



Donor Co-parenting and the Law

The role of donors in the life of a donor-conceived child can vary significantly. Unfortunately, the law as it currently stands does not legally acknowledge all forms of rainbow families.

There are increasing numbers of rainbow families where a donor is not just a donor, but a co-parent. And many of these families are facing difficulties in having their co-parenting relationship acknowledged by the law.

Additionally, a donor co-parent who assists a couple to conceive a child, will not be formally recognised as a parent. However, a donor co-parent who assists a single woman in conceiving a child, with evidence of the parties' intention for the donor to be a co-parent prior to conception, will be deemed a legal parent of any child conceived.

The legal status of a donor co-parent and intended parents

The Family Law Act 1975 (Cth) (the FLA) only recognises two people as parents of a child. This means that in circumstances where there are two intended parents (regardless of sexuality) and a co-parent donor, only the two intended parents will be named on a child's birth certificate. This is regardless of the intention of the parties prior to conception.

This means that the donor co-parent is vulnerable to the intended parents changing their minds as to a donor's role in a child's life, either prior to or after the birth of a child. Like Donor Agreements, Co-parenting Agreements are also important as they are commonly the only evidence of the intention of the parties as to the donor's role in a child's life.

A Co-Parenting Agreement should be executed by the donor co-parent and the intended parents and clearly outline the parental role of each party both during the pregnancy and after the birth of a child.

It should address issues such as who a child will live with; which parent is responsible for long-term decisions for the children; who will financially support a child and in what proportions. Most importantly, it should provide that upon the birth of a child, the parties lodge an Application for Consent Orders and a Minute of Consent Orders, with the Federal Circuit and Family Court of Australia. These orders should specify which parent has parental responsibility for the child, where the child will live and what time the child will spend with their other parent(s).

Parental responsibility means all the duties, powers, responsibilities and authority which by law, parents have in relation to children. This includes not only day-to-day decisions but also long-term decisions.

In the absence of a court order to this effect, the donor co-parent is vulnerable and will have no legal right to make decisions for a child as they are not listed on the child's birth certificate, and they are not a "parent" of their child. This is the only protection available to donor co-parents under the current laws.

The Co-parenting Agreement can provide a form of security around their parental status with a child and can be used as evidence of the parties' intention as to their role prior to conception.

It is vital that in any parenting relationship involving a donor co-parent and intended parents, a Co-Parenting Agreement be drafted and all issues (as best as can be) be agreed upon prior to conception and evidenced in the Co-parenting Agreement. It is also imperative that each party obtain independent legal advice prior to executing the Agreement and that each legal representative sign a Certificate (to be attached to the Agreement) confirming that independent legal advice was provided to each party. It would also be prudent for the parties to draft the court documents and attach them to the Agreement, signed but not filed (as they cannot be filed until the birth of the child).

Legal status of a donor co-parent – Single Woman

A Donor who seeks to be a co-parent with a single woman can be legally recognised as a parent of any child conceived and they can be listed on the child's birth certificate.

Evidence of the parties' intentions prior to conception must be documented in the form of a Co-Parenting Agreement.

In the event that the intended Mother changes her mind as to the donor co-parent's role at any stage after conception, the evidence of intention in the Co-Parenting Agreement may be sufficient to establish a mutual intention and that the "Donor" was to be a parent of a donor-conceived child.

The case law shows that if this intention is established, the FLA will not preclude a child from having two parents. There may however be court proceedings required to establish this, but a child's birth certificate can be amended by court order, to include the donor as a parent.

Parental status of a donor co-parent's partner

Unfortunately, the law is yet to recognise the legal parentage of a donor co-parent's partner, regardless of the marital status of the intended parent(s) and regardless of whether it is intended that all parties are to have a parental role for any child conceived.

The best protection available for a donor co-parent's partner is for all parties to jointly make an application to the Federal Circuit and Family Court of Australia upon the birth of a child.

The laws surrounding donor co-parents are complicated and sometimes fraught. It is important if considering becoming a parent, and you are either a donor co-parent or an intended parent, that you first obtain independent legal advice to ensure the proper legal parentage of your child can be achieved upon their birth.

