Toronto Law Journal

Modern Families: Assisted Human Reproduction, Private Sperm Donations & The Deciphering of Parentage

Michael J. Ashley, Boulby Weinberg LLP

For many people, regardless of their age, sex or sexual orientation, biological complications to reproduction affect their ability to naturally conceive a child, thereby necessitating the use of donated sperm or ova, or both, and/or insemination or other assisted human reproductive procedures such as *in vitro* fertilization. As a result of these complications, federal and provincial governments have adapted their laws regarding assisted human reproduction and parentage to facilitate a process of family planning more conducive to these realities. For many of these laws, the genesis of change has been the Court and reflects the Court's reaction to the biological restrictions on family planning within the LQBTQ+ community (see *Rutherford v. Ontario (Deputy Registrar General),*[1] *A.A. v. B.B. and C.C.*[2] and *Grand v. Ontario (Attorney General)*[3]).

While the circumstances driving the need for reproductive assistance vary greatly (i.e., singles, heterosexual or homosexual couples, or arrangement between any combination of those three), the process of conceiving a child and becoming a parent is the same for all persons and can be quite cumbersome to navigate, especially given the intersection between assisted human reproduction and criminal law.

Restrictions on the Donation of Gametes (Sperm and Eggs) or In Vitro Embryos

In order to be a sperm or ova donor in Canada, the donor must be eighteen years or older[4] and must provide written consent for the use of their genetic material.[5] The same is true regarding the posthumous use of someone's sperm or egg; they must have previously consented to the use of their genetic material.[6] Similarly, an *in vitro* embryo donor must provide their written consent for the use of their *in vitro* embryo.[7]

Prohibition on Financial Gain and the Reimbursement of Expenses

Under the *Assisted Human Reproduction Act* ("*AHRA*"), the donation of sperm or ova must be altruistic, that is, the purchase, or offer to purchase, sperm, ova or *in vitro* embryos is

[1] *M.D.R. v. Ontario (Deputy Registrar General),* 2006 CanLII 19053 (Ont. S.C.J.)
[2] *A.A. v. B.B. and C.C.* 2007 CarswellOnt 2 (C.A.)
[3] *Grand v. Ontario (Attorney General)* 2016 CarswellOnt 8390 (S.C.J.)
[4] *Assisted Human Reproduction Act*, SC 2004, c 2, as am, at s.9
[5] *Ibid* at s.8(1)
[6] *Ibid* at s 8(2)
[7] *Ibid* at s.8(3)

prohibited in Canada.[8] It is a criminal offence to violate these provisions. If found guilty, they could face a fine between $250,000.00 and $500,000.00 and/or between five and ten years in jail.[9]

However, the donor is entitled to the reimbursement of expenses reasonably related to the course of donating the sperm or ova or the maintenance and transportation of an *in vitro* embryo as outlined in the *AHRA*[10] and sections 2 and 3 of the *Reimbursement Related to Assisted Human Reproduction Regulations* ("*Regulations*").[11] Further guidance on these expenditures is available in Health Canada's "Guidance Document: *Reimbursement Related to Assisted Human Reproduction Regulations.*"[12]

Form and Substance of a Request for Reimbursement

A request for reimbursement must be made by the donor in writing, dated and signed. Additionally, any relevant receipts must be provided.[13] The *Regulations* contain specific and detailed requirements to document these requests.

If applicable, the reimbursement request must include a copy of any relevant written referral provided by a treating physician in Ontario prior to the incurrence of the expense.[14]

Automobile Travel Expenses (for which no printable receipt is provided (such as Uber))

If automobile travel expenses are being requested, no receipt is required. However, the reimbursable amount will depend on the kilometres travelled and the CRA's allowance rate for the relevant year.[15]

Distribution of Sperm and Ova Prohibited, Subject to Regulations

The distribution of sperm (that is, sperm that is not intended to be used by the spouse of the sperm donor) and ova (that is, ova intended to be used by another female that is not the donor or their spouse) is prohibited unless they have been tested; obtained, prepared, preserved, quarantined, identified, labelled and stored and its quality assessed; and, the donor has been screened and tested, and the donor's suitability has been assessed, all in accordance with the

---

[8] *Ibid* at s.7(1) to (2)
[9] *Ibid at* s.60(a) to (b)
[10] *Ibid at* s.12(1)(a) to (b)
[11] *Reimbursement Related to Assisted Human Reproduction Regulations,* SOR/2019-193, as am.
[12] Canada, Guidance Document: Reimbursement Related to Assisted Human Reproduction, (Ottawa: Health Canada, 2019)
[13] *Supra* note 4 at s.12(2)
[14] *Ibid* at s.6
[15] *Supra* note 11 at s. 5. The CRA outlines the automobile allowance rates at any given year online on the Government of Canada website at: https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/payroll/benefits-allowances/automobile/automobile-motor-vehicle-allowances/automobile-allowance-rates.html

regulations. The same is true regarding ova obtained from a donor that is intended to be used by the donor as a surrogate.[16]

