

Los Angeles Lawyer

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Addressing the Uncertainties of Surrogacy and Sperm and Egg Donation

IN THE LAST 50 YEARS, ADVANCES IN MEDICAL TECHNOLOGY have spawned a major shift in the legal structure of the family. Through sperm donation, women may have children with no partner, donate eggs, and freeze embryos. Same-sex couples may have children in and outside of marriage, and single fathers may have children with surrogates. Children may be carried by women who are not biologically related to them. The law has not advanced at a similar pace. People who enter into nontraditional reproductive arrangements can find themselves embroiled in litigation and legally separated from a child they parented or brought into the world with the intention of parenting. For this reason, attorneys advising clients on nontraditional parenting arrangements should be aware of the state of the law governing assisted reproduction agreements and similar arrangements.

Historically, the law determined parentage based upon who gave birth to the child. A woman who delivered a child was conclusively presumed to be the child's mother. The father was the man who impregnated her. In early twentieth-century America, some rules were created to temper those basic assumptions to protect the social construct of marriage. For example, under Section 7611(a)-(c) of the Family Code, if a child was born within 300 days of a marriage's end, the husband was presumed to be the father of the child. This was the case whether he had impregnated his wife or not. This law was intended to ensure that the child was born within a legal family unit. Even if the wife had an affair that resulted in a pregnancy, her husband was conclusively presumed to be the father. Similarly, in *Dawn D. v. Superior Court*, the court held that a man who conceived a child as a result of an extramarital affair with a woman who was cohabiting with her fertile husband was statutorily precluded from establishing paternity.¹ It was not until 1992 that the legislature enacted the predecessor statute to Family Code Section 7541, which enabled a husband or a presumed father to seek blood tests to establish the fact of nonpaternity, so long as the husband brought the motion within two years.

Another example of the law's lagging behind technology is what became informally known as the sperm donor rule. It was implemented, in part, so that if a husband was sterile and a couple chose to use donated sperm, there was no risk that the sperm donor could later assert that he was the father of the child, nor was there a risk that the mother of the child could sue the sperm donor for child support. These rules, codified in the Uniform Parentage Act (UPA) and implemented in the majority of states, including California in 1975,² gave the first recognition to the fact that children were being created with medical assistance. In an effort to address the situation in which a woman needed donor sperm in order to conceive, the UPA created a class of biological fathers who would never be legal ones.

Pursuant to Section 7613(b) of the Family Code, the man who provided semen to either a physician or sperm bank for use in artificial insemination or in-vitro fertilization was barred from becoming the child's legal father under any circumstances and by requiring that the donation be made through a physician or sperm bank,



medical personnel were deemed to be the appropriate documenters of this fact for legal purposes. People who took artificial insemination into their own hands, so to speak, were not afforded the protection of termination of parental rights of the sperm donor. The operative statute, Family Code Section 7613, provides that the bar to parentage or the conclusive presumption of parentage are only applicable when the married woman conceives "under the supervision of a licensed physician and surgeon" or when the donor provides semen to "a licensed physician and surgeon."³

Until recently, courts maintained the sperm donor rule as an absolute bar to a man's being the father of a child conceived by sperm donation, no matter the circumstances.⁴ In an effort to protect those parties who were using fertility with the intention not to marry but to coparent, in 2011 the California Legislature amended Section

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7613(b) to provide that the sperm donor rule would not apply if the “parties otherwise agreed in writing.”⁵ Oddly, this amendment did not truly specify what the writing had to consist of. When engaging in fertility treatments, the parties are routinely given consent forms for the procedure. Those forms often refer to the parties as “intended parents.”

Consent Forms

In a recent case, *Jason P. v. Danielle S.*,⁶ while the court did acknowledge the right of the biological father, Jason Patric, to prove his parentage on other grounds, the consent forms were deemed not sufficient to prove his parentage. The court did not accept the argument that the consent forms—which declared both parties to be the “intended parents”—were a sufficient writing to prevent assertion of the sperm donor rule. This seems somewhat at odds with Family Code Section 7606, which defines an “Assisted reproduction agreement” as “a written contract that includes a person who intends to be the legal parent of a child or children born through assisted reproduction and that defines the terms of the relationship between the parties to the contract.” While not legally binding precedent at this time, in the tentative decision rendered in the highly watched embryo dispute in San Francisco known as *Findley v. Lee*, the court found that both parties were to be held to the consent forms signed prior to creation of the embryos. Under the terms of the forms, if the parties were to divorce the embryos would be thawed and discarded. Thus the former wife did not have the right to take control of the embryos and implant them unilaterally.⁷ It will be interesting to see what the court of appeal will do with this finding if the matter goes up on appeal.

