

LEGAL ISSUES RELATED TO SPERM & EGG DONATION  
AND TO FROZEN EMBRYOS

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**1. Sperm Donation.**

a. Statutes.

**ORS 109.239.** Rights of semen donors; rights of children born as a result of artificial insemination.

If the donor of semen used in artificial insemination is not the mother's husband:

(1) Such donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination; and

(2) A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to such donor.

**ORS 109.243.** Relationship of mother's husband to child resulting from artificial insemination.

The relationship, rights and obligation between a child born as a result of artificial insemination and the mother's husband shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband if the husband consented to the performance of artificial insemination.

**ORS 677.360.** Selection of donors; qualification to perform procedure.

Only physicians licensed under ORS chapter 677 and

persons under their supervision may select artificial insemination donors and perform artificial insemination.

**ORS 677.990.** Criminal penalties.

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(3) A person who violates the provisions of ORS 677.360 to 677.370 commits a Class C misdemeanor.

b. Donor Retaining Rights.

- *McIntyre v. Crouch*, 98 Or App 462, 780 P2d 239, rev den, 308 Or 593 (1989), cert den sub nom *Crouch v. McIntyre*, 495 US 905 (1990) . A man who gives his semen for the purpose of artificial insemination is a “donor” within the meaning of the statute. The statute severs the parental rights of a sperm donor even if the insemination is performed in violation of ORS 677.360. Federal due process rights require an exception to the statute’s coverage if the donor “‘grasp[s] the opportunity’ to ‘participate in the rearing of his child’” (quoting *Lehr v. Robertson*, 463 US 248, 261, 262 (1983)).

c. Donor Surrendering Rights.

- *Leckie v. Voorhies*, 128 Or App 289, 875 P2d 521 (1994). A sperm donor may make an effective contractual waiver of his parental rights.

**2. Egg Donation and Embryo Transfer (IVF).**

a. Court’s authority to determine maternity.

**ORS 109.124.** Definitions for ORS 109.124 to 109.230.

As used in ORS 109.124 to 109.230, unless the context requires otherwise:

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(2) “Child born out of wedlock” means a child born to an unmarried woman, or to a married woman by a man other than her husband.

(3) “Respondent” may include, but is not limited to, one or more persons who may be the father of a child born out of wedlock, the husband of a woman who has or may have a child born out of wedlock, the mother of a child born out of wedlock, **the female**

**pregnant with a child who may be born out of wedlock**, or the duly appointed and acting guardian of the child or conservator of the child's estate.

**ORS 109.125.** Who may initiate proceedings; petition; parties.

(1) Any of the following may initiate proceedings under this section:

(a) A **mother of a child born out of wedlock** or a female pregnant with a child who may be born out of wedlock

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- *Fox v. Hohenshelt*, 275 Or 91, 549 P2d 1117 (1976). Paternity may be established by a declaratory judgment in situations not covered by the paternity statutes.

b. Donor Retaining Rights.

- *K.M. v. E.G.*, 37 Cal 4<sup>th</sup> 130, 117 P3d 673, 33 Cal Rptr 3d 61 (2005). A lesbian partner retained parental rights when she donated eggs so that her partner could bear a child. The sperm donor statute, even if it applied to egg donations, did not apply when the "donor" intended to retain parental rights. The woman who donated the eggs and the woman who gave birth were both legal mothers to the child.
- *Soos v. Superior Court*, 182 Ariz 470, 897 P2d 1356 (1994). A woman who donates eggs has a fundamental liberty interest in developing a relationship as the mother of a resulting child. *Accord McIntyre*.

c. Donor Surrendering Rights.

- *Leckie v. Voorhies*, 128 Or App 289, 875 P2d 521 (1994). A sperm donor may make an effective contractual waiver of his parental rights.
- *McDonald v. McDonald*, 196 AD2d 7, 608 NYS2d 477 (1994); *In re C.K.G.*, 173 SW3d 714 (Tenn 2005). A gestational carrier intended to be the mother is the legal mother of the resulting child, even though the egg was obtained from an anonymous donor.
- *Buzzanca v. Buzzanca*, 61 Cal App 4<sup>th</sup> 1410, 72 Cal Rptr 280, *rev den* (1998); *J.F. v. D.B.*, 2006 Pa Super 90, 897 A2d 1261

(2006). A gestational carrier not intended to be the mother is not the legal mother of the resulting child. The California court applied that state's sperm donation statute to create parentage in both intended parents, even though the genetic material came from neither of them.

### 3. Frozen Embryos.

#### a. Enforcement of Agreement.

- *Witten and Witten*, 672 NW2d 768 (Iowa 2003); *A.Z. v. B.Z.*, 431 Mass 150, 725 NE2d 1051 (2000); *Kass v. Kass*, 91 NY2d 554, 696 NE2d 174, 673 NYS2d 350 (1998); *Litowitz v. Litowitz*, 146 Wash 2d 514, 48 P3d 261 (2002). An agreement for embryo disposition entered into at the time of fertilization is enforceable, with the caveat that a party may later change their mind and cannot be forced to reproduce against their will.

#### b. Absence of Agreement.

- *J.B. v. M.B.*, 170 NJ 9, 783 A2d 707 (2001); *Davis v. Davis*, 842 SW2d 588, *modified*, 1992 WL 341632 (Tenn 1992), *cert den sub nom Stowe v. Davis*, 507 US 911 (1993). A party has a "fundamental right not to procreate"; frozen embryos should be awarded to the party who intends to destroy them rather than the one who intends to have them implanted in a surrogate. The Tennessee court anchored its decision explicitly in the state and federal constitutions. The New Jersey court relied on the Tennessee decision but the basis for its holding was less clear.