



MODERN FAMILY CREATION – THE LEGAL IMPLICATIONS OF DONOR INSEMINATION

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From single-parent families to “blended” or extended family units, whether they be same-sex parents or opposite-sex parents (whether married/in a civil partnership or not), the concept of the “nuclear family” has become less prevalent, and less apt, to describe modern families in the 21st century.

Today’s modern family structures include those where children are created through assisted reproductive technologies and encompass sperm/egg/embryo donation, or children born via a surrogate or are adopted. Despite dedicated legislation in the form of HEFA 1990 and 2008, the law is in a permanent state of catch-up with the advances in medical reproductive technologies. Novel legal issues are emerging, which the law has had to respond to, and grapple with.

Further, the demand for donor gametes shows no sign of abating: 35% of men suffer with sub-optimal sperm, more women are embarking on motherhood alone and increasingly, same-sex couples are choosing to have children. The latest domestic figures from HEFA show the number of women attempting to start a family on their own has soared by a third in two years: 1272 women registered to have fertility treatment without a partner in 2016, up from 942 in 2014. The worth of the global sperm bank market is expected to reach an astonishing \$5 billion by 2025.

The demand for donor sperm, in particular, vastly outstrips domestic supply. The shortage of domestic sperm donors received extensive media coverage when Brexit threatened to impact on the importation of Danish sperm. While the proportion of imported

“Every year around 2,700 children in the UK are conceived with the help of a donor. Fertility clinics in the UK are regulated by the Human Fertilisation and Embryology Authority (the HFEA). This ensures that everyone undergoing treatment or donating gametes has received appropriate information and counselling in order to make informed decisions.”

egg donations remains small, the proportion of imported sperm is now at 39% of all newly registered sperm donors. Of the non-UK sperm donors registered, the most common countries are dominated by the US (49%) and Denmark (45%). This demonstrates the need to make donating sperm more appealing to men in the UK.

This article provides an overview regarding the legal implications of donor conception in England and Wales.

In the UK, it is illegal to pay a donor anything other than expenses. This means that most donors donate for altruistic reasons rather than financial gain. In line with the requirements set by the HFEA, in the UK, a donor’s sperm may only be used to create up to ten families (not including their own). There is also a limit on compensation.

Those donating sperm can receive up to £35 for each clinic visit, and those who donate eggs £750 per donation “cycle”. It is a rigorous process to be a registered sperm donor in the UK: he must be between the ages of 18 and 41, be screened for sexually transmitted diseases and some genetic disorders, his sperm must be of good quality and he must answer questions regarding his sexual habits and drug use.

Furthermore, since the law changed in 2005, it is no longer possible to register with a HFEA-licensed clinic as an anonymous sperm or egg donor. Donors must, therefore, agree to be identifiable once the donor conceived individual reaches 18, and consent to their details being included on the HEFA Register of Information. As this law was only introduced in 2005, and the oldest donor conceived individuals will have

just reached 15, it remains to be seen how many children will seek to contact their sperm donor.

The law regarding donor insemination is complex. Whose genetic material is involved, and how, when and where conception takes place, will affect whom the law determines are the legal parents of the child, and who has parental responsibility. On that note, it is important to remember that legal parenthood is not synonymous with having parental responsibility.

It is vital that intended parents seek specialist legal advice prior to their child's conception to ensure that those who intend to be the legal parents are recognised as such, and that there is a clear understanding of who has (and who does not have) parental responsibility for the child. Donors may also be concerned about financial claims being made against them in the future, or the impact upon their own family.

The Legal Implications

Conceiving with an unknown donor via a HFEA licenced fertility clinic.

If one chooses to conceive with an unknown donor through a HFEA-licensed fertility clinic in the UK, the donor will not be the legal parent, and will be protected from any legal claims pertaining to the child, such as maintenance and Inheritance Act claims.

The woman who gives birth to the child will be the legal mother (under English

law, the woman who gives birth to the child will always be treated as the legal mother). If she is married or in a civil partnership, her spouse or civil partner will be the second legal parent. If she is not married or in a civil partnership, her partner may become the second legal parent provided certain prescribed forms (which would be available via the licensed clinic) are signed before conception.

It is also worth bearing in mind that in addition to the intended parent(s) being entitled to certain information about the donor, any child conceived via a licensed clinic in the UK will also have the right to certain information in respect of the donor. Any child who has been donor conceived at a licensed clinic in the UK after 31 March 2005 will now be entitled, at the age of 16, to some limited information about their donor, such as a physical description, their year of birth, marital status, and medical history.

