

The Legal Side of 3rd Party Reproduction: Sperm/ Egg /Embryo Donation and Surrogacy



This Fact Sheet is for you if you are:

- An **Intended Parent** who needs a sperm, egg or embryo donor or surrogate to have a child
- A sperm **donor**, egg donor or embryo donor
- A **surrogate** who is going to carry a child for the Intended Parent(s)

THE LAWS THAT APPLY TO YOU

There are two important legal schemes that apply to you.

- Canada: **The Federal Assisted Human Reproduction Act¹ (AHRA) and Reimbursement Regulations²:**
 - It is illegal to pay for sperm/eggs/embryo donation or surrogacy services in Canada. Donors and surrogates can be reimbursed for “expenses” only. The *Reimbursement Regulations* provide a complete list of expenses that may be reimbursed to a donor or surrogate, such as travel expenses. No other expenses or payments are allowed. Receipts are required and declaration form must be completed to provide reimbursement. Some expenses require a medical practitioner referral, such as for lost wages for surrogates and egg donors (sperm donors are not eligible for lost wages). Health Canada has produced a [Guidance Document](#)³ and a [Reimbursement of Expenditures Declaration Form](#) to assist.
 - There must be written consent to use another person’s sperm/eggs/embryos. The person must be over 18.
 - The penalty for breaching the law is a **criminal offence, punishable by a maximum \$500,000 fine and 10 years in prison.**
- Local: How you identify **who is the legal parent** of a child born through assisted reproduction. The law is different in each province/ territory/ country. **The law of the place where the child is born, is the law that applies to you.**

THE LAW IN BC: Who is a parent under the BC Family Law Act

If your child will be born in BC, the *BC Family Law Act* (FLA)⁴ applies to determine the child’s legal parents. BC is one of the best places to have a child through assisted reproduction because the laws are clear about who is and is not a parent. There is no requirement for a genetic connection between the child and one of the parents. As well, the birth registration process is administrative (no court order is required after birth to confirm the parentage of the child, unlike most places).

Children conceived through sexual intercourse (FLA s. 26):

“That’s a Daddy/Parent Not a Donor” Rule: where a child is conceived through sexual intercourse the biological parents are the child’s legal parents. You cannot opt out of this. **TAKE AWAY:** If you have a known sperm donor, you cannot have sex to conceive, otherwise they are no longer a donor; they are a parent with all rights and responsibilities of a parent.

Who is a parent where assisted reproduction is used – general rules under the law (FLA Part 3):

When creating families with assisted reproduction (clinic or self-insemination) intention to parent trumps genetic connection.

- The parents of a child are the **birth parent and their partner/spouse** (FLA s.27).
- Donor (sperm, egg or embryo) is not a parent (FLA s.24).
- Surrogate is not a parent; the intended parents are the parents – there **must be a written agreement prior to conception** and another signed by the surrogate **after birth** (FLA s. 29).
- Multiple parent families are a-ok! (in certain circumstances)- there **must be a written agreement prior to conception** (FLA s. 30).
- A person can become a parent after their death in certain circumstances- there must be written consent (FLA s. 28).

¹ [Federal Assisted Human Reproduction Act](#), S.C. 2004, c. 2

² [Reimbursement Related to Assisted Human Reproduction Regulations](#) (SOR/2019-193). Note:there are other regulations about consent, enforcement, process.

³ [Guidance Document - Reimbursement Related to Assisted Human Reproduction Regulations](#)

⁴ [Family Law Act](#) [SBC 2011] CHAPTER 25



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QUESTIONS & ANSWERS

Do I need a legal agreement for my sperm/ egg/ embryo donation or surrogacy process? Why?

- In a surrogacy situation, a written and signed legal agreement is required under the law. Your Fertility Clinic will require a letter from a lawyer stating that the Intended Parents and Surrogate have entered into a legal agreement to ensure all parties understand what they are agreeing to and to confirm the agreement is in compliance with the law.
- While an agreement is not mandated under the law for sperm, egg or embryo donation, your Fertility Clinic may still recommend it or require confirmation of the agreement or arrangements.
- In all cases, except an unknown donor, a legal agreement between the parties is strongly recommended. Without a legal agreement, there is increased potential for future issues between the parties.

What about if the sperm donor is my friend and I am not using a Fertility Clinic (I am self-inseminating at home). Do I need a Sperm Donor Agreement in that case?

- You are not required under the law to have a written agreement with a known sperm donor. But an agreement is even more important in these situations. If your donor may have a relationship with the child, a legal agreement ensures you do not face unnecessary legal battles over contact or support later. You must both be on the same page before conception and a legal agreement documents that shared intention.
- If you are self-inseminating at home—that is fine under the law—but **the child cannot be conceived through sexual intercourse**, otherwise your donor is now a parent with parental rights and child support responsibilities. A written agreement will confirm the plan to self-inseminate and reduce the risk of an unsupported dispute about conception later.

What does a legal agreement cover?

