

# LGBT PARENTAL RECOGNITION IN ONTARIO

*Some Key Questions and Answers*



**Egale**  
Canada



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# LGBT PARENTAL RECOGNITION IN ONTARIO

## Introduction

There are many different ways to create families. While there have been many legal developments, the law still does not adequately recognize, account for, and reflect the ways that lesbian, gay, bisexual and trans (LGBT) people form relationships with the children in their families. The legal landscape regarding family formation for those who are LGBT can be confusing and uncertain.

This booklet speaks broadly to individuals who are LGBT. Other resources speak more directly to legal issues specific to current and future parents who identify as trans or gender variant. See, for example, Rainbow Health Ontario<sup>1</sup> and resources prepared by the LGBTQ Parenting Network.<sup>2</sup>

This booklet addresses some of the common legal questions that LGBT people ask when considering parenthood. It is not intended as formal legal advice. Prospective parents should seek out community resources or consult a lawyer before starting the process of becoming parents. Legislative or judicial developments may have changed the information in this booklet. Furthermore, some points are too complex or uncertain to address below. For a list of legal aid clinics, see the Web site of Egale.<sup>3</sup>

## Useful Concepts



### *Adoption Orders*

An adoption order is “a court-issued document that names individuals who adopt a child, that child’s legal parents.”<sup>4</sup> A court issues an adoption order only if persuaded that doing so advances the best interests of the child. An adoption order creates a bond of legal parentage between an adult and the child.

An individual may apply to the court to adopt the child of their married or common-law spouse. A second parent adoption order may only be sought by someone who is a current spouse of the other legally recognized parent.<sup>5</sup>

Other than when recognizing a parent’s spouse as a second parent, adoption orders terminate the parental status of any prior parent.

<sup>1</sup> [www.rainbowhealthontario.ca](http://www.rainbowhealthontario.ca)

<sup>2</sup> [lgbtqpn.ca/library/legal-background-on-trans-parents-and-family-law-in-ontario/](http://lgbtqpn.ca/library/legal-background-on-trans-parents-and-family-law-in-ontario/); [lgbtqpn.ca/library/trans-parents-family-law-tip-sheet](http://lgbtqpn.ca/library/trans-parents-family-law-tip-sheet)

<sup>3</sup> [egale.ca/legal-aid-clinics](http://egale.ca/legal-aid-clinics)

<sup>4</sup> “What is an adoption order?” Government of Ontario (4 June 2014), online: [www.ontario.ca/government/what-adoption-order](http://www.ontario.ca/government/what-adoption-order).

<sup>5</sup> “Birth Registration for Lesbian/Bi/Queer Women in Ontario, Queer Parenting Info Brochure Series” LGBTQ Parenting Connection (2007), online: [www.lgbtqparentingconnection.ca/resources.cfm?mode=3&resourceID=1269ae09-3048-8bc6-e84a-16109c061b5d](http://www.lgbtqparentingconnection.ca/resources.cfm?mode=3&resourceID=1269ae09-3048-8bc6-e84a-16109c061b5d) at 1.





### **Declaration of Parentage**

A declaration of parentage is a court order recognizing a person as a child's legal parent. The applicable legislation "does not define parentage solely on the basis of biology," meaning that an individual may apply for a declaration of parentage even without having a genetic connection to the child.<sup>6</sup>

Relative to a second-parent adoption (see Adoption Orders), a declaration of parentage is necessary where the person seeking recognition is separated from the child's already recognized legal parent. Moreover, a declaration of parentage may be obtainable where the parties seeking parental recognition are not spouses of one another, as in the case of co-parenting arrangements.



### **Donor Insemination**

Donor insemination, or Alternative Insemination (AI), is the process by which sperm are deposited into the uterus, fallopian tubes or vagina by means other than sexual intercourse. It may occur in a clinic, in which case it is subject to a regulatory regime. It may also occur, less formally, at home or elsewhere.



