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Fertility and Third Party Assisted Reproduction Law

September 15th, 2022

Andrea Collins-Fitzpatrick, Legal Director, METRAC: Action on Violence
Kelly D. Jordan, Kelly D. Jordan Family Law Firm

www.onefamilylaw.ca

Land Acknowledgment

We acknowledge that this land is the traditional territory of many nations including the Huron-Wendat, Haudenosaunee, and the Mississaugas of the Credit. Today, the meeting place of Toronto is still home to many Indigenous people. We honour all the First Nation, Metis and Inuit people living on this land. We recognize the traditional territories on which our organization is located, and on which our programs and trainings take place.

Disclaimer

This webinar is for general information purposes only and is not legal advice.

It is not intended to be used as legal advice for a specific legal problem.

METRAC

METRAC: Action on Violence

- works to end violence against women, youth and children, Two Spirit, trans and nonbinary people.
- a not-for-profit, community-based organization

www.metrac.org

METRAC's **Community Justice Program**

- provides accessible legal information and education for women and service providers
- focuses on law that affects women, from diverse backgrounds, especially those experiencing violence or abuse

FLEW, **Family Law Education for Women** in Ontario

- provides information on women's rights and options under Ontario family law
- in 14 languages, accessible formats, online and in print

www.onefamilylaw.ca

www.undroitdefamille.ca

Presenter

Kelly D. Jordan

Family Lawyer, Kelly D. Jordan,
Family Law Firm

Principal Lawyer and Mediator with Kelly D. Jordan Family Law Firm in Toronto, Ontario. Practises in the areas of family and fertility law, wills and estates. Certified as a Specialist in Family Law by the LSO. Accredited Family Mediator (OAFM). Adjunct Professor at Queen's University Faculty of Law. Particular expertise in family law issues pertaining to the gay and lesbian community and assisted human reproduction. Fellow of the American Academy of Assisted Reproductive Technology Attorneys. Co-counsel on *Baker v. Francis* (1999) and *Miglin v. Miglin* (2002) before the Supreme Court of Canada. Past Chair of the Ontario and Canadian Bar Association, Family Law Sections. Member of the Office of the Children's Lawyer. Frequent lecturer and author on issues pertaining to family and fertility law. Co-author of *Canadian Family and Immigration Law* in 2015 for Carswell.

Contributing author to Property and Support Rights and Obligations Under Ontario Family Law for Canada Law Book and to LGBTQ2+ Law: Practice Issues and Analysis for Emond Publishing. Contributing editor to Wilson on *Children and Law* for Lexis Nexis on assisted reproduction. Named as one of the Best Lawyers in Canada and as a Lexpert. Graduated from Osgoode Hall Law School 1993. Called to the Ontario Bar 1995.





Fertility and Third Party Assisted Reproduction Law



Key Concepts

Reproductive
Medicine

Statutory
Framework

What is third party reproduction?

Surrogacy

Gamete
Donation

Embryo
Donation



Gamete Donation

Sperm Donation

Egg (ova) Donation

Embryo Donation

Types of Donors

(Egg, Sperm, Embryo)

KNOWN – family member, friend, acquaintance

OPEN IDENTITY– When the child becomes 18 or 19 they have access to identifying information including name, last known contact information, etc.

ANONYMOUS – Can no longer be guaranteed for either party

Surrogacy



Definition & Types:

- a. **Traditional** (person carrying has a genetic link)
- b. **Gestational** (person carrying has no genetic link)

Surrogacy in Canada has increased 400%
in the last decade



Main reasons for growing use of surrogacy

Need & Awareness

16% of Canadian couples experience
infertility/reproductive loss

Gay couples/single men

Underlying female medical issues
incompatible with pregnancy

Fertility Law Terms

GC = Gestational Carrier
TS = Traditional
Surrogate

Gestational Surrogate;
Carrier; Surrogate

IP = Intended Parent
GM/GF= Genetic
Mother/Genetic Father

IM = Intended Mother
IF = Intended Father
IPs = Intended Parents
Recipients (donation)

Donor

Who is NOT
considered a donor
or a surrogate?

What is intrauterine insemination (IUI)?

