Engaging in 3rd Party Reproduction?
The importance of an estate plan

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You may know well before your child is born how and when you plan to talk to your child about how he/she was conceived. You may intend to wait until the child reaches a certain age, and may have specific ideas on what information to disclose and how to disclose it. But what if something happens to you prior to this disclosure? Or what if you do not plan to disclose to your child how he/she was born unless there is a medical emergency requiring disclosure? How do you protect your child and your ability to disseminate this information?

Most intended parents involved in third party reproductive arrangements enter into an agreement with the donor and/or surrogate setting forth the expectations, obligations and intentions of each participant to the family building arrangement. Although this agreement is crucial to any third party arrangement, the agreement will not address (nor should it) your wishes with respect to how you intend to tell your child about his/her conception or birth.

Moreover, in many third party reproductive arrangements, parentage cannot be established until after the birth of the child. What if something happens to you and/or your spouse or partner before the child is born or parentage proceedings have been completed? Although you will have your legal agreement with the donor/surrogate, there is no guarantee that the agreement will be enforced or upheld by a court should a dispute occur. Many states have few, if any, statutes or case law on assisted reproductive technology. This lack of legal guidance can lead to uncertainty with respect to how the parties' intentions may be interpreted by a court, especially if one party is incapacitated or deceased.

Entering into an estate plan will help clarify the intent of the parties and provide legal certainty to both intended parents and donors. Because states have different laws

governing genetic donations and/or surrogacy, as well as heirship, and the parties involved may live in different states, the first step is to make sure your attorney is knowledgeable about which state law should apply, the law in that state, and the law in your own state. The laws governing your donation/surrogacy arrangement should be considered in drafting your estate plan.

Estate planning documents are essential for situations where the intended parents cannot establish parentage prior to the birth of the child. For example, if state law does not allow intended parents to form a legal marriage or domestic partnership (or even if it does), the non-carrying intended parent or non-genetic intended parent may only be able to establish his/her parentage after the birth of the child and completion of an adoption proceeding. If that intended parent were to die prior to the child's birth, the child may not be considered the natural or legal child of the deceased intended parent, and absent a will, may not inherit from his or her estate. Perhaps more troubling is a situation where the carrying or genetically related intended parent dies or becomes incapacitated prior to or during birth. Without proper estate planning documents, the hospital may prevent the surviving intended parent from making health care decisions for the child. The surviving intended parent may also have difficulty proving the deceased partner's intent that the surviving partner be deemed the legal parent or guardian of the child. Careful estate planning, including guardianship forms or health care powers of attorney, can be instrumental in alleviating these road blocks.

Your intentions for disclosure can also be included in your estate plan. Perhaps you would like to designate a family member or friend to talk to your child about how your child was conceived. You can set forth in your estate plan how you would like this information disseminated. For anonymous donations it is a good idea to include all of the information you have about your donor, i.e., the agency and/or fertility clinic you worked with, contact information for the attorneys, the donor's profile, the donor agreement, etc. This way even if you never intend to disclose, should a medical necessity arise, your child at least has access to the information you have and can use it for a medical emergency.

Parties to third party arrangements should be informed that a birth certificate is *not* the same as an underlying court order establishing legal parentage. Practically, it will

allow the intended parents to act as the child's legal parents, as most schools, hospitals, doctors, etc. will require proof of a birth certificate to demonstrate parentage. However, intended parents could seek an underlying order via an adoption proceeding terminating the egg/sperm/embryo donor's rights to the child and establishing their rights as the legal parents. Intended parents typically do not choose to initiate an adoption proceeding in third party reproductive arrangements, as these proceedings are costly, time-consuming, erode anonymity between the parties, and will likely be confusing to the court (as the intended parents name(s) are already on the birth certificate). Most intended parents are comfortable not seeking an adoption order. However, should the parent die, a properly drafted estate plan designating the child as an heir or beneficiary will protect the child from any other claimant contesting the child's ability to inherit from the estate. The importance of a will cannot be understated when the parent does not have his/her name on the birth certificate and there is no underlying parentage order. Without an estate plan the child will not be considered an heir or beneficiary of the estate and will not have any rights to inheritance.

An estate plan is also useful for a donor. Most states do not have statutes for egg donors, and statutes addressing sperm donation are often limited to specific circumstances. A donor should consider entering into a will to protect himself/herself, especially if the donor has children. The will should acknowledge that the donor donated his/her sperm/egg and specifically disinherit any resulting child that may have been born via the donation.

In sum, the importance of careful estate planning cannot be underestimated – it should play an integral role as you work towards building your family through third party reproduction. And remember, because the laws vary from state to state for both third party reproductive arrangements, and heirship, it is important to make sure your estate plan attorney is knowledgeable about the appropriate state law to apply, and either practices in the area of third party reproduction, or consults with your family building attorney when drafting your estate plan.