Violating these provisions is a criminal offence. If found guilty a person, they could face a fine between $100,000.00 and $250,000.00 and/or between two and five years in jail.[17]

Presumptions of Parentage in Sperm, Egg, and In Vitro Donations

Under the *Children's Law Reform Act* ("*CLRA*"),[18] as amended by the *All Families are Equal Act*, the donor of sperm, ova or *in vitro* embryos is not, by law, a parent to the child unless, in the case of sperm, the donation is performed through sexual intercourse.[19] In that case, unless the sperm donor consented pre-conception to non-parentage,[20] the person whose sperm was used to conceive the child through sexual intercourse is a parent.[21]

Furthermore, unless the contrary is proven on a balance of probabilities, if the child was conceived through sexual intercourse, a person is presumed to be the parent of the child under 7(1) of the *CLRA* if that person:

(a) was the birth parent's spouse at the time the child was born;

(b) was married to the birth parent by marriage that was terminated by death, judgement, or divorce granted within 300 days before the child was born;

(c) was living in a conjugal relationship with the birth parent before the child's birth and the child was/were born within 300 days after they ceased living in a conjugal relationship with the birth parent;

(d) certified the child's birth as a parent under the *Vital Statistics Act*[22], or similar act within Canada; or,

(e) was found to be a parent by of the child by a Court of competent jurisdiction outside of Ontario.[23]

If any of these presumptions applies to more than one person, that presumption is deemed not applicable for the purpose of determining parentage and any interested party or parties whose presumption is negated may file an application for the declaration of parentage under s. 13 of the *CLRA*.[24]

---

[16] *Supra* note 4 at s.10(2) to (3)
[17] *Ibid* at s.61(a) to (b)
[18] *Children's Law Reform Act*, R.S.O. 1990, c. C.12, as am.
[19] *Ibid* at s.7(1)
[20] *Ibid* at s.7(4) and (5)
[21] *Ibid* at s.7(1)
[22] *Vital Statistics Act*, R.S.O. 1990, c. V.4, as am.
[23] *Supra* note 19 at s.7(2)(1) to (5)
[24] *Ibid* at s.7(3). Currently, there does not appear to be any caselaw dealing with the consequences of negating the presumptions which apply to two or more people, nor does the *CLRA* specifically provide for a remedy for this

If the birth parent who conceived either through the insemination of donor sperm or assisted reproduction, including *in vitro* fertilization of an embryo, had a spouse (meaning a person to whom the birth parent is married or with whom the birth parent is living in a conjugal relationship outside marriage, as defined by the *CLRA*)[25] at the time of conception, that spouse is a parent of the child,[26] unless that spouse did not consent to being a parent or they previously consented to being a parent but withdrew their consent;[27] the birth parent was a surrogate;[28] or the child is conceived after the death of a person declared to be a parent of the child posthumously pursuant to s.12 of the *CLRA*.[29]

Pre-Conception Parenting Agreement

Prior to the conception of a child, a birth parent and other relevant parties may enter into an enforceable written agreement regarding the parentage of the child. Pursuant to the *CLRA*, this document is referred to as a "Pre-Conception Parenting Agreement".[30]

A Pre-Conception Parenting Agreement must be entered into prior to the conception of the child to displace any presumptions of parentage. In the case of *M.R.R. v J.M.*, the Ontario Superior Court of Justice confirmed that a retroactive attempt (in this case, nine months after the child was born) to contract out of the presumption that someone who donates sperm through sexual intercourse is a parent of the child is non-binding.[31]

Parties may only enter into a pre-conception parenting agreement if: there are no more than four parties to the agreement; the birth parent is not a surrogate and is a party to the agreement; and, if applicable, the sperm donor who donated through sexual intercourse is a party to the agreement; or, if applicable, the spouse of the birth parent is a party to the agreement if the child was conceived either through assisted reproduction, such as *in vitro fertilization*, or insemination.[32]

The spouse of the birth parent need not be party to the agreement (in the case of *in vitro* or insemination) if the spouse provides written consent not to be a parent of that child and does not withdraw their consent. Each party to the pre-conception agreement will be recognized, in law, as the parents of the child on the birth of that child.[33]

---

negation under the applicable section. While the *CLRA* permits four or more people to be a parent of a child and the spirit of the *All Families are Equal Act*, which amended the *CLRA*, is to streamline the issue of parentage, s. 7(3) effectively requires interested parties