IUI vs. Home Insemination

- **IUI is a medical procedure** that puts sperm directly inside the uterus through a catheter, around the time of ovulation
- **Benefits:**
 - Cuts down on the distance sperm travel, making it easier to fertilize the egg
 - Supported by cycle monitoring, which ensures accurate timing
 - Less expensive and less invasive than IVF
- **Possible risks incl** (esp. with medicated cycles): multiples, premature delivery, miscarriage, ectopic pregnancy
- **IUI is not guaranteed to be effective**
 - 20% cycle success for women under 35, which drops significantly as women age, and after 5-6 cycles
- **Who uses IUI with 3rd Party?**
 - People in need of donor sperm: Lesbian couples, trans couples, straight couples with male factor infertility, single women
- **Who uses Home Insemination with 3rd Party?**
 - People in need of sperm (more often known): Lesbian couples, trans couples, straight couples with male factor infertility, single women
 - People doing Traditional Surrogacy

What is In-Vitro Fertilization (IVF)?

Who uses IVF?

- **IVF is a medical procedure** whereby retrieved eggs are fertilized by sperm in a lab, and 1 or more fertilized eggs (embryos or blastocysts) are transferred into a uterus
 - IVF vs. ICSI (Intracytoplasmic sperm injection)
- **Benefits:** Higher success rate than IUI/insemination, only way to do gestational surrogacy and egg donation, necessary if there are male factor limitations, freezing embryos
- **Possible risks incl:** ovarian hyperstimulation, multiples, premature delivery, miscarriage, ectopic pregnancy
- **IVF is not always successful**, and statistics can be misleading
 - Pregnancy vs. live birth, age, genetic testing, etc
- **IVF with 3rd Party Reproduction**
 - Retrieval vs. transfer
- **Who uses IVF with 3rd Party?**
 - People in need of donor eggs and/or surrogacy: gay male couples, trans couples, straight couples with female factor infertility, single men
 - Egg donors (retrieval)
 - Surrogates (transfer)

Psychological Issues for IPs

(Hetero vs. LGBTQ+)

Surrogacy: Trauma; Grief; Guilt; Jealousy; Fears re: Loss of control re: decision making & inclusion (prenatal care, termination, nutrition, activities); Disclosure; Bonding; Religious concerns; Stigma; Logistics; Finances, etc.

Donation: Trauma; Grief re: loss of genetic link/traits; Loss of racial/ethnic/nationality connection; Type of arrangement; Inequality with partner; Difference with multiple children; Religious concerns; Stigma; Disclosure, etc.

Psychological Issues for Surrogates

Loss of control/shared control; Patient autonomy; Impact on intimate relationship, children & other relationships; Emotional impact of medication; Disclosure; Workplace concerns; Expenses; Logistics; Parental under or over-involvement; Complications in pregnancy/delivery; Post-partum depression; Guilt; Grief; Conflict; Unmet expectations/promises during/after delivery, etc

Psychological Issues for Donors

Egg Donors: Fears re: medical procedures, injections, side effects; Logistics; Patient autonomy; Lack of information at various stages; Satisfaction re: arrangement in the short & long-term; Questions re: outcome(s); Future disclosure re: partner/children; Contact with offspring, etc.

Sperm & Embryo Donors: Satisfaction with arrangement short & long-term; Questions re: outcome(s); Disclosure; Contact with offspring, etc

Psychological Issues for Offspring

Details that are often considered in a Surrogacy Agreement (other than parentage)

- How many embryos to transfer at a time? How many transfers will occur over the length of the agreement? How many fetus(es) is the surrogate willing to carry?
- What happens if the embryos split?
- What is the plan if there is a medical issue and/or bed rest is required?



Details that are often considered in a Surrogacy Agreement (other than parentage) Continued

- Abortion, selective reduction
- Medical testing
- Type of medical care (obstetrician, midwife, doula)
- Travel, food, activity restrictions
- Confidentiality
- Future relationship of the surrogate and child
- Plan in the event that the intended parents divorce or pass away
- Expenses/details/maximums/regulations reference



Details that are often considered in a Sperm/Ova Donor Agreement

- Obligations of donor and recipient
- Donor's health warranties
- ID of clinic, location
- maximum expenses, specifics, reference to regulations
- Future contact; limits; donation: open ID; anonymous; known
- Confirmation of intent that donor is not a parent
- Waivers/releases by donor re: parentage rights
- Waivers/releases/indemnification by recipient re: child support

Ontario's New Parentage Law



“Multiple Parents” or Restrictions on Parentage?



