the "mother" of the child.⁸

In Vitro Fertilization Issues

When a woman utilizes *in vitro* fertilization, numerous issues may arise. First, if the intended parents are undertaking a co-maternity, and the eggs used to create the embryo are those of the

non-gestational spouse/partner, who is the mother? Can both women's rights be protected?

Most generic reproductive medical practice contracts require the egg donor to relinquish by contract all parental rights she may have to any child conceived of an embryo created from her egg, or to any unused embryos. However, if clients engage counsel before creating the embryos, the medical practice contracts can be altered to refer to the woman giving eggs not as a donor, but as a co-mother or co-parent, eliminating the relinquishment language and leaving the uncertainty of a possible dispute between the couple to the future, rather than possibly depriving one woman of parenting rights to her genetic child.

And, what if there are embryos created but not used, and the couple breaks up? Who owns the embryos? There is case law around the country dealing with the 'property' rights and procreative rights a straight married couple have in their embryos,⁹ but none appear to deal specifically with a lesbian couple. Who 'owns' the material—the woman contracting with the reproductive medical practice for purchase of the embryos for transfer to her, or the genetic mother of the embryos? Absent any case law or statute, only a well-thought-out contract prepared in advance can provide a possible road map.

Male same-sex couples using embryos to create a family also face significant quandaries. One can find a surrogate by engaging an agency in a state where compensated or reimbursed surrogacy is legal and available to gay men. Another alternative is to embark on a compassionate surrogate agreement with a friend or relation willing to carry a child without reimbursement or compensation. The most difficult option is for the couple to try to locate a surrogate on their own.

If a surrogate is found and a child is to be born in New Jersey, the intended parents need to hire counsel to terminate

the parentage rights of the surrogate and, if married, her husband. Fortunately, in this one instance, New Jersey case law has crafted procedures when one or both of the intended parents are genetically linked to the child.¹⁰ But where there is no genetic connection, such as the spouse/partner of a gay male father, a second parent adoption is mandated.¹¹

Due to the significant financial costs of using ART to create a family, some gay men elect to use 'medical tourism' to reduce the expenses. These men contract with an overseas agency to undertake a surrogacy in a foreign country, where surrogacy is a legally recognized, binding contractual relationship. In these contracts, one member of the couple *must* be the genetic parent; otherwise, the child will not be allowed entry into the United States as a child of an American born overseas.

Medical tourism agreements impose

significant risks and burdens. For example, once the child is born, the genetic father must prove through DNA testing that he is the father before the local U.S. consulate will issue a consular certificate of birth abroad and a passport for the child.

Further, after the child returns to the U.S with the couple, the non-genetic father must undertake a second-parent adoption to gain his parentage rights. The implications of medical tourism then become intertwined with the adoption. It is only a matter of time before the courts will start to grapple with conflicts between New Jersey law and the law of the jurisdiction where the surrogacy took place.¹²

Attorneys need to help clients develop plans to meet these challenges. New Jersey's prohibition of pre-birth consents to adoption, or to the termination of one's parental rights, do create issues.¹³ In addition, the foreign surrogate usually cannot

be made available to sign a 72-hour consent, or to otherwise participate in the adoption process. Lawyers need to recognize that some courts may require service of a notice of hearing on the surrogate or her agency. While the surrogate's nation may not consider her a mother, New Jersey case law and laws do.

Traditional Surrogacy

In traditional surrogacy there are significant risks of custody disputes between intended parents and carrier. If the carrier changes her mind post-birth and wishes to parent the child, she is the genetic mother and her maternity will be respected.¹⁴

Despite it being the least expensive type of surrogacy by cutting out *in vitro* and egg purchase costs, most ART lawyers strongly counsel against the use of a traditional carrier. Thirty years ago, the *Baby M* case memorably demonstrated the pitfalls of this type of surrogacy.

Traditional surrogacy often occurs within families. Family members should undergo counseling to make sure the process will not disrupt a cohesive family.

