

Parenthood

for same-sex couples



A guide designed to provide an overview of new parenting laws for lesbian, gay and bisexual people.



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1. Introduction



Following changes introduced by the Human Fertilisation and Embryology Act 2008, same-sex couples can now become equal legal parents of children they conceive together or conceive through a surrogate.

The information in this guide is designed to provide an overview of parenting law for advice services to use when advising same-sex couples who have or are expecting children. It is not intended to be an exhaustive statement of the law nor a substitute for seeking legal advice on particular circumstances. Neither Stonewall nor Gamble and Ghevaert LLP (the authoring solicitor) accepts any liability for the information given. Further information on these issues is also available at www.stonewall.org.uk/parenting and at www.gambleandghevaert.com.

For comprehensive information for lesbian women on fertility treatment, donor insemination and pregnancy, please see Stonewall's guide, *Pregnant Pause*, available at www.stonewall.org.uk/parenting

2. New rights for lesbian couples



The law was changed on 6 April 2009. The new rules on parenthood for lesbian couples apply only to children conceived on or after that date. They allow both lesbian partners to be treated as parents of a child they conceive together in certain circumstances.

2.1 Lesbian couples who are civil partners

Lesbian couples who are civil partners at the time of conception and conceive a child through artificial insemination will both automatically be treated as their child's legal parents.

This applies both where civil partners conceive through fertility treatment at a licensed clinic and where civil partners conceive through artificial insemination by private arrangement at home (for example using sperm donated by a friend acting as a known donor).

For civil partners to be recognised as joint parents:

- The couple must be civil partners at the time of conception. If they register as civil partners during the pregnancy or after the birth, they will not qualify.
- The conception must be through donor insemination or fertility treatment rather than through sexual intercourse. This includes donor insemination at home.
- The non-birth mother must consent to the conception, although it is presumed that she does consent unless demonstrated otherwise.

The non-birth mother, where treated as a legal parent, can be named on the birth certificate and will automatically have full parental status and parental responsibility, like a married father.

Where a child has a mother and a second female parent, he or she does not have a legal father.

2.2 Lesbian couples who are not civil partners

Couples who are not civil partners at the time of conception but who conceive together through a fertility clinic in the UK licensed by the Human Fertilisation and Embryology Authority may also both be treated as legal parents. The non-birth mother will be treated as the child's other parent if both partners sign consent forms electing for the non-birth mother to be treated as a parent.

For non-civil partners to be recognised as joint parents:

- Both partners must sign the election forms (which will be provided by the clinic) before the date of conception. The forms will not be effective if signed after conception, which means that the couple must be conceiving the child together from the outset.

- The couple must conceive at a licensed clinic in the UK. Non-civil partners who conceive outside a UK licensed clinic (for example at a clinic abroad, by private arrangement at home, or through sexual intercourse) will not qualify.

The non-birth mother, where treated as a legal parent, can be named on the birth certificate if her partner consents. If she is named on the birth certificate, she will have parental responsibility (the authority to make decisions about her child's care). If she is not named on the birth certificate, she will be financially responsible for the child and will be treated as a parent for the purposes of inheritance, but she will not have the authority to be involved in parental decision-making unless she acquires parental responsibility by other means (including by a court agreement or a court order).

When non-civil partners conceive outside a UK licensed clinic (for example by private arrangement at home) the non-birth mother will have no legal parenthood and will have to adopt the child to obtain parental rights.

Where a child has a mother and a second female parent, he or she does not have a legal father.

2.3 Impact on birth registrations

Since the new rules only apply to children conceived on or after 6 April 2009, the government has decided that the earliest a birth could possibly be registered by a female same-sex couple in the UK would be 1 September 2009.

Where a lesbian couple registers a child's birth after this date, both partners can be named on the birth certificate if they qualify as joint parents under the rules explained above. If the couple are not civil partners, the non-birth mother must be present at the birth registration together with the birth mother to be named on the birth certificate.

The birth certificate will record the birth mother as the 'mother' and her partner as a 'parent'. No father's details will (or can) be recorded if two women are named on the birth certificate.

2.4 Impact on relationship breakdown situations

The new rules give lesbian partners financial responsibility for their children, as well as recognition as parents in relation to any court application.

