



## Comment

### Fathers or donors? The legal position of friends who act as informal sperm donors

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I read with interest the article in BioNews and reply commentary from Berenice Golding about the recent Vitabiotics survey finding that over half of women would consider asking a friend to father their child. As a solicitor who has represented many single women and lesbian couples conceiving with 'friends' as donors, this is an issue I have quite a bit of practical experience dealing with.

There are many good reasons for a woman to choose to conceive with an informal donor rather than an unknown donor via a clinic. Of course, the problems with donor sperm supply are an important factor, but there are additional positive reasons. When conceiving with an informal donor, conception is free and unmedicalised, something which is often particularly attractive to single women and lesbian couples who do not have a fertility problem which needs to be treated medically. There is also the prospect of having an identifiable father around, which many feel is better for a child than being conceived with an unidentified donor they know very little about (albeit that the child will now be able to contact him at age 18).

Legally, however, the issues are immensely complex. Most people think that a donor's legal status hinges entirely on the place of conception: if a licensed clinic, he has no responsibilities as a parent; if at home, the law does not protect him. In fact, the law on informal donation is much more complicated. The first question in assessing the legal status of an informal donor is not where the conception takes place, but who he is donating to.

If a known donor donates to a married couple, he usually has no status as the legal father, even if the conception takes place entirely informally at home. This is because the law says that where a married couple conceives by donor insemination (DI) and the husband consents, the husband 'and no other person' is the legal father of the child. There is no requirement in the law for the insemination to take place at a licensed clinic, and so provided that the child is not conceived through sexual intercourse, the donor will not be a legal parent.

The Human Fertilisation and Embryology Act 2008 will introduce similar rules for civil partners. For children conceived after April 2009, this means that the non-birth mother in a lesbian civil partnership will be the child's second parent, leaving the biological father with no legal rights or financial responsibilities. Again, this will apply to all DI conceptions, including those which take place informally at home.

In cases of home donation to married couples/civil partners, the dividing line which determines whether the donor or the husband/civil partner is the second legal parent is therefore the means of conception. In practice, if a dispute arises later on, it may be difficult to prove that conception did occur by DI rather than sexual intercourse, so I always advise couples and donors entering into these arrangements to sign formally witnessed legal statements to confirm the circumstances of conception, making it very difficult for either party to later allege something different.

In all other cases, informal donation at home does mean that the donor is the legal father of the child. In particular, where an unmarried couple or a single woman conceives by DI at home using a friend's sperm, the donor will be the child's legal father.

There are various implications. First, it means that the donor is financially responsible for the child just like any other natural father. The Child Support Agency (if asked by the mother or where the mother is on means-tested state benefits) can pursue him for maintenance. I acted last year for Andy Bathie, the fireman sperm donor whose case hit the headlines after he was pursued for maintenance for the two children conceived by a lesbian couple with his informally-donated sperm. I know all too well that, in the absence of evidence of treatment at a licensed clinic, the CSA have little sympathy for biological fathers who claim they were 'just acting as a donor'.

Secondly, status as the legal father means that the donor can seek involvement in the child's upbringing, just like any other natural father. In common with other unmarried fathers, the donor will only have 'parental responsibility' (the right to be actively involved in day to day decision making about the child's upbringing) if he is named on the birth certificate. Current law says the mother is entirely free to decide whether to name him, so the best advice for those conceiving with informal donors is clearly not to do so. Berenice Golding commented on the proposals by the government to introduce compulsion to name unmarried fathers on birth certificates. This proposal is very much in the early stages of discussion but, if introduced, could mean a fine for single women who refuse to name an informal donor.

Even if the mother does not name the donor, his status as father is not removed. Even if he has no parental responsibility, being the legal father means that he can apply to the court for this at any time, and he can seek other court orders, including a right to regular contact, a right to be consulted on certain issues, or a right to stop the mother moving away. In making any decision in this vein, a court must weigh up the situation as a whole in the child's best interests, so his rights are not guaranteed. However, there is clearly potential for long, difficult legal battles; I have advised parents whose lives have been made a misery as a result.

So what can be done to overcome these difficulties?

Having a written agreement is a very good idea. Such an agreement is not legally enforceable in the way that a commercial contract would be but, if a dispute arises between the parties, it acts as strong evidence about the context of the situation. I suspect the courts will give such agreements greater weight as more of these cases arise.

Perhaps more importantly, existing case law (and my own experience) demonstrates that disputes arise most commonly where there is a mismatch of expectations between the mother and the donor at the outset: the donor perhaps envisages regular involvement but the mother sees him as a more distant 'uncle' figure. The process of discussing in detail how the relationship will be managed in order to draft an agreement helps flush out any such issues, and so reduces the risk of a dispute arising. I have advised clients who, after realising that they in fact had quite different expectations, decided to walk away from the arrangement and pursue other options. Much better for any problems to be discovered at this early stage, rather than after a child was born.

Another option that potentially gives much better legal protection is for the woman to take her known donor 'friend' to a licensed clinic and to register him as a sperm donor (normally on the basis that he only donates to her). This is likely to exclude his legal status as the father, but care still needs to be taken. Many women - and clinicians - assume that the donor signing consent to be treated as a donor acts as a guarantee that he has no status as the father. In fact, when conceiving with a single woman, the donor could still be treated as the legal father of the child if he intends any kind of co-parenting role. Since most women conceiving with known donors choose to do so because they want the father to have some degree of involvement, the legal position of the donor is a complicated question. There are steps which can be taken to secure the position, but specialist legal advice in all such cases is essential.

Known donor conception is undoubtedly on the increase, driven by the donor sperm shortage and the increasing numbers of single women prepared to go it alone as parents. Having advised on many such arrangements, I have seen the good and the bad. At one end of the spectrum I have seen such mothers happily and effectively raising children with varying degrees of donor involvement. At the other, I have seen bitter legal disputes between mothers and donors where one side or the other ends up wishing that they had never entered into an informal arrangement. The key message is that it is crucial for those involved to be clear about the legal situation they are getting into, so that they make the right choice with their eyes wide open.

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