Gestational Surrogate Arrangements

Gestational carrier contracts are multi-page, complicated documents. They outline the rights of parties in areas of law that are not covered by statute or case law. For example, the parties to these agreements usually live in different states. The lawyer for the intended parents must make a careful review of the home state law of the carrier to assure that no parental rights will accrue to the surrogate or her husband.

With differing state laws at play, there are choice of laws issues. It is necessary to determine what standard of review will be used by a court in the jurisdiction elected under the agreement's choice of laws provisions.

For example, in one New Jersey case the gestational carrier for a New Jersey same-sex male couple changed her mind after the birth of twins. Although she lacked any genetic relationship to

the children, she exercised her right to be deemed a mother under the New Jersey Parentage Act. As a result, given New Jersey's lack of any statute or case law other than the Parentage Act, the couple and the gestational carrier mother share visitation.¹⁵

States that do not enforce or make surrogate agreements illegal rely on biology/DNA to determine who is a father, and who carried and delivered the child to determine who is the mother.¹⁶

Inter-State Issues—

The Portability of ART

For lesbian, gay, and transgender families, inherent in all ART procedures is the likelihood that inter-state legal and social differences may interfere with the successful outcome, either short-term or long-term. While not exhaustive, the following issues make it clear that representation of clients in ART matters should often, if not always, involve counsel from sister states with which the New Jersey client may have contact.

Interstate recognition of relationship status: The United States has a

patchwork of laws about legal recognition for same-sex couples. Recognition of coupled status is decidedly lopsided against recognition. When a couple seeks to use donors, cryobanks, medical practices and surrogates in other states, they may find local barriers to access and, in fact, legality, of what they seek to accomplish. In many states that have statutory surrogate procedures, those procedures are limited to married, heterosexual couples, thus making surrogacy outside of traditional marriage either illegal or unregulated and unenforceable contracts.¹⁷

Choice of laws agreements may not even survive scrutiny if a dispute arises and a state chooses to 'protect' its citizen donor or surrogate over the agreements that favor New Jersey intended parents.

Lack of statutory law and case law: In many states, the lack of legal or common law authority make it impossible for a lawyer to formulate a reasonable expectation of the outcome. Given the time, cost and emotional investment being made by the intended parents,

these uncertainties may drive them away from otherwise workable solutions to their family-building goals.

Conclusion

With any use of ART, it is imperative that the intended parent(s) have all of the relationships judicially determined. On an almost daily basis cases arise where the legal relationships between parent and child have never been confirmed by a court. Then, when the relationship of the intended parents ends, the child becomes the center of a battle where the parent with the established legal rights tries to freeze out the non-biological parent from any further continuing relationship with the child.

The failure of gay and lesbian couples to confirm their rights before a court, therefore, creates an injury to the non-biological parent. More importantly, this failure injures the child, who does not have two legal parents on whom to rely for support and nurture. Those LGBT families living in states hostile to gay and lesbian parents are at special risk. Many of those states also do not recognize the *in loco parentis* status, such as New Jersey's psychological parent status, putting the non-biological parent at a distinct disadvantage in any dispute. ❧