### **In Vitro Fertilization (IVF)**

IVF is a process by which eggs are collected and fertilized by sperm in a lab. Then the fertilized egg (embryo) or eggs are implanted in a uterus. For example, IVF is the process that a gay man could use for having a child via surrogacy involving an egg donor and a gestational carrier.



### **Legal Parent**

A person recognized by law as the parent of a child. A legal parent need not be genetically related to the child.

Legal parentage imposes a reciprocal obligation of support on parent and child and confers the responsibility to make decisions for the child. It determines lineage and defines inheritance rights where an individual dies without having made a will.

A person or persons listed on a statement of live birth are presumed to be the legal parents of the child. Legal parentage may be established definitively by a declaration of parentage or by an adoption order. Legal parentage cannot be changed or altered except via adoption or declaration.

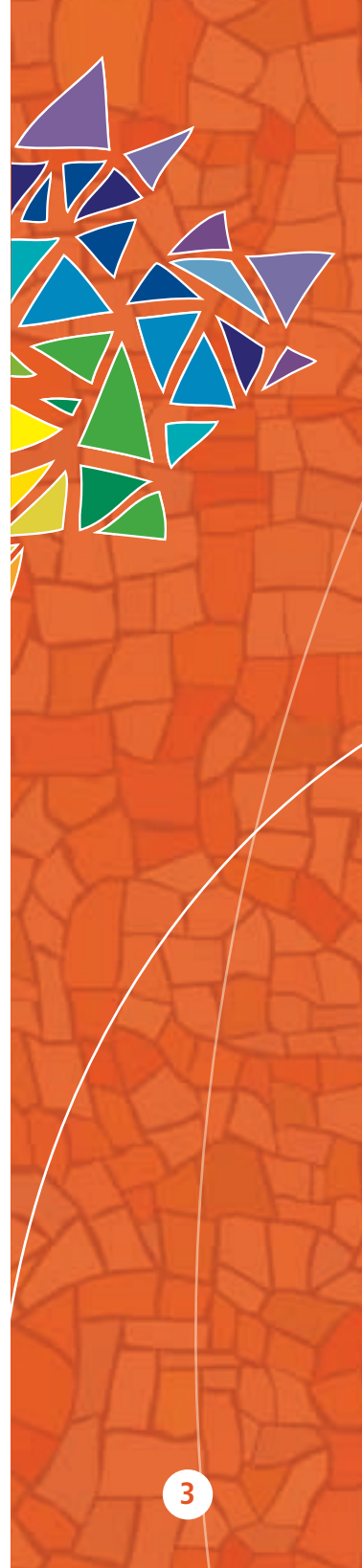


### **Surrogacy**

Surrogacy is an arrangement in which a person carries an embryo or fetus and surrenders the child at birth to another person or persons. Surrogacy may be genetic, using the egg of the surrogate, or it may be gestational, using an egg from someone else. Surrogacy may be altruistic (no payment) or commercial (for payment). In Canada, federal law prohibits commercial surrogacy.

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<sup>6</sup>MD et al v LL et al (2008), 90 OR (3d) 127 at para. 36 (OSCI).



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## Legal Parental Recognition



***Can two women be immediately registered as parents on a statement of live birth in Ontario without court involvement?***

Yes, with some pre-conditions. The sperm donor must be unknown and the child needs to be conceived using assisted reproduction.<sup>7</sup> The person who gives birth to a child may acknowledge another person as “father/other parent” on the statement of live birth if both of the above pre-conditions are met.<sup>8</sup> Given this gender-neutral language in reference to the second parent, two women may register as parents on the statement of live birth in Ontario.



***How can someone apply to the Superior Court for a declaration of parentage?***

It is a good idea to seek legal advice before the baby is born. Once the baby is born, your application can go before a Superior Court Judge. It may be helpful to bring a copy of the parenting agreement (if any), an affidavit from the person who gave birth to the child or the egg/sperm donor confirming they renounce their claim to the child, as well as any other documents your lawyer believes will assist in your application.