[25] *Supra* note 19 s.1(1)
[26] *Ibid* at s.8(1) to (2)
[27] *Ibid* at s.8(3)
[28] *Ibid* at s.8(4)
[29] *Ibid* at s.8(4)
[30] *Ibid* at s.9(1)
[31] *M.R.R. v J.M.*, 2017 ONSC 2655 (CanLII) at para. 65-66, 82-83
[32] *Supra* note 19 at s.9(2)
[33] *Ibid* at s.9(4)

Displacing the Presumption of Parentage Post-Conception by a Sperm Donor Through Sexual Intercourse

The Court in *M.R.R. v J.M.* further analyzed the availability of a declaration of non-parentage under section 13 of the *CLRA* to a sperm donor who donated sperm through sexual intercourse without a valid Pre-Conception Parenting Agreement. In doing so, the Court considered the settled intention of the parties, whether the settled intension changed post-conception and the best interest of the child. With regard to the parties' intentions, the Court found that the parties acted in a way which was consistent with the settled intention that the sperm donor was not a parent.[34] The Court also found that "[examining] the "best interests of the child" in a parentage case could produce results that directly contradict the spirit and purpose of Part I of the *CLRA*."[35] It further stated that, "Part I of the amended *CLRA* was designed to protect the security of children regardless of family composition; a family can be comprised of one parent and one or more children."[36] Finally, the Court determined that, in cases where both parties had the settled intentions that the birth parent would be a single parent, the argument that financial support from the sperm donor would be in the best interest of the child is not consistent with the spirit of the *CLRA* of providing parents with autonomy in defining their family unit, including excluding known sperm donors or surrogates as parents and could, if permitted, discriminate against those who choose to be single parents prior to the conception of the child.[37] As such, "the court is not required to look to the child's 'best interests' in the traditional sense in every case when making a declaration of parentage" under section 13 of the *CLRA*."[38]

Although the Court in *M.R.R. v J.M.* displaced the presumption of parentage for the sperm donor who conceived the child through sexual intercourse, Justice Fryer was clear in her decision that,

> This case *should not stand for the proposition that parties are not required to reduce their agreement to writing*. Rather the facts in this case highlight how crucial it is for parties to have a written agreement clearly defining their intentions before a child is conceived. Decisions as to whether or not to be a parent to a child are far better reached in a dispassionate setting than in the emotional place following the conception and birth of the child. [Emphasis added.][39]

Summary of Parentage

In summary, regarding parentage of a child conceived through assisted human reproduction, such as *in vitro* fertilization, or through sexual intercourse and not for the purpose of surrogacy,

---

[34] *Supra* note 34 at para 88-135
[35] *Ibid* at 149
[36] *Ibid* at 149
[37] *Ibid* at 149
[38] *Ibid* at 150
[39] *Ibid* at 164

In all cases, the birth parent *is* a parent of the child;

In all cases of insemination or assisted human reproduction, such as *in vitro* fertilization, the sperm donor *is not* a parent;

In all cases of insemination or assisted human reproduction, such as *in vitro* fertilization, the egg donor *is not* a parent;

In all cases of insemination or assisted human reproduction, such as *in vitro* fertilization, the spouse of the birth parent *is* a parent, unless the spouse of the birth parent consents to non-parentage and does not withdrawn their consent; and,

In all cases of donation of sperm by sexual intercourse, subject to an agreement, in writing, whereby the donor consents to non-parentage prior to conception of the child, the sperm donor *is* a parent.

In all cases of donation of sperm by sexual intercourse the presumption is that anyone under s.7(2)(1) to (5) *is* a parent, unless proven otherwise on a balance of probabilities, including the spouse of the birth parent at the time the child was born.

Restrictions on Surrogacy and the Prohibition on Financial Gain

A surrogate must be twenty-one years or older.[40] Surrogacy must also be an entirely altruistic act — that is, it is prohibited to pay, offer to pay, or advertise payment for a surrogate's services. Furthermore, it is prohibited to pay or accept payment for the arrangement of a surrogate's services, offer to pay or accept payment for the arrangement of a surrogate's services or advertise payment or receipt of payment for the arrangement of a surrogate's services.[41] If any person violates these provisions and is found guilty, they could face a fine between $100,000.00 and $250,000.00 and/or between two and five years in jail.[42]

Reimbursement of Surrogate's Expenses

Surrogates are entitled to be reimbursed for some expenses incurred during their surrogacy as outlined in the *AHRA*[43] and section 4 of the *Regulations*.[44] Further guidance on these expenditures is available in Health Canada's "Guidance Document: Reimbursement Related to Assisted Human Reproduction Regulations."[45]

Criminal Sanctions for Violation of the AHRA and Regulations Regarding Reimbursement of Surrogate's Expense

---

[40] *Supra* note 4 at s.6(4)
[41] *Ibid* at s.6(1) to (3)
[42] *Ibid* at s.61(a) to (b)
[43] *Ibid at* s.12(c)
[44] *Supra* note 11 at s.4
[45] *Supra* not 12

