

Consent to IVF: what happens if your relationship breaks down?

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Starting a family and ending a marriage or civil partnership rarely go hand-in-hand, but it can happen. If one spouse or partner feels the marriage or civil partnership has broken down and no longer wants children, the other can be left still desperately wanting to make it work and start a family. This dynamic, and the legal position, is complicated where the couple either cannot or choose not to conceive naturally, and look to IVF as an alternative.

Assisted reproduction

A mother is defined under the Human Fertilisation and Embryology Act 2008 (HFEA) as the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and egg. So, infor a heterosexual couple having a child through IVF, even if the egg is from a donor, the mother who carries the child is still considered the legal parent. It's Nnot quite so straightforward with fatherhood. Under the HFEA, if a man is married or civil partnered to the mother at the time of the placing in her of the embryo, or sperm and eggs, or of her artificial insemination through a licensed clinic, then he is the father, unless he did not consent. If the father is not married to the mother, then if certain conditions are satisfied, he can be treated as the legal father of the child. A similar scenario applies to same sex couples.

Consent to IVF etc is key when it comes to legal parenthood and surrogacy arrangements conducted via licensed clinics, but remember that in relation to informal agreements between individuals (DIY surrogacy) different rules apply.

For example, where a same sex female married or civil partnered couple become pregnant with donor sperm in a DIY informal arrangement, the donor is not a legal parent because of the marriage / civil partnership, but where a same sex female unmarried couple become pregnant with donor sperm in a DIY informal arrangement the donor is a legal parent.

Is consent to treatment enough?

The consent to IVF treatment by each of a couple is required in order for both to qualify as the legal parent of a child conceived via IVF. However, consent is not enough. Recent cases have shown that inadequate processing of the Human Fertilisation and Embryology Authority's standardised consent forms, different policies and protocols adopted by UK licensed clinics and clerical errors have all resulted in situations where parental status following IVF is uncertain, leading to unexpected litigation.

More difficult still, if married couples or civil partners have an established relationship with a clinic and the birth mother's spouse or civil partner wishes to withdraw their consent (for example, where the relationship has broken down), a child could be conceived in the window of time before consent is formally withdrawn, and this can lead to further complications, because the birth mother's spouse or civil partner is automatically considered the legal parent of the child, unless it can be shown that they did not consent to, or know of, the IVF procedure.

From a legal perspective, consent will be determined in accordance with the following factors:

- Was the IVF embarked upon and carried through jointly and with full knowledge of both parties?
- From the outset of the treatment, did both parties intend to be legal parents of the child?
- From the moment the pregnancy was confirmed, did both parties believe they were parents of the child, and did this remain their belief when the child was born?

Proving knowledge, intention and belief of consent – or the lack of it – is not straightforward in any ‘your word against theirs’ scenario. Written evidence (such as an email explaining your feelings to your spouse or civil partner) is essential but not always effective, as emails, letters or texts can go astray or be left unread.

Parenthood and financial claims

Fast-forward to a situation where treatment is successful and a child is born to married or civil partnered parents. The birth mother’s spouse or civil partner cannot be the legal parent where it can be proved there was no consent. Nor will that spouse or civil partner be a biological parent. This means that the CMS (Child Maintenance Service) jurisdiction would not apply.

However, they could still be treated as being responsible as a spouse to provide financial support if they were to treat the child as a ‘child of the family’, maintaining a close relationship and sufficiently assuming responsibility for the child’s maintenance, knowing that the child was not their own. This could give rise to certain financial claims being made for the child. Whilst this is quite a leap from withholding consent to treatment, it is not unheard of where a relationship has been on and off.

Practical suggestions

If you are about to separate or embark on divorce or dissolution and no longer want to start a family, then clear communication is key, as is making sure you have documentary evidence of those communications. This is easier said than done in an emotionally charged environment, and informing your spouse that you feel the relationship has come to an end and you no longer want to have children together of course requires great sensitivity. It will also be essential to explain the situation to the IVF clinic involved quickly and clearly, confirming your decision in writing. Honesty and clarity is the way forward.

Having all your (legal) ducks in a row from the point you decide to withdraw consent to treatment will give you more control over your future parental status and financial exposure.

It’s complicated... but so is parenthood.

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