***Can Ontario law recognize more than two persons as legal parents?***

Yes, if it is in the child’s best interests. This can be done by seeking a declaration of parentage to that effect.<sup>9</sup>

An alternative way to obtain some legal recognition, although less than full parental status, is to have a court make a consent order (an arrangement proposed with the agreement of all parties involved) that recognizes shared custody. If the court found it was in the child’s best interests, it might grant an order conferring joint custody on a child’s legal parents, as well as on their respective partners.



***Can someone other than a legal parent attain custody or access regarding a child?***

An individual other than a legal parent may seek an order for custody or access to a child.

In the event of a breakdown in the relationship between a child’s legal parent and that parent’s partner who is not also a legal parent, the partner may seek custody or access to the child.

The best interests of the child “will govern any decision relating to custody in this matter. In this fundamental principle, same-sex parents seeking custody are no different from opposite-sex parents seeking custody.”<sup>10</sup> In the event of a dispute, a judge will decide who receives custody or access to the child.

<sup>7</sup> Joanna Radbord, “GLBT Families and Assisted Reproductive Technologies” Canadian Bar Association (2010), online: [www.cba.org/cba/niagara2010/PDF/2.1\\_Radbord\\_paper\\_final.pdf](http://www.cba.org/cba/niagara2010/PDF/2.1_Radbord_paper_final.pdf) at 10.

<sup>8</sup> Vital Statistics Act, Regulation 1094, RRO 1990 at s 2(2).

<sup>9</sup> AA v BB (2007), 83 OR (3d) 561 (ONCA).

<sup>10</sup> Murphy v Laurence, [2002] OJ No 1368 (OSC) at 12.

## Sperm/Egg Donors

### *Should I or my partner and I use anonymous sperm or sperm from a known donor?*

A variety of factors may influence this highly personal decision. Conceiving at home with sperm from a known donor may be simpler and less costly than using anonymously donated sperm at a clinic. However, if you or you and your partner intend to parent with no involvement from the donor, it is safest to use anonymous sperm. If you do use a known donor and do not wish that individual to become the child's legal parent, do not list the donor on the birth registration and obtain a declaration or an adoption order eliminating parental rights on the donor's part. With a known donor, only the birth parent will be able to include their particulars on the birth registration. To secure legal recognition for the intended co-parent, an adoption or declaration is necessary.

### *Does a known sperm/egg donor who is not a legal parent have rights regarding the child?*

Laws pertaining to what residual rights sperm/egg donors have to a child born with their genetic material vary across Canada. For example, section 24 (1) of the British Columbia *Family Law Act* states that a donor of genetic material is not considered to be a parent solely on the basis of the donation.<sup>11</sup> Quebec's Civil Code, too, provides that donating genetic material does not lead to legal parentage.

Ontario does not have legislation that addresses this issue. It is unclear how an Ontario court would deal with a sperm/egg donor who asserts their rights as a parent. It is possible that a known donor may be recognized as a legal parent and found liable for child support.<sup>12</sup>

If you wish to exclude the sperm/egg donor from having any parental claims and responsibilities, it is advisable to clearly state such intentions in a donor contract prior to using their genetic material. While not legally enforceable, a donor agreement may be beneficial to you in a court case resulting from a conflict arising out of the birth of a child. Given the lack of case law in this area, it is unclear how much weight a judge would give to such an agreement given the highly contextual nature of the situation.

### *I am an HIV negative male. Can I donate my own sperm to conceive a child through AI in a clinical setting?*

A directive from Health Canada excludes certain groups from donating sperm for the purposes of insemination. It excludes men who have had sex with men, even once since 1977, from donating semen for insemination.<sup>13</sup> Anyone who is considering donating sperm should consult this document to see if there are other exclusions or provisions which may apply.

<sup>11</sup> Family Law Act, SBC 2011 CHAPTER 25 at s 24 (1).

<sup>12</sup> [www.slaw.ca/2013/01/02/donors-not-dads/](http://www.slaw.ca/2013/01/02/donors-not-dads/)

<sup>13</sup> Canada, Health Canada, Health Canada Directive: Technical Requirements for Therapeutic Donor Insemination (Ottawa: 2000) at 4.