The reimbursement or payment of funds for any other purpose not permitted by the *Regulations* is a criminal offence. If any person violating these provisions and is found guilty, they could face a fine between $100,000.00 and $250,000.00 and/or between two and five years in jail.[46]

Unenforceability of a Surrogacy Agreement

Under the *CLRA*, a surrogacy agreement (that is, a written agreement between a surrogate and one or more persons respecting a child to be carried by the surrogate, in which, the surrogate agrees to not be a parent of the child, and each of the other parties to the agreement agrees to be a parent of the child)[47] is unenforceable and may only be used as evidence of the parties' intentions, including the intended parent(s)' intention to be a parent and the surrogate's intention not to be a parent of the child.[48]

Consequently, if a surrogate refuses to consent to relinquish her rights as a parent after the child's birth, the intended parents must bring an application.

Parentage and Surrogacy

A surrogacy agreement must be in writing[49] and recorded prior to the conception of the child, with all parents and the surrogate receiving independent legal advice. The maximum number of parties to a surrogacy agreement permitted by the *CLRA* is five, being the surrogate and up to four intended parents.[50] Additionally, a precondition to a surrogacy agreement is the conception of the child through assisted reproduction such as *in vitro* fertilization.[51] An oral agreement is not enforceable as a surrogacy agreement.[52]

A surrogate must consent in writing to the relinquishment of their entitlement to parentage of the child no earlier than 7 days after the birth.[53] If this is done, the child becomes the child of the intended parents who were parties to the surrogacy agreement and the child ceases to be the surrogate's child.[54] Between the date of the child's birth and the seventh day, all parties to the surrogacy agreement are entitled to share the rights and responsibilities of a parent.[55] There is no requirement for any party to a surrogacy agreement to apply to the court for the declaration of parentage pursuant to s. 13 of the *CLRA* under these circumstances.[56]

If the surrogate refuses to provide the consent required to relinquish her rights has a parent to the child (or if the surrogate has died or cannot be located) any party to the surrogacy

---

[46] *Supra* note 4 at s.61(a) to (b)
[47] *Supra* note 19 at s.10
[48] *Ibid* at s.10(9)
[49] *Ibid* at s.10(1)
[50] *Ibid* at 10(2)(3)
[51] *Ibid* at s.10(2)(4)
[52] *M.L. v. J.C.*, 2017 ONSC 7179 a para. 64-65
[53] *Supra* note 19 at s.10(4)
[54] *Ibid* at s.10(3) and (4)
[55] *Ibid* at s.10(5)
[56] *Ibid* at s.10(3)

agreement may make an application to the Court for the declaration of parentage pursuant to s.10(6) and 13 of the *CLRA*. The Court may either grant the declaration sought in the application or make any other declaration respecting the parentage of the child born to the surrogate. In doing so, the Court must consider the best interest of the child as the paramount consideration.[57]

For the purpose of clarification, no more than four persons may be a parent of the child. If that limit is exceeded and the surrogate has relinquished her parentage, the parties to the agreement must apply to the Court for a declaration of parentage of the child under s. 11(1) and (4) of the *CLRA*.[58]

Limitation Period for the Application for Declaration of Parentage Under the CLRA

An application for the declaration of parentage must be made before the child's first birthday.[59]

In summary,

> If there are no more than four intended parents and the surrogate has relinquished her rights as a parent in writing no earlier than seven days after the child's birth, the intended parents *are* parents and *do not* need to file an application for the declaration of parentage.[60]
>
> If there are no more than four intended parents and the surrogate has not provided written consent to relinquish her rights as a parent no earlier than seven days after the birth, *an application for the declaration of parentage under s. 10 and 13 of the CLRA is required.*[61]
>
> If there are more than four intended parents, whether or not the surrogate has provided written consent to relinquish her rights as a parent within the requisite time period, *an application for the declaration of parentage under s. 11 and 13 of the CLRA is required.*[62]

Conclusion

While the changes to the *CLRA* have certainly provided all persons more autonomy in family planning, the intersection between assisted human reproduction or sperm donation and parentage under the *CLRA* and the substantial regulations and potential criminal sanction under the *AHRA* creates a complicated legal regime. Prospective parents, donors, and surrogates all need advice as to their respective rights and responsibilities before a child is conceived,

---

[57] *Ibid* at s.10(8)
[58] *Ibid* at s. 11(1) and (4)
[59] *Ibid* at s.11(2)(b) and s.13(5)(1)
[60] *Ibid* at s. 10(3)
[61] *Ibid* at s.10 and 13
[62] *Ibid* at s.11 and 13

Lawyers practicing in this field need continued legal education on these issues in order to provide adequate advice to their clients.