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**FREQUENTLY ASKED QUESTIONS ABOUT  
SURROGACY, SPERM DONATION,  
AND EGG DONATION IN WASHINGTON  
FOR PROSPECTIVE GAY & LESBIAN PARENTS<sup>1</sup>**

**Q: What is surrogacy?**

**A:** Surrogacy is the term used to describe the arrangement under which a woman agrees to gestate and give birth to a child who may or may not be genetically related to her, and who will be parented by an intended parent or parents other than the surrogate. Washington law (RCW 26.26.210) refers to a surrogate who is not genetically related to the child she is carrying as a “gestational surrogate” or “surrogate host.” A surrogate who is genetically related to the child is often referred to as a “biological surrogate” or “traditional surrogate.”

**Q: Who can be a surrogate in Washington?**

**A:** Under Washington law, any adult woman or emancipated minor who has not been diagnosed as mentally retarded or having a developmental disability or mental illness may serve as a surrogate.

**Q: My boyfriend/girlfriend and I would like to have a baby. Can we pay a woman to have a child for us?**

**A:** Not in Washington. Washington law forbids the compensation of surrogates. No person, organization, or agency may enter into or assist in the formation of a surrogate parentage contract, written or unwritten, which provides for compensation of the surrogate. A surrogate parentage contract which is entered into for compensation, whether executed in Washington or another jurisdiction, is void and unenforceable in Washington. However, payment for expenses related

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<sup>1</sup> This is a publication of Skellenger Bender, PS, which summarizes general information concerning Washington state law. No action should be taken on the basis of this publication without advice based upon your specific circumstances, provided by an attorney who is licensed to practice in your state.

to the pregnancy (other than medical treatment, including assisted reproduction) may be allowed with court approval. (Consult an attorney before entering into a surrogacy arrangement.)

**Q: What legal issues should we be aware of if we are considering using a surrogate?**

**A:** It is important for individuals or couples who are considering becoming parents with the aid of a surrogate to enter into a written agreement with the surrogate. These agreements are enforceable under Washington law, as long as they do not call for the surrogate to be paid other than court-approved pregnancy expenses.

Surrogacy agreements spell out the intentions of the parties (the surrogate and the intended parent or parents) with regard to many issues, including what involvement the intended parent or parents will have in decisions regarding prenatal care and testing; whether the intended parents will be present at the birth; how the surrogate's medical expenses are to be paid; and what involvement, if any, the surrogate may have with the child after the birth.

An attorney experienced in assisted reproduction law can help you evaluate a potential surrogate and assist you with the preparation of a surrogacy agreement.

**Q: If we use a surrogate, how do we get our names on the birth certificate? Do we have to adopt?**

**A:** Under Washington law (RCW 26.26), the woman who gives birth to a child is presumed to be the child's legal parent. If you are a male couple using a surrogate to start a family, and the child born to the surrogate was conceived using sperm provided by one of you, the legal parentage of the partner who did not provide sperm will need to be established through an adoption proceeding (which requires a home study). The partner who did provide sperm will join in the adoption petition. The surrogate's parental rights to the child will be terminated in the adoption proceeding.

If you are a lesbian couple using a surrogate, and the child born to the surrogate was conceived using donor sperm and an egg provided by one of you, the partner who did not provide the egg will need to be established through an adoption proceeding (which requires a home study). The partner who did provide the egg will join in the adoption petition.

If you are a single person using a surrogate, you will need to adopt the child if you were not the source of egg or sperm used for the child's conception. If you did provide egg or sperm, an adoption may still be necessary in order to confirm that the surrogate is not a legal parent.

In any of the above scenarios, the presence of a written agreement between the surrogate and intended parent or parents is critical. In the event the surrogate has a change of heart, the agreement is important evidence of the parties' intent with respect to the child's legal parentage.

**Q: What happens if the surrogate changes her mind after the baby is born?**

**A:** Washington law provides that if a dispute between the parties to a surrogacy agreement happens after the child's birth, the party who has physical custody of the child may retain custody pending a judicial decision. In such circumstances, the award of legal custody is based on the parenting plan provisions which apply in dissolution of marriage actions. It is unclear whether a gestational surrogate (who is not biologically related to the child) would have rights to the child in the event of a custody dispute.

If the surrogate will not consent to the termination of her parental rights, a planned adoption may not be able to proceed. Custody would be resolved between the surrogate and the intended parents.

**Q: My girlfriend and I have decided that I'll provide the egg, we'll use donor sperm, and she'll give birth to the child. Do we have to do an adoption?**

**A:** Under Washington's Uniform Parentage Act, RCW 26.26, your girlfriend will be presumed to be the legal mother of the child, because she will give birth. The same Act says that your sperm donor will have no parental rights (to avoid any legal dispute over this, have the insemination done by a medical professional who can certify that you used a donor). A separate section of the Act says that you, as provider of the egg, are presumed not to be the child's parent unless an agreement between you and the woman who gives birth to the child (your girlfriend) states to the contrary.

You may be able to take advantage of this section of the Act and use a form called the Affidavit and Physician's Certificate, which you sign and the physician who performs the assisted reproductive technology procedures also signs. This form is filed with the Washington Center for Health Statistics, and enables the issuance of a birth certificate reflecting that you and your girlfriend are the child's legal parents. However, it's not clear at this point whether a birth certificate with your name on it issued pursuant to an Affidavit and Physician's Certificate results in the same degree of legal protection of your relationship with the child as an adoption, which results in a Decree of the court.

**Q: My boyfriend and I have found a woman who is willing to carry a child for us but she doesn't want to be biologically related to the child. How can we find an egg donor?**

**A:** Prospective gay and lesbian parents may choose to secure donor eggs in order to become parents through assisted reproduction. Anonymously donated eggs can be obtained through reproductive medicine clinics or through donor services unaffiliated with a medical facility. It is also possible to use a known egg donor. Unlike surrogates, egg donors can be compensated for their services under Washington law.

**Q: If my partner and I use a donor egg or donor sperm to conceive, could the donor change his or her mind and try to take the child from us after it's born?**

**A:** Under Washington's Uniform Parentage Act, RCW 26.26., a donor of egg or sperm for use in the assisted reproductive medical technology is presumed not to be the parent of the resulting child.

When a known donor is used, it is strongly advised that intended parents enter into a contract which is prepared and signed prior to the commencement of medical procedures, spelling out the rights and responsibilities of the donor and intended parents. In that agreement, the donor should acknowledge that he or she will have no legal rights to the eggs or sperm once donated, or to any embryos that the donated sperm or eggs may be used to create, or any child who may result. Financial obligations and any understandings with regard to the donor's contact with the child should also be spelled out.

If an unknown donor is used, the medical facility or service may still require the intended parents and donor to enter into a contract. Contracts are less commonly used in unknown sperm donation arrangements. Intended parents who decide to use an unknown egg donor are also strongly advised to enter into a contract prior to undergoing any medical procedures, in order to clearly spell out the intended parents' financial commitment to the donor (if any), define the role of the intended parents and donor, and allocate risk.