At the age of 18, the child will be entitled to identifying information about their donor, including their donor's name, date of birth and last known address. If the child was conceived after 1 August 1991, they can also join the HFEA's Donor Sibling Link, which would enable them to make contact with any donor-conceived genetic siblings (provided those siblings have also joined the Donor Sibling Link, or join in the future).

An important development has arisen in the arena of anonymous donation which relates to so-called "three parent families". Here, the embryo is created from three genetic parents. The UK is the only country so far to have officially

approved the use of mitochondrial replacement therapy (MRT) technique, and only in order to prevent children from inheriting severe mitochondrial disorders. The procedure, undertaken in a clinic, is similar to IVF but uses genetic material from three people. It was developed for women who have genetic mutations in the DNA of their mitochondria as this DNA is only passed on via the mother. The MRT technique swaps the woman's defective mitochondrial DNA with that of the donor.

As the resulting embryo's DNA is predominantly derived from the two parents who supplied the egg and sperm (the mitochondrial DNA is by far the smallest contribution at less than 1%), the DNA donor has no legal rights in relation to the child and will remain anonymous (i.e. the child will not be able to apply for identifying information about them when they are 18). However, from the age of 16, the child can access non-identifying information about the donor in the form of the screening tests carried out on them, their personal and family medical history, a personal description and any additional information that they have agreed to share with the child.

Conceiving with a known donor

The legal position in relation to conceiving with a known donor depends on whether the arrangement is undertaken via a licensed clinic in the UK, or elsewhere (i.e. pursuant to a private arrangement at home).

“Will the donor have a parental role? If not, will the donor have another role, i.e. akin to an uncle?”

Will the donor have any contact with the child? If so, when, and how frequently will such contact take place?

Will the donor be consulted in relation to the child's name, education, etc.?

Will the donor be expected to provide any financial support to the child?

Will the child be told about the role of the donor in their creation?”

Conceiving with a known donor – licensed clinic in the UK

If one conceives with a known donor at a licensed clinic in the UK, the position will mirror that set out in the paragraphs above. The known donor will be given a health check at the clinic, undergo the necessary counselling, and be provided with information to ensure that they are able to give informed consent to the donation, and understand their legal rights and responsibilities. Here, the donor will not be the legal father if the couple he donates to are both legal parents. If there is no second legal parent, he could be the legal father, depending upon the consent forms at the clinic and any agreement between the parties.

Conceiving with a known donor – other arrangements

If the conception is not undertaken at a licensed clinic in the UK (for example, if it is pursuant to a private arrangement), the legal situation is more complex. As stated above, under English law, the woman who gives birth to the child will always be treated as the legal mother.

If the woman is not married or in a civil partnership, the donor will be the legal father (and will consequently be liable for child support if an application were to be made to the Child Maintenance Service). However, if the woman is married or in a civil partnership at the time of conception, the woman's spouse or civil partner will be the second legal parent (and be eligible to be so named on the child's birth certificate). The donor will not be the legal father despite being the biological father.

More generally, when conceiving with a known donor, it is also very important

to ensure that everyone involved understands exactly what each expects from the arrangement, and what their respective roles will be. For example, consideration should be given at an early stage of the process, preferably pre-conception, to these matters:

A sperm donor who is not the legal father has no rights and responsibilities towards the child and cannot be recorded on the child's birth certificate. He can, however, apply to the court for parental responsibility in respect of the child, so for example, he can enjoy spending time with the child and be involved in some decisions.

These are just a few of the issues which will need to be considered by intended parents and donors. In the authors' collective experience, these issues, if not properly discussed and agreed upon at the very outset, can very often lead to bitter disputes. Those who wish to embark on a journey towards building a family via donor insemination are therefore strongly encouraged to consider and agree upon these issues before conception, and to record their "agreement" in writing.

Donor or Pre-conception Agreements

Donor agreements or preconception agreements are intended to set out the roles and responsibilities each of the parties will have. Whilst these agreements are not legally binding, they can be incredibly helpful in facilitating honest conversations, setting a guiding framework in relation to the adults' roles and responsibilities in the child's life, and help avoid future disputes. There is also now case law which suggests that judges will give proper weight to these agreements if the courts are called upon to decide arrangements for a child, and the role of the adults in that child's life. In this sense, they are akin to prenuptial agreements.

Conclusion

This area of law can be immensely complex, and the stakes can be high. It is therefore vital that those intending to embark on this journey seek specialist legal advice at the very outset, preferably pre-conception, as to the possible legal implications for them and any child conceived via gamete donation.

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