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However, gay/bisexual men and men who have sex with men (MSM) may ask their physician to apply to the Minister of Health to request permission to use their sperm in the insemination process with a willing surrogate. Such an application has stated requirements.<sup>14</sup> Practically speaking, a bisexual man can donate sperm to aid his sexual partner in conceiving. Moreover, a gay man might show up at a clinic with a surrogate mother or a co-parent and be assumed to be her sexual partner, no questions asked.

The special permission provisions to donate sperm may also be available to HIV positive men where the recipient is known and consents.<sup>15</sup> However, if the donor is HIV positive, the Minister of Health may require other steps or assurances such as having a low viral load, sperm washing, and any other recommendations from your physician before granting permission.

## Surrogacy Issues



*How can two men become the legal parents of a child that a surrogate carried for them?*

The intended parents do not complete the Statement of Live Birth. They apply for a declaration of parentage from the Superior Court of Justice naming them both as parents of the child, and indicating that there is no other parent.



*Can a surrogate keep the baby?*

It is possible. Under Ontario law, the person who gives birth to a child, is that child's mother. There is no basis for thinking that anyone could enforce a surrogacy agreement by taking the baby from a surrogate who changed her mind about the arrangement.

In such circumstances, the intended parent who contributed genetic material could pursue custody and access to the child, might be recognized as a legal parent, and would then be liable for child support.



*In a surrogacy situation, who decides whether to terminate a pregnancy?*

The person carrying the baby is the one who decides whether or not to terminate. Intended parents, even if one of them has contributed genetic material to the conception, cannot stop a surrogate from terminating a pregnancy. Nor can they compel the surrogate to terminate, for example if they learn that the child will have a disability.

In such circumstances, the intended parent who contributed genetic material could be recognized as a legal parent and would then be liable for child support.

<sup>14</sup> Processing and Distribution of Semen for Assisted Conception Regulations, 7 May 1996, SOR96-254.

<sup>15</sup> Mona Loutfy et al, "Canadian HIV Pregnancy Planning Guidelines" SOGC Clinical Practice Guideline (June 2012), online: Society of Obstetricians and Gynaecologists of Canada sogc.org at 585.





***How can I ensure that a child born through an international surrogacy situation can cross the border into Canada?***

Whether or not you are genetically connected to the child, this legal situation is complex. Couples or individuals considering this option should proceed with caution and consult with a lawyer.

## **Money Matters**



***Can someone who is not a legal parent become liable for child support?***

Acting as a parental figure can bring with it legal responsibilities regardless of the lack of official legal recognition of status. For example, someone may be found liable to pay child support despite never having adopted the child or secured a declaration of parentage.



***Does the Ontario Health Insurance Plan (OHIP) cover AI? IVF?***

Yes, OHIP covers some cost of AI for Ontario residents with OHIP cards, including medical services such as physician consultations and blood tests.<sup>16</sup> However, OHIP will not cover some costs, such as the cost of sperm and the cost of the lab service of providing a sperm wash.

Under certain circumstances, OHIP will also cover the cost of IVF. The age limit to qualify for public funding for IVF is 39 years old at the time of treatment.<sup>17</sup>

Where the patient qualifies for OHIP funded IVF, “the blood work, ultrasounds and physician procedures are insured in all hospital and non-hospital community based fertility clinics in Ontario.”<sup>18</sup> If the IVF process is completed at Mount Sinai Hospital Reproductive Biology Unit, London Health Sciences Fertility Clinic or in the Ottawa Fertility Centre, associated embryology procedures are also funded through OHIP.<sup>19</sup>

Of note, “The ministry does not fund fertility drug costs, intra-cytoplasmic sperm injection (ICSI) or costs associated with the freezing and storage of sperm, eggs and embryos, regardless of where insured IVF services are provided.”<sup>20</sup> Where a sperm bank is used, OHIP does not cover the cost of sperm for AI or IVF.



