

"Gayby" boom: Part 2

LEGAL BRIEFS

Sperm donor agreements

By Elizabeth F. Schwartz

An increasing number of gays and lesbians are choosing to take on a new role as parents, and in our last column we began exploring some of the legal issues involved. We looked at the merits of inseminating with a known versus an unknown donor. We concluded that, while there are no clear answers and much depends on the kind of relationship you envision between the baby and donor, it is preferable from a purely legal standpoint to go with an anonymous donor to assure that he cannot assert any parental rights in the future.



Still, many lesbians are choosing to bear children with a longtime, trusted friend or a cute, smart, stable acquaintance. Each situation is different and some work out better than others. We have seen instances in which everything goes smoothly and there are relatively few surprises. Unfortunately, we have also seen matters get quite sticky and complicated when Daddy O' sees that little baby face and all bets are off. Real pain can result and the baby is caught in the middle.

Whenever deciding to use a known donor, we strongly recommend drafting a *sperm donor agreement*.

We have talked with many mommies-to-be who are reluctant to consult an attorney for fear that a lawyer's involvement would escalate the process to a battle, sending a message to the donor that there may be a problem or a lack of trust. The decision to have a child is indeed a major one, challenging and intimidating under the best of circumstances. It might seem like approaching an attorney could make the situation even more nerve-racking.

But that need-not be the case. Truth be told, lawyers are paid to be paranoid and to foresee the worst possible turn of events in order to fully protect their client's interests. Therefore, we usually feel it important to reduce the parties' intentions to writing. The signing of this contract doesn't have to be an adversarial process. On the contrary, the very drafting of this agreement will assure that you have had open, honest communication with your partner in the experience, leaving everyone involved with some peace of mind.

Whatever arrangement you make with the donor, the point of a written agreement is to

Even though this is likely to be an agreement among friends, it's important that it have all of the elements of a contract. Following are some of the basic items which should be covered in a sperm donor agreement: An acknowledgment of payment of an agreed upon sum in exchange for semen; The marital status of each party; Donor's acknowledgment that he relinquishes his parental rights; Recipient (mom) has the authority to name the child; Donor waives the right to be named on the birth certificate; How the donor's identity will be dealt with; Recipient waives the right to bring a paternity suit; Recipient waives the right to child support; Understanding that the agreement presents legal questions that are unsettled; Donor waives the right to custody and visitation; Statement that each party signed the agreement knowingly and voluntarily.

The enforceability of sperm donor agreements under Florida law is not yet clear. As far as we know (please e-mail if you know otherwise), no such agreement has been brought before a Florida judge. The general presumption is that courts are reluctant to terminate anyone's parental rights. However, if a sperm donor agreement has all of the elements of a valid contract and is part of an overall scheme evidencing the parties' intentions, it might be enforced *if it is found to be in the best interests of the child*. Moreover, the gravity of the terms of the contract are likely to bind both parties' conscience in a way that no fear of court action ever could. Most importantly, the parties would have hopefully talked through these important issues and reached a real consensus.

The timing of this agreement is important. From the donor's perspective, it is best to have it prepared and signed before insemination is attempted because the donor's potential liability for the child starts at conception, not birth.

Donors might also consider acknowledging any irregularities in their family's medical history and including a statement regarding results of recent tests for sexually transmitted diseases, so they will not risk liability for passing on an undisclosed condition to the child.

Another tip for donors is to have your own attorney look over this agreement before signing, just to be clear that you understand the importance of your undertaking. As a general rule, whenever you sign anything involving an alteration of your rights, you should have someone looking out for your best interests alone review the document. You are giving a marvelous gift, and shouldn't be left with any doubts or regrets when all is said and done.

evidence that understanding. For the purposes of this column, we will assume that you don't want the donor to be considered the baby's father. Plenty of lesbians choose otherwise, and wish for their child to know their father and cultivate a connection with him. Again, sometimes this works, and sometimes it doesn't. Just be aware that a relationship between the donor and the baby creates a legal presumption of fatherhood, that is difficult to rebut. We find the majority of women embarking on the journey of parenthood don't want to be faced with the possibility of a lawsuit asserting custody or visitation rights, and most men don't want to get slapped with a judgment for child support.

is said and done.

As with any legal matter, try to find a lawyer who is gay or gay-friendly and with whom you feel comfortable. Having a baby is a major life event for anyone, and it is particularly important for gays and lesbians to undertake this responsibility in the face of such a homophobic system.

So we have covered some of the basic issues implicated by the donor/birth mother relationship. Next time, we'll learn about the complexities of documenting the biological mom/non-biological mom relationship. So please check us out, and as always, email me at eschwartz@sobelaw.com with any feedback. Thanks!