All fertility law agreements should clearly address the following at minimum and be tailored to the particular circumstances and intentions:

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| <ul style="list-style-type: none"> • Background facts and role of each party; • The applicable law, confirm that the parties understand and will comply; • Confirm the Intended Parent(s) are the only parents of the child; the donor or surrogate is not a parent under any circumstance; • Consequences to a party if they breach the agreement; • Facilitate information-sharing and confidentially based on the parties' shared intentions; • Set out the reimbursements allowed, any agreed upon limits, and the process for claiming expenses; | <ul style="list-style-type: none"> • Waive all claims for child support against a donor or surrogate or a claim against their estate after death; • Waive any right the donor or surrogate may have to be a parent, have decision-making rights or contact; • Confirm the parties' intention about their future relationship, including with the child; • Address challenging issues or unexpected but foreseeable situations that may arise; • Confirm whether the parties had independent legal advice. |
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Does my Donor Agreement or Surrogacy Agreement need to be drafted by a lawyer?

- Many people look to the internet for sample agreements to draft one on their own. Assisted reproduction is expensive; the wish to save money is understandable. But the risks of having an agreement that does not adequately address the issues and requirements under the law are not worth it. This step is an important investment. A quality fertility agreement is necessary to protect you, the child and other party. Without it, you are leaving yourself at risk of breaching the law or facing a dispute about the child, contact or expenses in the future.
- Fertility Law is a niche and rapidly changing area of law. It is essential to use a fertility lawyer with expertise in this specific area of law. Ask your clinic for a referral list.

Birth registration and Birth Certificates where assisted reproduction- do I need to do anything special?

- In BC we have a system that allows intended parents to register as the child's parents so long as the proper steps are taken (such as the written pre-conception and post-birth agreements in surrogacy situations). No court order, declaration of parentage, or adoption is required in assisted reproduction situations in BC if you comply with the legal scheme.
- If you are a single person or a couple who needed a sperm, egg or embryo donor, you can simply apply to the BC Vital Statistics Agency using the regular birth registration process. The parent who gave birth will be the birth parent, and their partner will be the child's other parent. The Birth Certificate will list those parents as the child's only parents. No additional steps are required.
- If you had a surrogate carry the child, you must contact the BC Vital Statistics Agency and ask for the appropriate package. You will be required to submit additional information, such as a letter from the Clinic, a post-birth declaration from yourselves as well as the surrogate, and confirmation that your legal agreement complied with the law.



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I purchased sperm/ eggs from outside Canada and had them sent to me or my Fertility Clinic. Am I breaking the law (AHRA)?

- No. It is not illegal to purchase sperm or eggs from somewhere else (such as a USA sperm bank) and have them sent to your clinic. You cannot however buy sperm or eggs from/in Canada. Canada has an altruistic system and payment for sperm/ eggs/ embryos is prohibited.

How do I deal with expenses for the donor or surrogate?

- The law (AHRA) and Regulations prohibit any payment to a donor or surrogate except for those set out in the Reimbursement Regulations. The regulations set out a process that must be followed, including a requirement to provide receipts and a signed declaration. Health Canada published a [Guidance Document](#) to assist in understanding the regulations, including a [Reimbursement of Expenditures Declaration Form](#) that can be filled in by the donor/surrogate to claim reimbursement and signed by all parties.
- Steps:
 - Donor or surrogate fills in the Declaration Form requesting reimbursement of expenses, attaches all receipts and signs the form;
 - The Intended Parent(s) review and sign the form and then can provide the reimbursement to the donor/ surrogate;
 - The Intended Parent(s) must keep the records for 6 years.
- The Intended Parent(s) can (and should) pay some expenses directly --- such as the clinic-related costs and legal fees for the donor/ surrogate. This simplifies the process and ensures the expense does not need to be incurred by, and then reimbursed to, the donor/surrogate.

What is the process for getting our legal fertility agreement in place?

- The Intended Parent(s) and the donor/surrogate cannot have the same lawyer.
- Usually, the Intended Parent's lawyer will draft the agreement and the donor or surrogate will seek independent legal advice (ILA) from another lawyer (or vice versa if preferred).
- The Intended Parents will usually pay the legal fees for the donor or surrogate's ILA, and will pay those fees directly to that lawyer.
- Start early—often the legal agreement is an afterthought to the fertility process. But that can result in delays, since the Clinic can not proceed until the agreement is in place. If you get set up with a lawyer early, you can wait to proceed until the donor or surrogate has been medically cleared to avoid wasted costs.
- Once the agreement is signed by all parties, the Intended Parent's lawyer will provide the Clinic a Clearance Letter so they may proceed.

My child will be born outside BC. What do I need to know?

- ***The law is different everywhere***. The law of the place where the child is born, will be the law that applies to you.
- BC has one of the most progressive laws in the world, and many provinces and territories across Canada are following suit. But, if your child is going to be born somewhere else in Canada or the world, you must ensure that the law of your home jurisdiction will support your family-building objectives. You must know these steps and requirements of your home state.
- You may need a court order or declaration or parentage, or to go through an adoption process. In some places, the surrogate will be listed as a parent on the birth certificate and will need to be removed. In some places, there must be a genetic connection between the child and one Intended Parent, and a DNA test may be required. In some places, it maybe illegal or impossible for the other Intended Parent to be named, such as where same-sex relationships aren't recognized. In some places, surrogacy is illegal or is not recognized (like Quebec). In most cases, other than in BC, there will be steps after the birth that you will need to take and there may be costs associated with those.

Where can I get more information?

- [Government of Canada: Assisted Human Reproduction Act Resource Webpage](#)- Links to information, fact sheets and the Act, Regulations and Guidance Documents and Declaration Forms for expense reimbursements.
- [Fertility Law BC](#) Website- Information and resources about assisted reproduction and the law in BC.



Disclaimer:

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