

FAMILY LAW AND EGG DONATION

By Susan Katzman

Revisiting Nontraditional Families

In CITATIONS' October issue, Commissioner Young reported on dissolutions filed pursuant to California's Domestic Partnership Act.

In this issue, we continue to review issues affecting nontraditional families. Susan Katzman's article, "Family Law and Egg Donation" addresses legal concerns of families that use certain forms of assisted reproduction technology.

In December, Maria Capritto provides an overview of property transfers between Domestic Partners.

Using an egg donor or surrogate may increase your clients' chances of building a family. But what are the legal aspects of using such assisted reproductive technologies? Can your clients be sure that they will always and forever be conclusively presumed to be the legal parents, and that they will have physical and legal custody of the children they intend to parent?

The legal stage surrounding egg donation and surrogacy is active and evolving. Unlike sperm donation, egg donation in California has not been codified, but is instead based on case law. Courts have looked to the written agreements between the intended parents and the egg donor (and the egg donor's husband, if she is married) in determining the intent of the parties as to parentage.

In *Johnson v. Calvert* (1993) 5 Cal.4th 84, the intended parents and a surrogate signed a contract providing that the surrogate would be implanted with an embryo created by the sperm of the intended father and the egg of the intended mother. The surrogate would relinquish to the intended parents any parental claim to a child born. After relations between the parties deteriorated, the intended parents filed a lawsuit, seeking a declaration they were the legal parents of the unborn child. The surrogate also filed an action seeking a declaration that she was the mother of the child. The court concluded, "although the [Uniform Parentage] Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child

relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law." Footnote 10 to this case states, "in a true 'egg donation' situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law."

With a properly drafted agreement, your clients can be reasonably assured that their intention to be parents of a child conceived with donor eggs will be upheld. The agreement should clearly and with certainty detail the intentions, rights, responsibilities, and obligations of the parties.

Besides a statement of the parties' intention that any child born from the donated eggs shall be the child of the intended parents, there are other issues that should be covered in the agreement. Although this is not an exhaustive list, the agreement should include the financial responsibility of the intended parents; the egg donor's fee and what the fee covers; contact with the donor for the purpose of obtaining medical information from her, if necessary, after a child is born from the donated eggs; the disposition of any embryos that will not be transferred to the intended mother or a surrogate; the extent of medical and psychological screening; medical insurance; informed consent; and whose name will be on the birth certificate. A court proceeding is not necessary to establish maternity. When the assisted reproduction involves a gestational surrogate, either using an egg donor or the intended mother's egg, a court order is necessary to establish that the intended parents' are the legal parents; that neither the surrogate nor her husband has any legal rights or responsibilities; and that the intended parents' names will be on the birth certificate.

Same sex partners "who have chosen to share one another's lives in an intimate and committed relationship of mutual caring" (Fam. Code, § 297) and have a common residence (*id.*) can file with the Secretary of State a "Declaration of Domestic Partnership" (Fam. Code, § 298). "The rights and

obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses." (Fam. Code, § 297.5(d).)

In August 2005, the California Supreme Court decided three cases involving former same-sex couples with disputed parental rights or obligations. It said "We perceive no reason why both parents of a child cannot be women. That result now is possible under the current version of the domestic partnership statutes, which took effect this year." (*Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 119. See also, *K.M. v. E.G.* (2005) 37 Cal.4th 130; and *Kristine H. v. Lisa R.* (2005) 37 Cal.4th 156.) Based on these rulings and the California Domestic Partnership Act, full parental status may be accorded to each of two mothers for the same child without an adoption procedure.

Susan Katzman is an attorney in the Ventura County area. Her practice is focused on assisted reproductive law in the areas of egg donation and surrogacy. www.susankatzmanlaw.com. While this article is intended to provide helpful information, you should consult professionals (medical, psychological, and legal) to address your particular situation and concerns.

Sperm donation is addressed in the Family Code. The requirements for the intended father to perfect his rights are in Section 7613. Subsection (a) states, "If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived...." Subsection (b) states, "The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."