

Minnesota Law and Becoming a Parent via Assisted Reproductive Technology

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Becoming a parent in the eyes of the law has traditionally meant that the child was either born to you or adopted by you. With the advancement of medical technology parenting is now possible to a number of people by means other than these. Through Assisted Reproductive Technology (commonly referred to as ARTS), families are created by other than traditional means. Minnesota law currently says very little about the use of ARTS and the establishment of parental rights under such circumstances. Historically, if a woman could show that she gave birth to a child, she was considered the child's mother and her husband was considered the child's father. While the presumption that the mother's husband is the father of a child born during the marriage has been challenged often enough, until the advent of ARTS, it was nearly unheard of for a woman to claim maternity of a child she had not carried and given birth to. With leaps in medical technology related to human reproduction, these once unheard of claims are becoming nearly common.

There are numerous situations where ART is used to allow an individual or individuals to become parents. Some of the situations are as follows:

- (1) Male/female couple unable to conceive on their own; Female's eggs are harvested; Male's sperm is collected; Embryos are created and implanted into female who carries her own genetic child;

- (2) Male/female couple; female's eggs unavailable; donor eggs are used and fertilized by male partner's sperm and embryo is implanted in female who carries and delivers the child who is genetically her partner's but not genetically her own;
- (3) Male/female couple unable to use own genetic material have donor egg and donor sperm used to create embryos; female is able to carry the embryo; child is genetically unrelated to either intended parent but intended mother carries and gives birth to child;
- (4) Male/female couple; female has own eggs but unable to carry child; eggs harvested; fertilized with partner's sperm creating embryos that are implanted into a gestational carrier for the benefit of the child's genetic/intended parents;
- (5) Male/female couple; female has her own eggs but unable to carry child; partner's sperm are unavailable; donor sperm used to fertilize intended/genetic mother's egg; embryo transferred to gestational carrier for benefit of child's genetic/intended mother and genetically unrelated but intended father;
- (6) Male/female couple; female's eggs are unavailable and she is unable to carry a child; male partner has available sperm; donor egg fertilized by genetic/intended father's sperm; embryo implanted into and carried by gestational carrier for benefit of the intended mother and genetic/intended father;
- (7) Male/female couple; neither has genetic gametes available for creation of embryos; donor egg and donor sperm are used to create embryos that are implanted into a gestational carrier for the benefit of the non-genetic intended parents.

These are just a few of the situations that arise as a result of ARTS. Many single individuals and same sex couples are also becoming parents through ARTS.

Minnesota statutes do not set forth how these situations and all their permutations are to be governed. Nonetheless, these procedures are being used in Minnesota to create families.

Our law provides that a husband of a woman who undergoes artificial insemination with the assistance of a physician is presumed to be and is the legal father of the child conceived as a result of that artificial insemination. Minn. Stat. §257.56, subd.1 (2006). In such a case, there is no need for the husband/father to seek any further order establishing himself as the father. This statute has been available to protect the rights of non-genetic fathers to children born as a result of artificial insemination for more than twenty years. The provision of the law that deals with artificial insemination also establishes that the donor is not to be treated as the biological father. To receive the protection afforded by these statutes, the insemination must be done under the supervision of a licensed physician.

As to mothers, our law provides that the parent and child relationship between a child and the biological mother may be established by proof of her having given birth to the child. It also allows a mother to prove that she is the child's biological parent through genetic testing. If such test indicates the likelihood of parentage is 99%, or greater, the Court is to give an evidentiary presumption that the alleged parent is the biological parent and the party opposing that maternity establishment has the burden of proving by clear and convincing evidence that the alleged parent is not the parent of the child. In 2006, the law was amended to state that a donor of genetic material for assisted reproduction for the benefit of a recipient parent, whether sperm or egg, is not allowed to claim to be the child's biological or legal parent. Minn. Stat. §257.62, subd. 5 (c). Notably, however, it is not only the genetics of the child that can be used to establish paternity

and maternity of the child but also the intent of the parties involved in an ARTS procedure that may determine who the child's legal parents can and should be. For example, when a donor egg and intended father's sperm are used, the gestational carrier, who is unrelated to the child and is not the intended parent of the child, should not be looked to as the mother of the child she agreed to carry for someone else. It is the intended mother, who, but for her desire to have a child the child would not exist, that should be looked to as the child's legal parent. When these medical procedures are being used to assist parents, it is critical for parties to enter into agreements in advance of embryo transfer/implantation to clearly establish the intent of all individuals involved, as well as the rights, duties, and obligations of all involved.

