"Courts Find It Harder To Tell Who Is A Parent"

Article By Stuart S. Sacks

The Pennsylvania Superior Court for the first time has held a third-party sperm donor liable for the financial support of two children born to domestic partners as the result of artificial insemination procedures. If ever there was a call for legislative action to set statewide policies, this case and the growing number of others like it, demand that now is the time.

Jodilynn Jacob and her domestic partner, Jennifer Lee Shultz-Jacob, enjoyed a civil union in Vermont and were raising four children. Wanting more kids, Shultz-Jacobsolicited her friend Carl L. Frampton Jr. to donate his sperm so her partner could bear a child. After successful artificial insemination procedures, Jacob gave birth to two more children, one in 1998 and one in 2000. Frampton was not named on the birth certificates.
Several years later, when Shultz-Jacob separated from her partner, she sued Jacob for legal and physical custody of all the children in York County. Jacob then sued for support in Dauphin County, where she was then living. Shultz-Jacobasked the court to bring in Frampton, arguing he was an indispensable party and was liable to share the burden of support. The court declined, saying that he played a minimal role in raising and supporting the children and that there was no precedent to hold three people liable.

On April 30, the Superior Court saw the support obligation differently because Frampton had contributed money for the benefit of the children, had visited them and was known to them as "Papa." It found Frampton had a statutory duty of support, just like any other parent. It based its ruling, in part, on a 2002 case holding that same-sex partners who assume parental duties are liable for child support on traditional theories of "equitable estoppel" (not allowing an adult to escape an obligation he or she took on) and not statutory grounds. The court also referred to a 2004 case that held an oral agreement by a woman to receive donated sperm in exchange for the donor's release from sup port is not enforceable.

Donor cases are complicated by the traditional view of adoption law that recognizes shifting rights only by court order. In donor cases, no one knows for sure if a married couple must adopt a child conceived by donor sperm, donor egg or donated embryo. In surrogacy cases, the rights of the surrogates and the intended parents are without safe harbor guidelines or regulations.

Various estimates have placed the number of children born in the U.S. through artificial reproductive technology at about 100,000 per year, almost one per 100. Of this number, 40,000 are born through sperm or egg donation. As of 2006, reports indicate there are more than 20,000 frozen embryos, of which almost all belong to people known to be at various stages of planning to use them for their own fertility treatments.

Sperm banks and egg donation centers include possibilities for an unimaginable number of additional opportunities. These opportunities are also available outside of the U.S. Fertility centers are thriving worldwide with the same scientific advances and benefit from legislative protections recognizing and fostering the process. The movement has matured so that current European legislation has advanced to addressing the rights of offspring and their siblings to know each other and their "extended" families, even if the donations were anonymous. The Internet has given us donorsiblingregistry.com for those trying to connect, and DNA tests are available to break shields of anonymity.
Two themes emerge from the Jacob case. First, courts are struggling to apply traditional laws to these nontraditional relationships and the new families created by successful reproductive technologies. Even more so than with "traditional" couples, domestic partners need partnership agreements and prebirth arrangements to define and acknowledge these relationships.

We know what happens when two traditional people get married, have children, then separate, divorce and need to resolve property, support and custody issues. However, Pennsylvania domestic partners do not have the benefit of the same predictability. There are no tax advantages, inheritance rights, property rights, or alimony and support rights like those of traditional couples. Creative "lawyering" is essential for partners to realize their dreams and protect their interests.

Secondly, sperm, egg and embryo donors are in the same boat. When it comes to parental rights, child support and visitation, the courts have been improvising for the last 10 years to fill the void.

How did we get into this sea of uncertainty? Pennsylvania legislators have not acted in the last 20 years to keep pace as medical technology raced forward in the private sector. We have no statutes or regulations regarding sperm, egg or embryo donation or surrogate relationships and, of course, no laws guiding the rights of domestic partners. The Legislature has left it to the courts to create law on a case-by-case basis for this new area without the benefit of careful study, legislative hearings and clear policy choices.

These occasional cases give us more questions than answers. For example, one set of cases holds that the parties cannot bargain away rights of support. In direct opposition, another ruling found that a surrogate mother who was not biologically related to the children she gave birth to had no right to keep the children because her contract bargained away those rights. Moreover, the court also rejected the claim of the egg donor to intervene and assert rights.
It seems to violate our constitutional principle of equal protection of laws as the court sets different standards for sperm donors, egg donors and even embryo donors. Why is it that the woman in one case was not permitted to waive the child's support rights, while the other case prevented the egg donor and the gestational carrier from trying to assert rights?

At one level, the result for Frampton seems correct. Here is a man who donated sperm to create two children, even if not in the traditional way. He became involved in their lives and contributed to their financial support. So why shouldn't he be liable for ongoing support?

At another level, the decision raises all of the questions that should be discussed in a public forum with a reasonable set of laws to follow. Artificial reproduction technology should be recognized. Egg and sperm donors should be protected if the parties all agree. Donors should register health information. Offspring should have access to the information, and a voluntary system of matching should be available for donors and offspring.

If a donor subsequently becomes involved with a child before age 18, then perhaps the courts can apply the equitable estoppel doctrines for support that are part of traditional law. With clear policies from the Legislature, including standards for what constitutes substantial involvement before support obligations are imposed, the public will be served. To the Framptons of the world, forewarned is forearmed.

Until then, Pennsylvania families risk benefiting from the advances of reproductive technologies. Who would want to work with a Pennsylvanian seeking to build a family if the support laws do not allow sperm, egg or embryo donor protection? How much more are embryo donors liable, since there is both a sperm and an egg donor? What will doctors tell their patients?

It is mind-boggling to think that a California man and a Florida woman could be responsible as donors in Pennsylvania for a support order when two Pennsylvania partners and another individual, perhaps from Ohio or New Jersey, could be held to carve up a support obligation in as many as five separate calculations with four different state laws -- all because Pennsylvania has none.

Our courts and our citizens are unprepared for these inconsistent, surprising outcomes and judicial rulings. We need legislative certainty, clear guidelines and new laws, and we need them now.

New adoption laws are also needed; the last real changes came in 1980. Other states have acted, and so should Pennsylvania. Intended parents, donors, doctors and partners must carefully plan their actions. While we wait, it is critical to have properly drafted documents addressing these issues by competent and experienced counsel.
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