Prior to *Jason P.*, California had competing statutes on parentage that could not be legally reconciled. While the sperm donor rule acted as an absolute bar to a man seeking to be declared the father of the child he conceived with his unmarried partner with the intent of raising the child as his own, Family Code Section 7611(d) allowed any man (in typical cases) to be declared the father of a child whom he had held out as his own and received into his home. The lack of reconciliation of these two statutes meant that any man could come forward and seek to be declared the father of a child if he could meet the criteria of Section 7611(d)—except a biological father in cases of sperm donation. In *Jason P.* the court acknowledged the fact that cases did exist in which the biological father established a relationship with the child and in those situations, the biological father should be able to obtain parentage status by meeting the conditions of Section 7611.⁸ For this reason, people intending to

conceive and coparent outside of marriage need to properly and carefully document what they are doing before entering into a fertility procedure. That documentation needs to address who is and is not going to be the parent before the child is created. Based upon the ruling in *Jason P.*, the parties must sign a separate and independent agreement from the consent forms in order to ensure that their intent is effectuated in the event of a later dispute.

It is worth noting that while the sperm donor rule prior to *Jason P.* served as an absolute bar to parentage for men, there is apparently a different standard for an egg donor. Prior to *Jason P.*, in *K.M. v. E.G.* the court ruled that the statute is inapplicable to a woman who donates her eggs to her female (unmarried) partner with the intent to conceive.⁹ The court reasoned that it was undisputed that the couple lived together and intended to bring the child into their joint home.

Surrogacy, Egg Donation, and Embryos

Medical technology has not only made it possible to donate sperm and eggs but also for a woman who is not biologically related to a child to carry that child to term. In this regard, the law has evolved to address this reality. California case law has recognized for some time that in situations involving the use of a gestational surrogate, the intentions of the parties should control the question of who is a parent. In *Johnson v. Calvert*,¹⁰ a husband provided his sperm to a fertility clinic for the purpose of fertilizing his wife’s eggs, which were then implanted into the womb of a woman other than his wife. There was never any suggestion that the husband in *Johnson* was not the father, despite the fact that his wife was not the one rendered pregnant by his sperm donation. As the Supreme Court stated in *Johnson*, “the interests of children, particularly at the outset of their lives, are [un]likely to run contrary to those of adults who choose to bring them into being....” Thus, “[h]onoring the plans and expectations of adults who will be responsible for a child’s welfare is likely to correlate significantly to positive outcomes for parents and children alike.”¹¹ *Marriage of Buzzanca*¹² holds that just as the husband can be deemed the father of the biologically unrelated child carried to term through surrogacy, so can the wife be deemed the mother of the child even if she has no biological relation to the child due to the use of donor eggs and a surrogate. These cases turn on the language of the contracts entered into by the parties. These decisions are, therefore, consistent with Section 7630(f) of the Family Code, which provides that “[a] party to an assisted reproduction agreement may bring

an action at any time to establish a parent and child relationship consistent with the intent expressed in that assisted reproduction agreement.”

Parties contemplating such an arrangement must, however, tread cautiously. California law upholds surrogacy arrangements involving gestational surrogates, who are women carrying children to which they are not biologically related. It does not, however, hold these arrangements as enforceable in a disputed case if the surrogate is also the biological mother, even though the original intent was to give the child to the parents with whom the surrogate contracted. In *Marriage of Moschetta*,¹³ the court declined to enforce a surrogacy agreement in which the surrogate was also the biological mother, finding that there was no tie to break between the mother who contracted with the surrogate and the surrogate herself when she was also the biological mother. For this reason, almost all surrogacies that are arranged in California involve gestational surrogates. Parties considering a surrogacy should be aware that California law has some regulation addressing who can arrange a surrogacy and handle the fees paid to the surrogate over the course of the pregnancy when an attorney is not involved, as well as defining what the contract with the surrogate should provide for.¹⁴