If a relationship breaks down, a lesbian partner who is treated as a parent will be responsible for maintaining the child and can be pursued by the Child Maintenance and Enforcement Commission (formerly the Child Support Agency) or made subject to court orders.

As a parent, she will also be able to apply to the court, without leave, for:

- parental responsibility (if she does not otherwise have it),
- a specific issue or prohibited steps order,
- a residence order, or
- a contact order.

The court will have the same powers to regulate arrangements for care of a child as they do in relation to separated heterosexual couples.

2.5 Impact on sperm donors

Donors who donate their sperm through a licensed clinic are not normally treated as being legal parents of the children they help conceive. This means that clinic donors cannot be held financially responsible for maintaining their genetic children, and nor will their donor-conceived children have any rights of inheritance from them.

A donor who donates sperm outside the context of a licensed fertility clinic (for example, a friend or a donor found through a website online) does not acquire this automatic protection and may be treated as the legal father of the child. However, where a child has a mother and a second female parent he or she does not also have a father. This means that, where a donor donates informally in circumstances where both lesbian partners will be treated as legal parents (including civil partners conceiving at home), the donor will no longer have any legal or financial responsibility for any resulting child.

2.6 Children conceived before 6 April 2009

The new rules only apply to children conceived on or after 6 April 2009. A different set of rules applies in respect of children conceived by lesbian couples before this date and these rules will continue to apply into the future for older children.

The partner who gives birth will be treated as the child's mother.

Her partner will not have any automatic status as a parent, even if the couple are civil partners. If no legal action is taken, this means that she may have no financial responsibility for the child and will not be able to apply for certain court orders to regulate her involvement in her child's life without the leave of the court.

A non-birth mother may acquire certain indirect rights and responsibilities automatically if the couple are civil partners. For example, if a civil partnership breaks down, the child will be treated as a 'child of the family' allowing the court to make appropriate arrangements for the child's care which recognises the non-birth mother's position.

The non-birth mother can also take steps to acquire direct parental status and there are a number of options including:

- A residence order - this is an order made by the court settling who a child should live with. Where made in favour of a couple, it has the effect of conferring parental responsibility (and so the authority to make decisions about a child's care) on the non-birth mother. However, the non-birth mother will not have full legal status as a parent for the purposes of things like inheritance, and this makes it important for the couple to make appropriate Wills.
- A parental responsibility agreement - this is an alternative means of acquiring parental responsibility for a non-birth mother and is available to couples who are civil partners. The process is more straightforward than applying for a residence order since it does not involve a court application.
- Adoption - this gives the non-birth mother full status as a parent as well as parental responsibility, including financial responsibility and inheritance rights. The process is lengthy and the court application cannot be made until the non-birth mother has lived with the child (post-birth) for at least six months. The couple do not have to be civil partners to apply. An adoption order will have the effect of extinguishing the legal status of the child's father (if any) as well as conferring parenthood on the non-birth mother.

This means that lesbian couples who have conceived children together before 6 April 2009 may be in very different legal circumstances, according to the steps they have taken (if any) to acquire status for the non-birth mother, and according to whether or not they are civil partners. Legal advice on the particular circumstances is recommended.

The child may or may not also have a legal father. If the couple have conceived through a licensed fertility clinic using a registered sperm donor, their child will have no legal father. If the couple have conceived at home using a friend or known donor before 6 April 2009, he will be their child's legal father until an adoption process (which extinguishes his status) is complete.

3. New rights for gay men



Different options are available to gay men who wish to conceive a child. One or both partners may donate sperm to a single woman or lesbian couple, with the intention of sharing the parenting with the child's mother/s (described in this information sheet as a co-parenting arrangement). Alternatively, the couple may enter into a surrogacy arrangement, whereby a child is carried for them by a woman (either using her own eggs or donated eggs) with the intention that they assume the full care of the child upon birth.

If a gay man donates his sperm to a single woman with the intention of co-parenting any resulting child, it is likely that he will be treated as the child's legal father. If named on the birth certificate, he will also have parental responsibility for the child, and so the right to be involved in key decision-making in the child's upbringing.

