

Legal considerations for lesbian and gay parents

By Joan M. Burda, JD

After five years together, Gail and Amy have decided to become parents. That alone causes them some sleepless nights. And when they consider the legalities involved, they feel overwhelmed. Where do they start? What do they do first? This is an evolving area of law. Plan ahead. If you and your partner are thinking about becoming parents, consider these things – **before** there is a pregnancy. You owe it to yourself and your children.

There are many questions that come up when people decide to have children. Lesbian and gay couples need to have the questions asked and answered before the patter of little feet hits the floor.

1 | **Who will be the biological parent?** Generally, for lesbians, one partner will give birth; for gay men, one partner will be the sperm donor. This decision will, in most states, determine many parental legal rights.

2 | **Known or unknown donor?** Using a known egg or sperm donor can create future problems. There is no guarantee that an agreement in which the donor gives up his rights will be enforced in court.

Have your lawyer review the donor agreements you get from the lab or medical facility before you sign it. It may include provisions that are not in your interest. A known donor could come back and seek custody and or visitation rights. Discuss this with a lawyer who is familiar with the laws on donor insemination and artificial reproductive technology.

3 | **Surrogacy agreements** – There are no uniform laws dealing with surrogacy agreements. Some states prohibit them and some states won't enforce them. You need to know the law in your state **before** you sign any contracts or the surrogate becomes pregnant. You also need to know whether the law allows the surrogate to change her mind about giving up the baby after the birth. Any surrogacy contracts must be carefully drafted. Don't do this on your own. Hiring a lawyer now is most likely less expensive than trying to fix things later.

4 | **Adoption** – You should be aware of the laws in your state. As of 2012, there are at least two states that prohibit adoption by lesbians and gay men: Florida law specifically prohibits such adoptions – no exceptions – and Utah will not permit unmarried individuals to adopt. Arkansas had passed a resolution banning adoptions by lesbians and gay men, but that has been struck down in court. Some states permit second-parent and co-parent adoptions, some do not, and others are silent on the matter. Adoptions granted in one state are recognized in every other state because the United States Constitution requires recognition of court orders, including adoptions. Adoption law itself is state-specific: talk to a lawyer to find out what your state law says.

5 | **Parenting agreements** – For the sake of your children, draw up a parenting agreement. Decide now what would happen if your relationship ended. Don't put your children in the middle; it happens often and can be avoided. If there is no second-parent or co-parent adoption, the biological parent's rights are superior. The non-biological partner will need to establish that he or she is a parent to the child – and there are no guarantees that a judge will agree that such a parent-child relationship exists.

Parenting agreements can document custody, support and visitation rights, and other obligations and responsibilities. Also, without the agreement, the non-biological parent may have no legal obligation to support the children, leaving the other parent with no right to seek support in the event that the relationship ends. File the agreement with the appropriate court – then you have an enforceable court order.

There are many questions that come up when people decide to have children. Lesbian and gay couples need to have the questions asked and answered before the patter of little feet hits the floor.

In addition to the issues mentioned, you will need to consider birth certificates, last names, guardianship, schools, and even such details as whether an authorization is needed to allow the non-biological parent to pick up the child from school. If you do not plan ahead, remember this: the non-biological parent has no established parental rights. Any problems will most likely be decided by the courts.

It isn't easy being gay or lesbian and becoming parents. It can't happen by accident. Put as much thought into the legal aspects as you do into what color to paint the nursery.

This article was prepared by Attorney Joan M. Burda. The opinions expressed in this article are those of the author and may not necessarily reflect those of Massachusetts Mutual Life Insurance Company.

The information provided is not written or intended as specific tax or legal advice and may not be relied on for purposes of avoiding any Federal tax penalties. MassMutual, its employees and representatives are not authorized to give tax or legal advice. Individuals are encouraged to seek advice from their own tax or legal counsel. Individuals involved in the estate planning process should work with an estate planning team, including their own personal legal or tax counsel.

