

The Out/Law Series of Legal Guides

Choosing Children

barbara findlay QC

Introduction

Many lesbian partners and gay partners are choosing to raise children. Sometimes, these are the children born to one of the partners during a heterosexual relationship. Other times, these are children born to lesbian parents; or adopted by lesbian or gay partners. This pamphlet talks about having a child, or adopting a child, during a same sex relationship.

Having a Child

Lesbian Moms

If lesbian partners are going to have a child, the first question is which of them will be the biological mother. Some lesbians choose to have two children, with each of them bearing one child. It is technologically possible, though difficult and expensive, for one mom to have the other mom's egg implanted in her so that both moms are connected to the child—one genetically, the other by being a birth mom.

The next question is where the sperm will come from. The choices are to use sperm from an unknown donor, or to use sperm donated by someone the mothers know.

Unknown Sperm Donors

If you choose to have a child by assisted insemination from an unknown donor, you will probably consult a fertility clinic. They will help you choose the donor characteristics, acquire the sperm, and inseminate. The advantage to having an unknown donor is that there is no possibility that you will ever be harassed by the donor; and the child grows up knowing the two lesbians as her family.

In Canada it is illegal for anyone to sell sperm. So most of the sperm currently used by Canadian assisted insemination clinics are acquired from the U.S. Some sperm donors stipulate that their identity never become known. Others agree that once the child has reached 18, he or she may contact them.

When you purchase sperm, you buy a 'vial'. The sperm in the vial can only be used for one attempt at insemination; so it is wise to order more than one vial.

Known Sperm Donor

If you choose to have a child by assisted insemination using sperm from someone you know, it is a very good idea to have a **donor insemination agreement**.

There are four reasons for a donor insemination agreement. The first, and by far the most, important reason is so that all the people involved in the conception - both moms, the donor, and perhaps the donor's partner - have the same understanding about the basis of the arrangement and how it will work once a child is born.

The second reason for having a donor insemination agreement is for the co-mothers to have clear evidence of the agreement in case the donor ever takes a step to assert parental rights over the child.

The third reason for having a donor insemination agreement is for the donor to have clear evidence of the promise that the co-mothers make to support their child without help from him, if anyone ever were to take child maintenance proceedings.

The fourth reason is for all the parties to be clear what everybody's rights are if they no longer get along with each other - for example, if the co-moms decide that the donor is a bad influence on the child.

Because the law does not spell out the rights and responsibilities of a donor separately from a father, there is a chance that a donor might later claim paternal rights to the child, or that the child's

parents might later make a maintenance claim against the donor. To minimize the chance of that happening, a donor insemination agreement spells out the rights and responsibilities of all the parties. It includes such things as whether the donor will have any role in the child's life, who will tell the child what the donor's identity is, what the consequences are if anyone makes a child maintenance claim against the father, what happens if the child's co-moms break up, and so on. A donor insemination agreement often specifies that the donor will consent to a **stepparent adoption** or **declaration of parentage** by the birthing mother and the co-mother.

Naming your Child

You are free to give the child a name which is the last name of either one of you, or a combination of your last names, or another name entirely.

Birth Certificate

Whether the child was conceived with sperm from a known donor or sperm from an unknown donor, both mothers can be registered on the child's birth certificate as the child's parents.

A copy of the current form by which a child is registered is at the end of this booklet.

If you are registering yourself and your partner as co-parents then:

- The birth mother must tick the box saying the birth father is incapable, outside the country, unacknowledged by the mother, unknown to the mother, or unwilling to acknowledge he is the father.
- The mother completes the "father or co-parent's information" block and signs.

If you are the Donor Dad

If you are going to be a donor, be very clear with yourself and the prospective mom(s) about why you are willing to donate sperm.

Arrangements by which you have a role in the child's life after he or she is born have never been tested in court. Generally the co-moms will want you to sign an agreement that they are the child's only parents, and a promise to sign a consent for a court order to that effect, or to a step parent adoption.

If you want to have a continuing role in the child's life, in a way that is not contingent on the co-moms' choices, then you will need to preserve as much of the 'traditional' father features as possible. For example you would not agree to a term in a donor insemination agreement that the mothers were the child's only parents, or that you would consent to a step parent adoption.

But if you opt for an arrangement or an agreement that gives you a right to have a continuing connection with the child, whether the moms want you to or not, you must face the difficult issue of what would happen if you and the moms at some point disagreed?

Step Parent Adoption

As its name suggests, a 'stepparent adoption' means that the non-biological parent adopts the child, along with the child's biological parent.

The effect of a court declaration or an adoption order to the effect that the child's two mothers, or two fathers, are the parents of the child is that those two mothers, or those two fathers, are the child's only parents in the eyes of the law. If the child was born by IVF or by assisted insemination with a known donor, all legal recognition of that person as a parent of the child is severed.

After the stepparent adoption, the parents can get a long-form birth certificate showing both of them to have been the parents of the child since the child was born.

If you are traveling to a homophobic country it is important for you to carry both the long form birth certificate and a copy of the court order with respect to the child's parentage.

Gay Dads

Adoption

Most gay couples who decide to have a child together choose to do so by adopting a child born to someone else, perhaps born in another country.

Gay partners and lesbian partners in B.C. are entitled to adopt children under the *Adoption Act*. Some adopt children in B.C. Others adopt children in international adoptions. In either case, the process involves contacting a licensed adoption agency, and arranging for a homestudy to be done. Such a study is a precondition to any adoption in B.C. except for stepparent adoptions. In addition prospective parents have to take mandatory education about adoption. All adoptions in BC must be done through those agencies, even if the birth parent knows the adoptive parents.

There are virtually no infant children available for adoption in BC. Older or special needs children are available for placement.

International adoptions are challenging, because the adoptive applicants must satisfy not only British Columbian requirements, but the requirements of Immigration Canada (to get a visa to bring the child into the country) and the requirements of the child's country.

Generally the adoption is completed in the child's country, under the laws in force there, and then the child is brought to Canada.

Since some countries will not permit children to be adopted by two same sex parents, one of the two must adopt. After the child arrives in Canada the co-parent can then adopt the child in a **stepparent adoption**.

International adoptions can take a long time, and be expensive.

A **stepparent adoption** is a process where a child is adopted as the child of both of her same sex (or opposite sex) parents. If the child has been conceived by donor insemination from a known donor, it is prudent to get the consent of the donor to the adoption. Once the child is adopted by her or his two parents, any connection to the donor or anyone else is legally severed.

In Vitro Fertilization

In Canada, it is illegal to pay a woman to be a surrogate mother. A gay couple may know such a woman personally, or make a connection over the internet.

The insemination process involves extracting an egg from the woman, fertilizing it “in vitro”, and then putting the fertilized egg back into the mother’s body. It is a procedure which is both complex and expensive. It is often not successful on the first try.

For the reasons discussed in the section on lesbian co moms, it is a very good idea to have an agreement with the gestational mother.

The information in this booklet is current to
January 2009.

This Out/Law Legal Guide is for information only. The law may have changed since its publication date. It is not legal advice. For legal advice about your own situation you should consult a lawyer.

Feel free to reproduce this booklet, provided that
you distribute it without charge and include this information block.

Published by
The Law Office of barbara findlay QC
635-1033 Davie St.
Vancouver BC V6E 1M7
604 251-4356
www.barbarafindlay.com

© barbara findlay Q.C. 2009