January 1, 2017 – Bill 28 “All Families Are Equal Act”

Parts I and II of the *Children’s Law Reform Act* are repealed and rewritten

CLRA circa 1978 is finally updated to bring parentage legislation in step with LGBTQ families and assisted reproduction

Related statutes are amended including the SLRA, and the *Child Support Guidelines*

CLRA: Who is a Parent

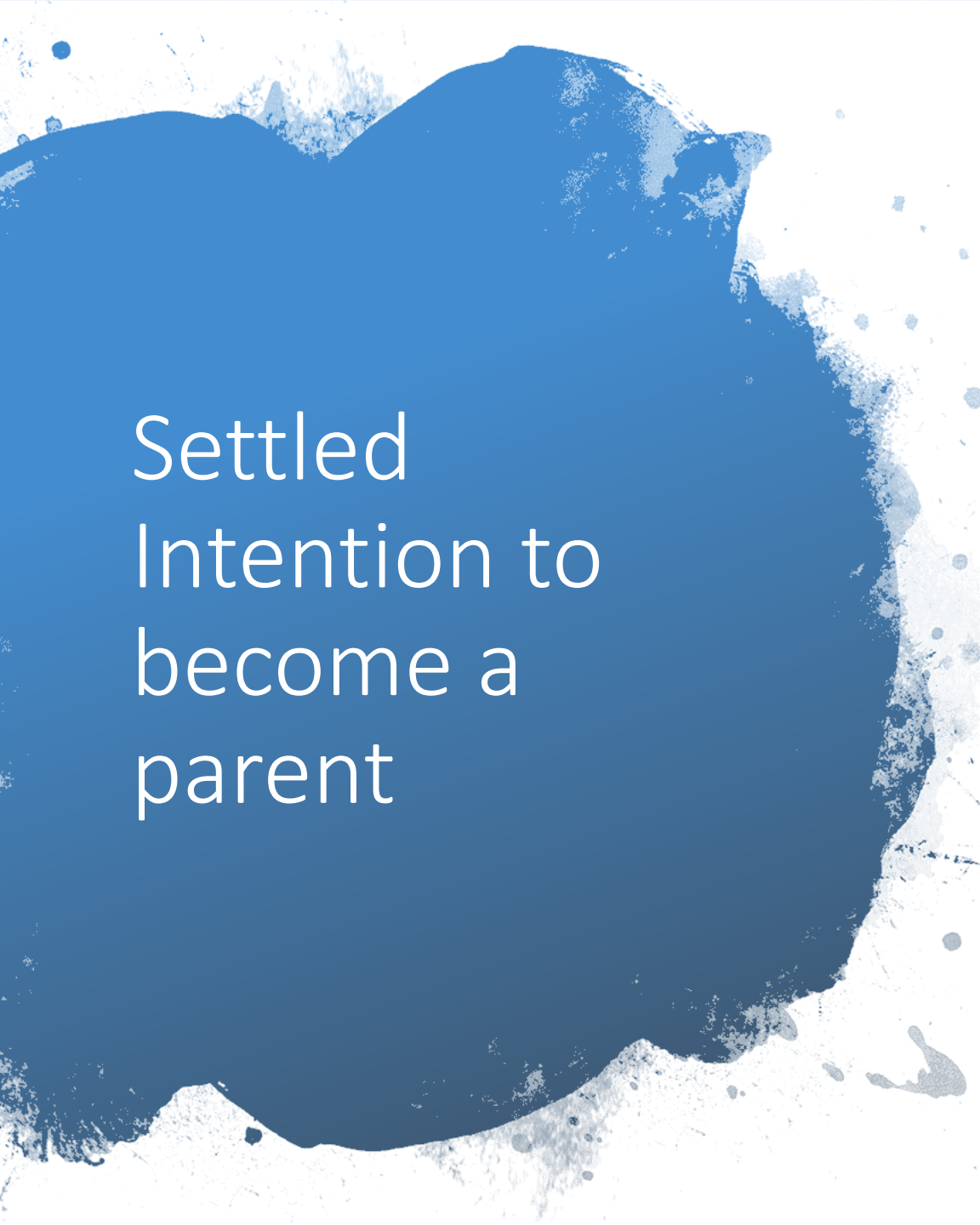
A **birth parent** is a parent, section 6 (exception surrogacy, subject to sections 6 and 10)

A birth parent is the “person who gives birth” and is no longer gender defined



CLRA: Who is a Parent (continued)

- A person who **provides sperm** through **sexual intercourse** is a parent, unless there is a written pre-conception donor agreement, section 7
- There is a presumption that a child conceived through sexual intercourse is a parent
 - If that person was the spouse of the birth parent at the time of birth
 - Married to the birth parent at the time of birth
 - Living in a conjugal relationship with the birth parent at birth and child is born within 300 days
 - Signs the birth registration
 - Found by a court to be a parent



Settled Intention to become a parent

Donors who stood in the place of the parent or have demonstrated a settled intention to treat the child as his or her family may bring claims to receive child support, or may have claims for child support brought against them.

