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Advising Clients Considering a Co-maternity
by Bill Singer

Thanks to advances in reproductive medicine, some female same-sex couples who are creating a family choose to undertake what is known as a co-maternity, or ovum sharing. Co-maternity enables both women in the relationship to participate in the creation and gestation of their child.

Under this procedure, a reproductive medical doctor harvests viable eggs from mother #1. Then, using sperm from a known or unknown donor, a reproductive medical physician creates pre-embryos. One or more of these pre-embryos is implanted in the uterus of mother #2, who carries the child full term and gives birth.

If your clients are considering undertaking a co-maternity, here are some issues they should consider:

Clinic documents. Normally, reproductive medical clinics deal with women who are donating their ova. Donors want to surrender all of their rights to any children born from the donated eggs. As a result, clinics produce documents written to meet the needs of these donors.

Unlike most egg donors, in a co-maternity the intended mother from whom the eggs are harvested does *not* want to surrender her parental rights. Unfortunately, clinics and patients do not carefully review the documents. Often unwittingly, intended mothers sign legal paperwork that contradicts their intent.

Later, if a controversy arises between the two mothers, problems can ensue. In a Florida case, the gestational mother asserted the genetic mother had no rights, using the executed clinic documents surrendering the mother's rights as evidence that the genetic mother never intended to be a parent. After years of court battles, the Florida Supreme Court found that despite the clinic documents, the genetic mother was a legal parent.[1]

To prevent a fight over parental rights in the future, if clients are considering a co-maternity, make sure they carefully read the clinic documents. Make sure that anything they are asked to sign accurately reflects their intentions. They should refuse to sign any clinic documents until they properly reflect the intentions of the parties. As a best practice, have the clinic documents reviewed by an experienced assisted-reproductive technology attorney.

Disposition of unused genetic material and embryos. After completion of the co-maternity process, the mothers may have leftover and unused genetic material, such as sperm from a donor, or unused embryos. What happens to this genetic material? Use it, donate it or destroy it are the three options. They are considered property, and subject to property division in case of divorce or dissolution of a civil union.

It is crucial the mothers discuss these issues and sign a written agreement between themselves regarding ownership and disposition of this material. They need to resolve who will have ownership if the relationship of the mothers ends, or if one or both of the mothers dies.

Most states do not have laws covering the disposition of these genetic assets. Thus, if there is a disagreement, the parties may have to resort to asking a judge to make a determination. To avoid the expense and stress of litigation, it is best for the parties to determine these issues before a crisis develops.

Issues resolving legal parentage. Despite the marriage equality decision in *Obergefell v. Hodges*,[2] it is still advised that the non-biological parent of a child in a same-sex couple obtain a court order confirming the non-biological parent's legal status. Marriage equality does not equal parentage equality.

In New Jersey, there is a rebuttable presumption that the spouse of a married woman who gives birth is the second parent of that child. Using that presumption, the non-gestational mother's name is put on the birth certificate. But, that presumption can be rebutted if it can be proved that the spouse is not genetically related to that child.[3]

In the scenario of a co-maternity where the non-gestational parent is biologically related to the child, one could argue that no court order is necessary, as the presumption cannot be overcome. That being true, it may still be advisable for the non-gestational mother to obtain a confirmatory adoption or parentage order. A birth certificate is only a record of what was told to the registrar of births. Facts on a birth certificate, unlike a court order, can be examined and discounted.

In a hostile state or a foreign country where same-sex parents are uncommon or refused recognition, families with two parents of the same sex can be questioned on the legal parentage of the woman who did not give birth. Having a court order to demonstrate the parentage of both parents should quell any inquiry.

When confronted with an adoption petition where one parent is the genetic parent and the other the gestational parent, judges have asked who should be the adopting parent. After all, the woman whose egg was used is a biological parent to the child.

However, in New Jersey a woman who gives birth is considered the mother. State regulations governing the creation of birth records require that the woman who gives birth must be recorded as a parent on the birth certificate.[4] Thus, the gestational mother is on the birth certificate by virtue of that regulation.

In these cases, the biological mother would be the adopting parent or the parent proving parentage. As a best practice, the order, whether an adoption order or parentage order, should list both women's names as the legal parents, making it clear they are equal parents.

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Endnotes

1. *D.M.T. v. T.M.H.*, 129 So. 3d 320 (Fl. 2013).
2. 576 U.S., 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).
3. *See* N.J.S.A. 9:17-43.
4. N.J.A.C. 8:2-1.4(a).