***Other than for the cost of the treatment itself, are costs related to IVF and AI tax deductible as medical expenses? (e.g. travel to doctors, clinics)***

There is a tax credit available for medical expenses.

The expenses you incur that are above the simple cost of the IVF process may be tax deductible. The Federal Tax Court has found that the costs associated with the implantation of an embryo fall under allowable medical expenses for tax purposes. The fact that the person who paid for the in-vitro fertilization was not the person who underwent the medical procedure was irrelevant. The court found that legal

<sup>16</sup> “General Fee Schedule” IVF Canada, online: [ivfcanada.com/index.php?route=product/category&path=62](http://ivfcanada.com/index.php?route=product/category&path=62).

<sup>17</sup> Ibid.

<sup>18</sup> “In Vitro Fertilization (IVF)” Ontario Ministry of Health and Long-Term Care (March 2012), online: [www.health.gov.on.ca/en/public/publications/ohip/ivf.aspx](http://www.health.gov.on.ca/en/public/publications/ohip/ivf.aspx).

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

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costs, travel, ultrasounds, and medication were allowed to be claimed as tax deductions for the intended parents.<sup>21</sup>

If your IVF treatment itself is not covered by OHIP, any money you spend on the procedure is a tax deductible medical expense according to the Canada Revenue Agency.<sup>22</sup>

Costs associated with AI are “eligible for the medical expense tax credit.”<sup>23</sup> For example, Mount Sinai Hospital charges additional fees for AI above what is covered by OHIP, including \$400 for Intrauterine Insemination (IUI) Sperm Preparation, \$400 for processing frozen/donor sperm (per insemination), \$500 for sperm freezing, \$240 for sperm storage, and \$200 in administrative fees if you want to transfer your sperm samples to another clinic.<sup>24</sup>



### *What expenses can be reimbursed for surrogates?*

Federal law prohibits compensation for surrogacy beyond the reimbursement of expenses. The courts, Parliament, and the government have not defined what can be reimbursed and what cannot. In the event that you have questions, you should seek legal advice.

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<sup>21</sup> Zieber v Canada, 2008 TCC 328 at 8.

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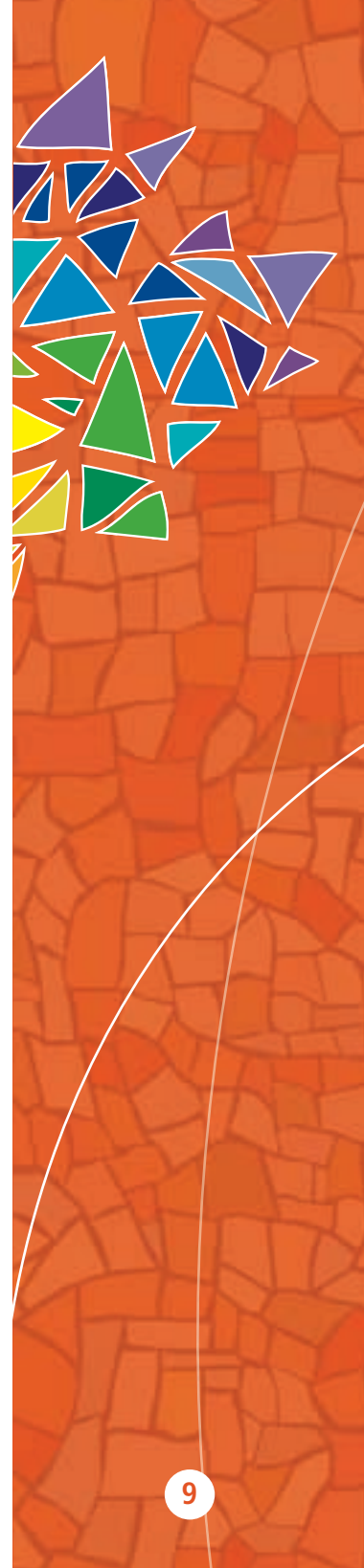
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