Women who wait until their more mature years to have children often find they do not have viable eggs. Single men with no partner and gay male couples are in a similar situation. In those instances, the parties are in need of donor eggs. This has given rise to a cottage industry, with egg donor agencies facilitating the donation of eggs to third parties for a fee. No court or governmental agency in California has challenged this practice. Typically, the parties to these proceedings sign an ova donation agreement that specifies who is to be the legal parent of the children that may be born of the donor eggs. There are no reported cases that address whether the ova donation agreement qualifies as an assisted reproduction agreement within the parameters of Family Code Section 7606, although a properly drafted agreement should qualify. However, a civil cause of action for breach of contract does lie even when a court may have found that one party to the contract intending to be the parent is not legally declared to be the parent by the family court. *Dunkin v. Boskey*,¹⁵ for example, holds that a determination that one domestic partner was not the legal parent of the child born of the other domestic partner mother using a donor egg was not res judicata on the question of damages for breach of contract and infliction of emotional distress.

While the process of egg donation, apart from the medical issues, would seem to be a

straightforward contractual arrangement between consenting adults, particularly in the present day and age when so many people are donating, and others are acquiring eggs through tissue banks, in some instances the old adage that biology trumps all still applies. In *Robert B. v. Susan B.*,¹⁶ the court held that the wife, who had no genetic connection to the donor egg, did not have standing under the Family Code to seek a parentage determination, despite having signed a written contract with her husband to acquire ova from an anonymous donor. That contract stated that it was the intention of both parties to be the parents of the resulting children. In this instance, another woman contracted with the same fertility clinic to purchase ova and semen from two people who would sign away their rights to the child. Thirteen embryos were then produced for the husband and wife. Some of the embryos were implanted in the wife, resulting in the birth of the parties' daughter.

Unbeknownst to the parents, however, the same clinic implanted three of their embryos in the other woman, who gave birth to a son only a few days later. The fertility clinic informed the husband and wife of the error, causing them to bring a parentage action against the woman. The court ordered genetic testing over the objections of the single mother, finding that husband had standing to bring the action due to his genetic link. The wife argued that she stood in the shoes of the genetic mother notwithstanding the lack of any genetic connection to the child because she had contracted with the ovum donor and acquired whatever parental rights ovum donor had. The trial court disagreed and dismissed mother from the proceedings, finding that the rights she had acquired were to embryos, but not to the actual child that was born of same. The court of appeal affirmed, finding that the single parent was the mother, and husband was the father, of the child she gestated with eggs from the same donor, thereby forcing the creation of an unusual blended family.

Fertility physicians are actively promoting the concept of cryogenic preservation of eggs as an effort to enable women to defer maternity and parenthood into later adulthood which would otherwise not be possible given the rate at which egg production decreases with age. The theory, of course, being that the eggs can be thawed and fertilized when the woman is ready to have children. Along with cryopreservation of eggs comes cryopreservation of embryos. Some physicians believe that the chances of success are higher if the embryo is created and frozen as opposed to fertilizing the egg after it has been thawed. Additionally, as part of the fertility process multiple embryos are often created and some

will be implanted with additional embryos being reserved for future use. Women are also availing themselves of cryopreservation when given cancer diagnoses as an effort to preserve fertility.

In other situations, embryos are created for future use by the recipients of egg donation. This is not an uncommon practice with gay male couples who may wish to have children with a genetic link to both of them and a sister may be willing to provide the ovum. However, issues can arise when the parties who created the embryos later get into a dispute over whether they can be implanted, remain frozen, or be destroyed—as is the case in several cases now pending before our courts, two of which have received significant amounts of publicity. As previously mentioned, a tentative decision has been issued in the San Francisco case of *Findley* holding the parties to the terms of their consent forms and not allowing the former wife unilateral use of the embryos. The current Los Angeles case involving actress Sofia Vergara has similar facts.¹⁷