His partner may also be able to acquire status in respect of the child and there are a number of options:

If the couple are civil partners, they may sign a parental responsibility agreement (together with the birth mother) to confer parental responsibility on the father's partner. This will give the non-biological father authority to make parental decisions, although he will not be treated as a parent for the purposes of inheritance, making it important for him to put in place a will.

If the couple are not civil partners, they may be able to apply for a joint residence order, again giving the non-biological father parental responsibility.

Adoption is unlikely to be a suitable option, because one of its effects would be to extinguish the birth mother's legal status as a parent, and this is usually not appropriate in co-parenting situations.

Those involved in the arrangement may wish to consider exploring their options and putting in place a co-parenting agreement.

If there is a breakdown in the co-parenting relationship the court will have powers to make orders in the best interests of the child. The various parties involved may have different rights to make different types of applications to the court, depending on the circumstances.

3.2 Co-parenting arrangements with lesbian couples

The legal position regarding co-parenting arrangements where a gay man/couple donates sperm to a lesbian couple is more complex. Following the changes implemented by the Human Fertilisation and Embryology Act 2008, lesbian couples who conceive with donated sperm are likely to both be treated as the parents of their child. One of the effects of this is to exclude the status of the child's biological father.

This means that, in respect of children conceived after 6 April 2009, a gay father who donates sperm to a lesbian couple may have no legal recognition as a parent. If the lesbian couple he is donating to are civil partners, the father's status will be automatically excluded. If the lesbian couple he is donating to are not civil partners, the mothers may be able to choose whether they wish the child's second parent to be the father or the non-birth mother.

Such situations are complex and legal advice is recommended.

3.3 Surrogacy

Surrogacy is the process by which an arrangement is made with a carrying mother that she will hand over the child she gives birth to immediately after the birth and relinquish her parental status. This is an option for gay couples who wish to have a child together without sharing responsibility with the child's mother/s.

Surrogacy arrangements (involving heterosexual couples, single men and gay couples) are legal in the UK, although the law bars arrangements being brokered on a commercial basis and makes it an offence to advertise for a surrogate mother. The close regulation of surrogacy in the UK can make travelling abroad seem attractive, where surrogate mothers and donor eggs may be more widely available. However, it is important for gay couples to be aware that, whether they conceive at home or abroad, English law on parenthood applies. International surrogacy arrangements can be legally complex and should not be entered into without careful legal advice.

Under English law, the surrogate mother is always treated as the legal mother of a child at birth. If the surrogate is married or in a civil partnership, her husband/civil partner is treated as the child's second parent, and this excludes

the intended father from having any legal status at birth. If the surrogate is not married or in a civil partnership (at the time of conception), the biological father will usually be treated as the child's legal father.

Couples who enter into a surrogacy arrangement may apply to the court within six months of their child's birth for a 'parental order' in order to acquire parenthood. Parental orders are designed specifically for surrogacy situations and have the effect of extinguishing the status of the surrogate mother (and her husband/civil partner) and conferring full parental status instead on the applicants. Following the grant of a parental order, the child will be issued with a new birth certificate naming the applicants as the child's parents.

Under the current law, only heterosexual married couples are eligible to apply for a parental order. However, as from 6 April 2010, gay couples will also be eligible to apply. Gay couples will be able to apply whether or not they are civil partners, but they must be in a relationship; single men remain ineligible.