When ART is involved, a woman carrying the child can be referred to as a traditional surrogate or gestational carrier depending upon the particulars of the case. A traditional surrogate is a woman who carries a child on behalf of another where the child she is carrying is genetically her own child. A gestational carrier is a woman who is carrying a child who is not genetically her own child. While we have no statutory guide associated with these situations other than that referenced above, Minnesota courts have been granting maternity and paternity orders in cases involving ART. Whenever an individual is contemplating this method of family building, they should seek the advice of an attorney to determine and aid the family in setting forth the terms of the agreement they have with a carrier. The woman who is carrying the child should make sure an agreement is in place that protects her rights and interests as they relate to the child and the obligations that result from carrying and giving birth to a child.

According to the Centers for Disease Control, in 2005, there were 52,041 infants born as a result of ARTS procedures. The types of situations involved and the legal means used, if any, to establish the legal parents of these children is not set forth in the study.

As one can imagine, serious legal and practical issues may arise when a woman carries a child on behalf of another individual. Issues regarding who the intended parent or parents are; who is responsible for the expenses of pregnancy, medical care, and birth of the child; who is responsible for the day to day parenting of the child after birth and who will have what rights, duties and responsibilities should be put into writing well in advance of embryo transfer. When another woman carries the child on behalf of a couple, she will want to ensure that she is not considered the parent of the child and thus obligated to financially support the child in the future if it is indeed everyone's intent that the parents for whom she is carrying the child will be that child's parents in all legal respects. Also, the intended parents will want to know that they are the child's legal parents with all the same rights, duties and obligations to the child as if the intended mother had given birth to the child.

The issues can become further complicated when the woman carrying the child is also the genetic parent of the child. This situation is termed a "traditional" surrogacy. Legal risks associated with such a situation and the potential for fighting about who has rights to the child and who has access to the child can be complicated and emotionally and financially draining on the parties involved. Determining legal rights, duties and obligations in advance of going through with such a procedure is extremely well advised.

Other legal actions, aside from the drafting and completion of a contract or agreement that establishes everyone's intended rights and clarifies who the intended parents are and what their obligations will be, may be necessary. A will establishing what should happen to the child

and the expenses associated with the child and the contractual obligations of the parties should something happen to the intended parent or parents during the course of the pregnancy should strongly be considered. Questions should also be raised about what the process will be to establish the intended parent or parents as the legal parents of the child and to ensure that the carrier of the child is not deemed or concluded to be, the parent of the child. As such, different legal actions may be required in order to establish who has what rights. It is possible that a maternity and/or paternity order would need to be sought either before or after the birth of the child. It is also possible that an adoption of the child may be necessary depending upon the interpretation of the law associated with the case and the way a particular court interprets the law. Issues regarding who may be listed on the original birth certificate of the child will also need to be addressed.

Numerous issues come into play in the preparation of these agreements. Questions regarding a duty of confidentiality and who will be able to tell the child what in the future exist. Questions about responsibility for the child both financially and physically arise. What the instructions will be to the physician and who has control of those instructions at what time should be determined. Who needs to participate in the paternity/maternity proceedings in order to establish fully the intended parents' rights to the child? Who will have the right to name the child? Who will bear the fees and expenses associated with carrying the child, insurance premiums for medical costs, psychological and counseling fees, paternity tests, lost wages, medical expenses, uninsured and other various expenses associated with the parties' agreement? What will be the impact of the Roe v. Wade decision and the number of fetuses that will be carried to full-term? How does the agreement come to an end or terminate? How are disputes resolved and what will be the governing law?

There are many issues that need to be addressed when deciding to go forward with the use of ART to have a child. It is imperative for all parties to have a clear understanding of the law, their rights, duties and responsibilities prior to completion of an ART transfer. When considering this option for becoming a parent, it is best to consult an attorney.

The preceding is prepared for discussion purposes only and is not intended to provide specific legal opinions on any case, nor should it be cited by anyone as a specific legal opinion.

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