Settled intention through access and must show more than a display of common courtesy or hospitality towards the child.

Section 5 of the Child Support Guidelines states that the amount of support that a person who stands in the place of parent is expected to provide is that which the court considers appropriate.


CLRA: Who is NOT a Parent?

- If using assisted reproduction, a **donor** of sperm, egg, embryo **is not** a parent, section 5
- **HOWEVER**, if the donor thereafter develops of relationship with the resulting child that a court considers to have met the test of 'settled intention to parent', the status of 'donor' may morph into that of 'parent', and accordingly, the rights/obligations that go along with 'parent' may apply
- A **surrogate** is NOT a parent, provided the criteria in Sections 10 and 11(surrogacy), and/or 13 (declarations of parentage) are met
- A Surrogate cannot sign a Statutory Declaration under Section 10 until the child is at least 7 days old

CLRA Amended: s. 13

- Declarations of parentage and non-parentage can be made on the balance of probabilities
- Must be made within 1 year of birth unless court orders otherwise
- Adopted children are excluded
- Pre-conception intent must be established
- Declarations of parentage are no longer required by intended parents when there is a pre-conception written surrogacy agreement, with independent legal advice on both sides
- Up to 4 people can be named as 'parents' without a court order, provided the requisite criteria are met, including a pre-conception written agreement

Statement of Live Birth – 3 or 4 Parents

 **Ontario** **ServiceOntario**

This is a permanent legal record.
Please read all instructions before completing this form.
Type or print clearly in blue or black ink and complete all items.

Office of the Registrar General
189 Red River Road
PO Box 4500
Thunder Bay ON P7B 6L8

Statement of Live Birth
Form 2 (With Three or Four Parents)
Vital Statistics Act

Section A - Child's Information (see instruction #1) If the child is being given a Single Name you must follow instruction #1b

Last Name or Single Name _____ First Name _____ Middle Name(s) _____ Sex of Child _____

Date of Birth (yyyy/mm/dd) _____

Place of Birth (City/Town/Village/Township) _____ Name of hospital (if not hospital give exact location where birth occurred) _____

Section B - ☐ Mother ☐ Father ☐ Parent (see instructions #3)

Current Legal Last Name or Single Name _____ (Regional municipality, county or district) _____

First and Middle Name(s) _____ Legal Last Name or Single Name at Birth _____

Any Previous Legal Last Name(s) or Single Name(s) _____ Date of Birth (yyyy/mm/dd) _____

Marital Status ☐ Single ☐ Married ☐ Common Law ☐ Divorced ☐ Widowed _____ Place of Birth (City/Town/Village/Township) / (Province/Country) _____ Age _____

I agree that the child's last name or single name will be as shown in Section A ☐ Yes ☐ No

I certify the statements made on this form are true and correct and I am aware it is an offence to wilfully make false statements. ☒ X

Section C - ☐ Mother ☐ Father ☐ Parent (see instructions #4)

Current Legal Last Name or Single Name _____ Surrogate birth? If Yes, see instruction 2c ☐ Yes ☐ No

First and Middle Name(s) _____ Date (yyyy/mm/dd) _____

Any Previous Legal Last Name(s) or Single Name(s) _____ Legal Last Name or Single Name at Birth _____

I agree that the child's last name or single name will be as shown in Section A ☐ Yes ☐ No

I certify the statements made on this form are true and correct and I am aware it is an offence to wilfully make false statements. ☒ X

Section D - ☐ Mother ☐ Father ☐ Parent (see instructions #4)

Current Legal Last Name or Single Name _____

First and Middle Name(s) _____ Date (yyyy/mm/dd) _____

Any Previous Legal Last Name(s) or Single Name(s) _____ Legal Last Name or Single Name at Birth _____

I agree that the child's last name or single name will be as shown in Section A ☐ Yes ☐ No

I certify the statements made on this form are true and correct and I am aware it is an offence to wilfully make false statements. ☒ X

Section E - ☐ Mother ☐ Father ☐ Parent (see instructions #4)

Current Legal Last Name or Single Name _____

First and Middle Name(s) _____ Date (yyyy/mm/dd) _____

Any Previous Legal Last Name(s) or Single Name(s) _____ Legal Last Name or Single Name at Birth _____

I agree that the child's last name or single name will be as shown in Section A ☐ Yes ☐ No

I certify the statements made on this form are true and correct and I am aware it is an offence to wilfully make false statements. ☒ X



Q & A



THANK YOU

METRAC



158 Spadina Rd

Toronto, ON, Canada

(416) 392-3135

info@metrac.org | www.metrac.org

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