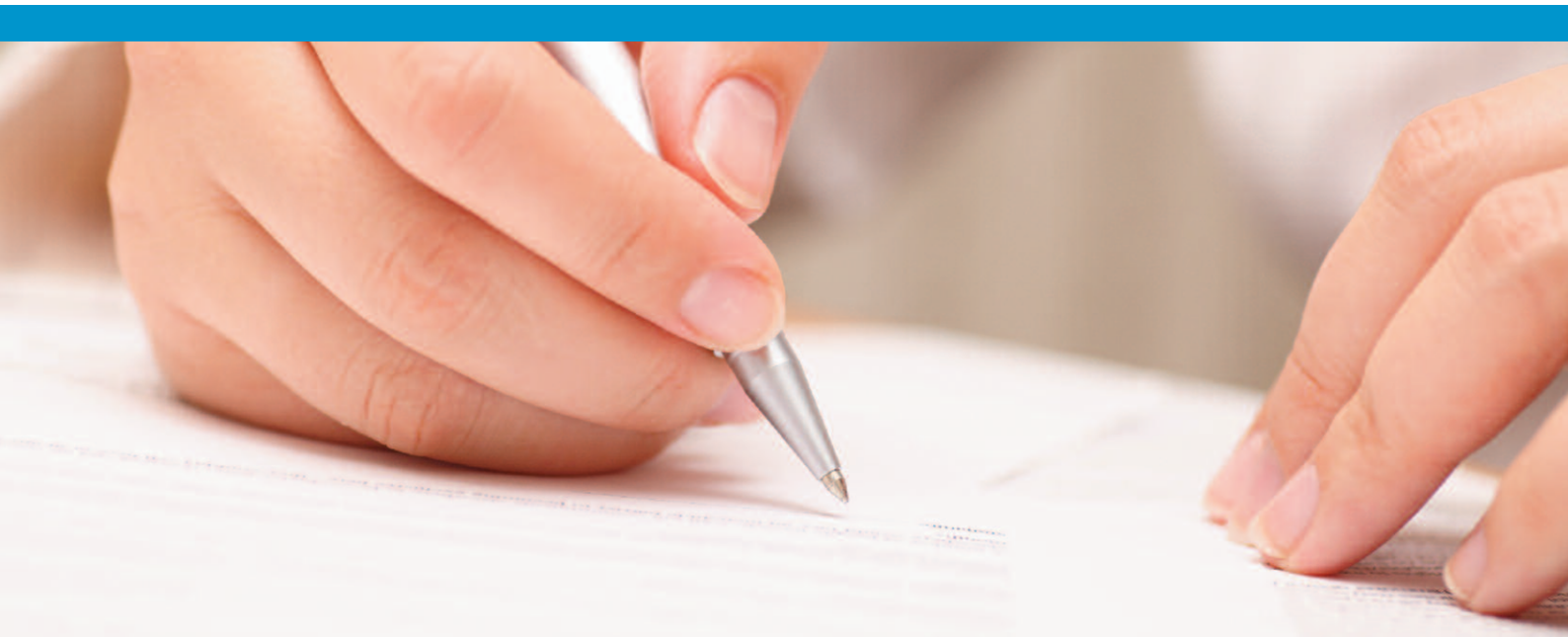
The new rules are specifically retrospective for the first six months, which means that gay couples who are already caring for a child conceived through surrogacy before the new law comes into effect (however long ago their child was born) will have until 5 October 2010 to apply for a parental order giving them full and equal parental status and a birth certificate naming them as their child's parents.

To obtain a parental order, the court will have to be satisfied that the following conditions have been met:

- one of the applicants is the child's biological father,
- the applicants are over 18 and are applying as a couple within six months of the birth (or within six months of 6 April 2010 if later),
- at least one of the applicants is domiciled in a part of the United Kingdom,
- the child is in their care at the time of the application,
- the surrogate mother (and her husband or civil partner) consent fully and freely to the order being made, and
- the surrogate mother has not been paid more than reasonable expenses, or alternatively the court agrees to authorise any payments which have been made.

Surrogacy arrangements are legally complex, and the courts consistently recommend that anyone considering embarking on surrogacy obtains specialist legal advice at the outset.

4. Where to go for further information



Stonewall

08000 50 20 20 (freephone)
www.stonewall.org.uk/info

Gamble and Ghevaert LLP (specialists in fertility and parenting law)

0844 357 1602
www.gambleandghevaert.com

The Human Fertilisation and Embryology Authority

020 7291 8200
www.hfea.gov.uk

NHS - England and Wales (for the contact details of every Primary Care Trust in England and Wales)

www.nhs.uk

NHS 24 - Scotland

0845 424 2424
www.nhs24.com

National Gamete Donation Trust (for information and advice on sperm and egg donation)

0845 226 9193
www.ngdt.co.uk

Equality and Human Rights Commission (information and advice on discrimination and human rights issues)

England: 0845 604 6610
Scotland: 0845 604 5510
Wales: 0845 604 8810
www.equalityhumanrights.com

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Please note: Stonewall do not run drop-in advice sessions.

