



Who is the parent of a donor-conceived child?

Rainbow families come in a multitude of diverse forms. Understanding who is a parent of a donor-conceived child is complicated and depends on several factors, including but not limited to:

- the intention of the intended parent(s) and the donor as of the date of conception.
- the relationship status of the birth parent.
- the method of conception.
- any evidence of the agreed role of the donor in the child's life; and
- the relationship (if any) that develops between a child and their donor.

If you are considering starting a family, it is always recommended that all parties obtain independent legal advice to ensure that your child's parentage is correctly reflected.

Legal status of intended parents: lesbian couples

Lesbian couples who conceive a child with a donor are presumed to be the legal parents of any child born as a result of assisted conception (including home insemination) subject to the following conditions being met:

- The intended parents were in a "domestic partnership" or in a de-facto relationship at the time of conception; and
- The non-birth parent consented to the assisted conception procedure being undertaken that resulted in the conception (although this includes home insemination; it does not cover conception where the birth parent has sexual intercourse with the Donor).

How do I know if I am in a domestic partnership?

In Victoria, you do not have to be living with your partner to be in a domestic relationship. The law recognises a domestic partnership as:

- A relationship between two adult persons who are not married to each other but are a couple, and
- One or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the benefit of the other; and
- It is irrespective of gender or whether the persons are living under the same roof.

If a child is conceived using a donor whilst the parties are either in a domestic relationship or de-facto relationship, and they separate prior to the birth of the child, the non-birth parent is still legally the other intended parent and they will be listed on the child's birth certificate as the "other parent".

Although the donor is not a "legal" parent of a child born to two intended parents, their rights to maintain a relationship with the child depends on the level of contact and their relationship with the child once they are born.

The Family Law Act 1975 (Cth) (the FLA) provides that any person who is "concerned with the care, welfare and development of a child" has a right to make application to the Federal Circuit and Family Court of Australia for parenting orders. When considering such an application the court has to have regard to the best interests of the child, including the benefit of the child having a relationship with their parents, and other people who are significant to the child.

This means that a Donor is not precluded from seeking orders that they are able to make long-term decisions on behalf of the child (also known as parental responsibility) or that the child spends time or lives with them. This is, however, dependent on the relationship between a donor-conceived child and the Donor.

Accordingly, if a donor-conceived child has an established relationship with their Donor, the Donor has standing to seek to formalize that relationship through orders providing for the donor-conceived child to spend time with them.

The intention of the parties prior to conception is vital in understanding the role a donor may play in a child's life.

Legal status of intended parents:

Single Parent

The FLA does not expressly define the parentage of a child conceived using a known Donor when the intended parent (birth parent) is single (regardless of their sexuality). However, recent case law has confirmed that when determining the parentage of a child, the intention of the FLA is not to limit a child's parents to less than two people.

What we do know is that where a known Donor provides their sperm to a single woman and a child is conceived as a result, the intention of the parties at the date of conception is essential in determining the parental status of the donor.

It should again be noted that if a Donor is not successful in establishing that they are a "parent" for the purposes of the law, then they will still have standing to make an application to the Federal Circuit and Family Court of Australia, as a person concerned with the care, welfare and development of the child, having regard to the child's best interests.

Donor Agreement

The intention of the parties at the date of conception is a defining factor in determining the parental status of a Donor and their potential role in the child's life.

It is, therefore, essential that the intended parent(s) and their Donor have a clear understanding of the Donor's role prior to conception taking place and that this intention be evidenced in the form of a written document, also known as a Donor Agreement.

What is a Donor Agreement?

A Donor Agreement is a written document signed by all parties to an assisted conception procedure, which outlines the intentions of all parties prior to conception taking place. Although a Donor Agreement is not a legally binding contract, it can be used as evidence of intention at the date of conception.

When a known Donor is being used, regardless of whether conception takes place through a Fertility Centre, it is imperative that a Donor Agreement be executed and both parties receive independent legal advice prior to signing the Agreement.

A Certificate of Legal Advice should be signed by each lawyer and attached to the Donor Agreement as evidence that each party understands the terms of the Agreement, and the applicable law as to their parental status, before the agreement is signed.

Whether the intended parents and the Donor intend to co-parent, or the Donor wants either minimal contact or no role at all in the child's life, under Australian law, there can only ever be two legal parents of a child on a birth certificate.

However, as outlined above, the guiding principle of the FLA is that the "best interest of the child" is the paramount consideration in determining matters relating to a child.

If a Donor has established a relationship with a donor conceived child, and the relationship between the intended parents and the Donor breaks down, or the Donor seeks more time with the child than what was originally agreed upon, then the Donor can make an Application to the Federal Circuit and Family Court of Australia, and the best interests principles require a Court to have regard to the benefit of the child having a relationship with their Donor who could be considered a significant person to the child.

If prospective parents are using a known Donor, it is very important that legal advice is obtained prior to conception and that all parties understand their rights and the role of the donor.

In the case of co-parent arrangements, where the birth Mother has a partner, they will be recognised as the child's parents on their birth certificate. This leaves the Donor vulnerable prior to the birth of the child and prior to the Donor establishing a relationship with the child. However, evidence of the parties' intention prior to conception could be relied upon after the birth of the child, if the intended parents were to change their minds as to the Donor's role in the child's life.

At any time after the birth of the child, the intended parents and the Donor can file consent Orders with the Federal Circuit and Family Court of Australia, which reflects the intention of the parties as to decision-making for the child (parental responsibility) as well as the care arrangements for the donor-conceived child. The Donor Agreement can also assist a Donor to file an Application in Court if the intended parents change their mind as to the Donor's role in the child's life.

Strength of a Donor Agreement?

The strength of the Donor Agreement will depend on whether the parties abide strictly by the terms of the Agreement. If an Agreement provides that a Donor will not play a role in a child's life and have no contact with the child, but upon the birth of the child, this changes and the Donor plays a significant role, then the Donor can make an application for a parenting Order.

On the other hand, if an Agreement signed by the parties specifies that the donor will not play a role and the donor subsequently changes his mind upon the birth of the child, the Agreement can be used as evidence of the donor's intention when conception occurred. In those circumstances, it would be difficult for the donor to successfully argue they should be afforded time and a relationship with the child.

There are no two cases that are the same when it comes to donor-conceived children. If you are contemplating starting a family as either the intended parents or as a known Donor, you should obtain legal advice and document the intentions of all parties prior to conception.



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