

skellengerbender | bulletin

A LEGAL UPDATE

FREQUENTLY ASKED QUESTIONS ABOUT FAMILY FORMATION IN WASHINGTON FOR PROSPECTIVE GAY & LESBIAN PARENTS¹

FAMILY LAW PRACTICE GROUP

RITA L. BENDER
rbender@skellengerbender.com

JANET M. HELSON
jhelson@skellengerbender.com

ELIZABETH
HERSHMAN-GREVEN
ehershmangreven@skellengerbender.com

DAVID S. LAW
dlaw@skellengerbender.com

CELESTE A. MCDONELL
cmcdonell@skellengerbender.com

CALEB OKEN-BERG
cokenberg@skellengerbender.com

RAEGEN N. RASNIC
rrasnic@skellengerbender.com

ESTATE PLANNING

CELESTE A. MCDONELL
cmcdonell@skellengerbender.com

Skellenger Bender, PS
1301 Fifth Avenue, Suite 3401
Seattle, Washington 98101

206.623.6501
www.skellengerbender.com

December 2012

Q: Can GLBT individuals and same-sex couples adopt children in Washington?

A: Washington's adoption statute allows "any person" to adopt, so long as he or she has the required adoption home study. There is no restriction on adoption by gay men, lesbians, or same-sex couples. A same-sex couple can adopt a child together through independent adoption or using an adoption agency, or serve as foster parents through DSHS.

A same-sex "second parent" can adopt the child of his or her partner like any other stepparent. This also requires a home study, though not as extensive as for newborn adoption.

Q: If my partner and I live in Washington, can we adopt a child from another state?

A: Maybe. It depends on the state where the child resides, or if the child is not yet born, where the birth parents reside. Some states have laws prohibiting adoption by unmarried couples, same-sex couples, or single individuals. Interstate adoption requires careful compliance with both states' laws. Please consult with an experienced adoption attorney to help you evaluate any potential interstate adoption before you make a decision.

Q: What is surrogacy?

A: Surrogacy refers to an arrangement in which a woman agrees to give birth to a child who will be parented by an intended parent or parents other than the woman acting as surrogate. A surrogate who is not genetically related to the child she is carrying is often called a "gestational surrogate." A surrogate who is genetically related to the child is often called a "biological surrogate" or "traditional surrogate." Both kinds of surrogacy are legal in Washington, with some limitations (described below).

Q: Who can be a surrogate in Washington?

A: Under Washington law, any adult woman or emancipated minor who has not been diagnosed as having an intellectual or developmental disability or mental illness may act 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: Washington law prohibits the payment of compensation to a woman acting as surrogate. 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, and the payment of compensation may be a criminal violation. However, payment for expenses related to the pregnancy (other than medical treatment, including assisted reproduction) may be allowed with court approval.

Consult an attorney before entering into any 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-related 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: If you are married or in a registered domestic partnership, Washington law states that you are both presumed to be the legal parents of any child born into the relationship. This presumption may not be recognized outside Washington, however. Thus, in addition to an accurate birth certificate, it is very important to secure the legal parentage of the partner who is not genetically related to the child. This may require an adoption or parentage proceeding. It may be necessary to have the surrogate sign documents indicating that she cooperates with the proceeding.

Washington courts do not issue "pre-birth orders" in surrogacy cases, unlike in some other states.

If you are a single person using a surrogate, and you were not the source of egg or sperm used for the child's conception, you may need to use an adoption or parentage proceeding to establish yourself as the child's sole legal parent. If you did provide egg or sperm, an adoption or parentage proceeding may still be necessary in order to confirm that the surrogate is not a legal parent, depending on the laws of the state where the child was born.

In any of the above scenarios, the presence of a written agreement between the surrogate and intended parent or parents is very important.

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 under Washington law.

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

A: If you and your girlfriend are married or in a domestic partnership, you will both be presumed to be the child's legal parents, under Washington's Uniform Parentage Act, RCW 26.26. When the child is born, the hospital or birth center should provide you with the appropriate form, which you will complete and the hospital will send to the Washington Department of Health. Both your names will be placed on the original birth certificate.

Because parentage arising from same-sex marriage or domestic partnership may not be recognized outside Washington, a second parent adoption is strongly recommended. This requires a home study (see above).

The Uniform Parentage Act also 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). This is true regardless of whether you and your girlfriend are married or in a domestic partnership.

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 not considered 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.



¹ 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.



Please contact us at (206) 623.6501 or see our website, www.skellengerbender.com, for more information or to set up a consultation.