Endnotes

1. *In re T.J.S.*, 212 N.J. 334 (2012). (While this case makes it clear that gestational carrier agreements are not against New Jersey's public policy and are legal, without statutory amendment, the Court would not refashion the Parentage Act to accommodate a wife seeking to be placed on the birth certificate of a child carrier by a gestational surrogate where wife's husband was the genetic father).
2. N.J.S.A. 9:17-44.
3. *In re Robinson*, 383 N.J. Super. 165 (Ch. Div. 2005).
4. Title 21, Chapter I, Subchapter L, Part 1271, *et. seq.* FDA's Code of Federal Regulations.
5. See e.g., *Jhordan v. Mary K.*, 179 Cal. App. 386, 224 Cal. Rptr. 520, 531-32 (Ct. App. 1986); *C.O. v. W.S.*, 64 Ohio Misc. 2d 9, 639 N.E.2 523 (Com. Pl. 1994); *Thomas S. v. Robin Y.I.*, 209 A.D. 2d 298, 618 N.Y.S. 2d 356 (1st Dept. 1994).
6. Donor is on notice per N.J.S.A. 9:17-44 that his semen must be provided to a licensed physician and the insemination performed by the licensed physician for his parental rights to be terminated by operation of law.
7. See *Katterman v. Di Piazza*, 150 N.J. Super. 209 (App. Div. 1977); *In the Matter of the Adoption of Children by F.*, 170 N.J. Super. 419 (Ch. Div. 1979); *Jacob v. Shultz-Jacob*, 2007 PA Super. 118 (Pa. Super. 2007); *Merrill v. Berlin*, 316 Mass 87 (1944); *A.A. v. B.B.* (2007 ONCA2, Court of Appeals for Ontario (2008); *In re Adoption of A.L. and E.L.*, Circuit Court of the State of Oregon, Multnomah County (Case 9207-65717 (1992); *In re Adoption of Anisha Oksoktaruk Lumiansky*, Alaska Superior Court, First Judicial District of Juneau, No. 1JU-85-25 PAS (1985).
8. N.J.S.A. 9:17-38, *et. seq.*
9. See *J.B. v. M.B.* 170 N.J. 9 (2000) (court ordered the destruction of embryos when divorcing couple fought over potential future use. The court reasoned that if the husband prevailed in preserving the embryos for him to use or to donate, the wife's constitutional right not to be forced to procreate would have been violated). See also, *Davis v. Davis*, 842 S.W. 2d 588 (Tenn. 1992) *on reh'g in part*, 34, 1992 WL 341632 (Tenn. Nov. 23, 1992); *Reiss v. Reiss*, 42 A.3d 1131, 2012 PA Super. 86 (2012) *appeal denied*, 2012 WL 6734325 (Pa. Dec. 27, 2012).
10. See *A.H.W. v. G.H.B., et al.* 339 N.J. Super. 495 (Ch. Div. 2000).
11. See *T.J.S., supra.*, note 1 (wife of genetic father was required to adopt a child delivered by a gestational carrier, rejecting a gender-neutral application of artificial insemination statutes).
12. See e.g., Ark. Code Ann Sec 9-10-201(b); 750 ILCS 47/15; Tex. Fam.Code Ann Sec. 160.760(a); Fla. Stat. Ann. Sec. 742.161 (1); *Johnson v. Calvert*, 5 Cal. 4th 84, 19 Cal. Rptr. 2d 494, 851 P.2d 776 (1993); *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280, 77 A.L.R. 5th 775 (4th Dist. 1998); *Raftopol v. Ramey*, 299 Conn. 681, 12 A.3d 783 (2011).
13. *Matter of Baby M*, 109 N.J. 396 (1988).
14. *Id.*
15. *A.G.R. v. D.R.H. & S.H.* Unpublished, Docket No. FD-09-001838-07, Ch. Div. Family Pt., 2009 N.J. Super. Unpub. LEXIS 3250.
16. See N.J. Uniform Parentage Act, N.J.S.A. 9:1/7-38, *et seq.* (example of statute governing parentage in state where there is no enforcement of surrogacy agreements).
17. Charles P. Kindregan Jr. and Maureen McBrien, *Assisted Reproductive Technology: A Lawyer's Guide to Emerging Law and Science*, Second Edition, p. 158-203(2011).

William Singer practices family creation and protection law at Singer & Fedun, LLC in Belle Mead. He specializes in counseling non-traditional families, including multiple-parent families and co-parenting partnerships. **Debra E. Guston** is a partner in Guston & Guston LLP in Glen Rock. She is a fellow of the American Academy of Adoption Attorneys and the American Academy of Assisted Reproductive Technology Attorneys.