Typically, the parties execute directives that dictate what the disposition of the embryos should be in the event of the death of one or both of the parties and, in the case of a married couple, in the event of their separation or divorce. Section 125315 of the Health and Safety Code provides that physicians are to indicate to fertility clients what their options are so that they can make this decision at the beginning of the process. The question arises, however, as to what happens with the embryos if the parties later get into a dispute about them or the circumstances change. Section 125315 does not address this, as it is intended as a regulation of medical personnel engaged in the practice of fertility treatments. In *Findley*, the wife unsuccessfully contended that she should be permitted to use the embryos to bear children despite having agreed that they would be thawed and discarded in the event of a divorce. In the case of Vergara and Nick Loeb, Loeb contends he should be given the right to use the embryos to have a child notwithstanding the parties' agreement on the disposition forms that any use of the embryos other than cryopreservation would require both parties' consent. There is little authority on the topic, and in fact, in most cases that have been decided in other states, the disposition forms have controlled unless one of the parties was unable to bear children and the frozen embryo created the only possible genetic link between the parent and child.¹⁸ In *Szafranski v. Dunston*,¹⁹ a court of appeal in Illinois affirmed the trial court's decision to award the embryos to the woman, rendered sterile as a result of cancer treatments. However, in that case the evidence

was that the male partner who assisted her in creating the embryos did so specifically so that she could have children knowing that she would likely lose her fertility due to her cancer diagnosis.

In California, Penal Code Section 367g provides that it is a criminal offense to use any genetic material, including ova or embryos, without the consent of the other party who created them.²⁰ It would appear that in the situation in which the parties agreed that any use of the material required joint consent, that one party could not later override that consent unilaterally regardless of the circumstances. The tentative decision in *Findley* is consistent with the intent of the statute.

Despite the common use of fertility treatments, people needing them have reason to tread very cautiously. While the courts have moved toward a more child-centered approach in resolving these treatment issues, such as was the case in *Jason P.*, the risk of being caught up in a legal dispute when one of the parties has a change of heart (especially in the case of unmarried parents), can result in a situation incurring substantial expense and significant uncertainty as to the outcome. People availing themselves of these treatments need to make sure that all contingencies are properly discussed, addressed, and documented before they start the process, and that they are dealing with reputable lawyers and medical professionals to ensure that their understandings on parentage are clearly resolved at the outset. ■

¹ *Dawn D. v. Superior Court*, 17 Cal. 4th 932, 937 (1998); FAM. CODE §7540.

² See FAM. CODE §§7600-7650.

³ FAM. CODE §7613(a), (b).

⁴ See *Steven S. v. Deborah D.*, 127 Cal. App. 4th 319 (2005).

⁵ A.B. 1349 (2011-12 Reg. Sess.) (amending Family Code §§7573, 7576, 7612, and 7613 relating to paternity).

⁶ *Jason P. v. Danielle S.*, 226 Cal. App. 4th 167 (2014).

⁷ *Findley v. Lee*, No. FDI-13-780539 (S.F. Super. Ct., filed Nov. 18, 2015), available at <http://www.sfsuperiorcourt.org>.

⁸ *Id.* at 6.

⁹ *K.M. v. E.G.*, 37 Cal. 4th 130 (2005).

¹⁰ *Johnson v. Calvert*, 5 Cal. 4th 84 (1993).

¹¹ *Id.* at 94.

¹² *Marriage of Buzzanca*, 61 Cal. App. 4th 1410 (1998).

¹³ *Marriage of Moschetta*, 25 Cal. App. 4th 1218 (1994).

¹⁴ See FAM. CODE §§7606, 7962.

¹⁵ *Dunkin v. Boskey*, 82 Cal. App. 4th 171 (2000).

¹⁶ *Robert B. v. Susan B.*, 109 Cal. App. 4th 1109 (2003).

¹⁷ See, e.g., TV star Sofia Vergara in battle over frozen embryos, BBC News, <http://www.bbc.com/news/entertainment-arts-32547470>.

¹⁸ See *Davis v. Davis*, 842 S.W. 2d 588 (Tenn. 1992); *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. 2012); *J.B. v. M.B. and C.C.*, 783 A. 2d 707 (N.J. 2001).

¹⁹ *Szafranski v. Dunston*, 993 N.E. 2d 502 (2013).

²⁰ See PENAL CODE §367g.