

Lawyer seeks certainty through sperm bank

Markham's Lauri Daitchman wanted to avoid pitfalls in current Ontario case

BY KENDYL SEBESTA

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When Markham, Ont., lawyer Lauri Daitchman sat down with her same-sex partner to plan how she'd become pregnant with their first child, she had no idea just how quickly visions of their rosy-cheeked newborn would soon lead to complicated legal questions.

"We weighed our options for quite some time," says Daitchman.

"We wanted to take the needs of the child into consideration and weren't sure what rights, if any, the biological parent would have. But we knew we didn't want to have to worry about making an informal contract that would later cause problems. We wanted to choose a path that was regulated and would provide us with the backup we needed."

Daitchman was hoping to avoid the legal pitfalls evident in a legal dispute over sperm donation currently before the Ontario courts. As a result, over the next several months, Daitchman, who has a busy family law practice at Feldstein Family Law Group in Markham, and her partner spent a considerable amount of time before settling on a local sperm bank and then sifting through a large stack of potential donors and ultimately selecting a Canadian man with a healthy medical record and a desire to one day meet his biological child if everyone, including the child, agreed.

"It took us a while to reach that decision, but we knew we wanted our child to have the option of meeting their biological parent if they wanted to," says Daitchman. "I think that's something every child deserves if it's in their best interest. But when it comes to contracts made informally between two people, you never know what will be enforceable and there is a lot of uncertainty there. So we chose the support and regulation that sperm banks provide. We didn't want to worry."

Daitchman is now four months' pregnant and is expecting the couple's first child in November.

"I've been getting a lot of great advice from my friends and family," she adds with a noticeable tinge of excitement in her voice.

"The reception has really been great. Everyone has been so excited for us. It's more than we could have ever asked for."

Daitchman says the pair's decision to go to a sperm bank was an effort to avoid the potential problems of having a friend or acquaintance as a donor.

She points to a recent dispute in Cochrane, Ont., that has weighed heavily on her mind. In Cochrane, a donor brought a court application against a lesbian couple he had donated sperm to. According to the application, which followed the child's birth in October 2010, a contract granted Rene deBlois no access to the child in return for donating sperm to the mother, Nicole Lavigne. The biological father, however,



Lauri Daitchman is now four months' pregnant after she and her partner sought the legal security of using a sperm bank. Photo: Robin Kuniski

alleges he signed the contract under duress, according to the application. The application requests recognition of deBlois as the father and requests liberal access to the child.

A trial date in the matter has not yet been set. DeBlois and Lavigne couldn't be reached for comment.

"If two friends decide to make an agreement for the donation of eggs or sperm and one person later changes their minds about the agreement, it is highly probable that the court won't give that agreement much weight," says Daitchman.

"That being said, anyone who is biologically related can have access to the child, although it isn't an end-all be-all. The courts are required to look at the larger picture and assess what is best for the child."

But Daitchman says that although she has limited knowledge of the case, it likely won't be an easy one for the biological father to win.

"Duress is a very high legal standard to meet," says Daitchman.

"Any time you feel a little bit of pressure, which is natural during divorce and marriage contracts, you can't just claim duress. There needs to be a firm basis for the claim. Luckily for us, duress isn't an issue for sperm banks, so we don't have to worry."

Still, lawyer Andrew Feldstein, also of Feldstein Family Law, says it's unfortunate that current legislation on the issue isn't clearer.

"The challenge in this case is deciding what our legislation wants," says Feldstein.

"Do we want people to have the ability to create firm and binding contracts when it comes to egg or sperm donations or not? The problem is that we currently have legislation that became law in the 1980s but we're trying to fit the questions of those people who created the law into our current, technologically advanced context of reproduction."

But, Feldstein adds, the deBlois case may not be as complicated as it seems.

"I perceive there'll likely only be one question in this case, and that is what access agreements will the father be allowed to have," he adds.

"Even if he did make a deal with the mother, he could say that he saw the woman's stomach growing, felt the baby kick, and decided he wanted to be a dad, and that might move a judge. But he'll still have to determine what is in the best interest of the child and that's a very broad test."

Sherry Levitan, a Toronto lawyer practising in the field of third-party reproductive law, notes sperm-donor agreements likely won't carry much weight in court.

"We've always known sperm-donor agreements are not necessarily enforceable," says Levitan.

"There have been a couple of cases where the sperm is treated like property, but the rights to a child are much murkier and have never truly been resolved."

Levitan notes that once a child is born, the partner of the biological parent receiving the donation has no legal rights to it. Getting legal rights would involve formally adopting the child or entering into another type of binding agreement, but the biological donor would have to accept it.

In cases like Daitchman and her partner's, however, if the donor remains anonymous, his consent wouldn't be necessary, says Levitan. "It absolutely affects my clients' decision about whom they choose," she says.

"Those who want their child to have a relationship with the donor often make less formal agreements, whereas those who want more control and access over the process often turn to anonymous donors. Really, we're 10 or 20 years out and we're still left with a lot of questions."

According to the Ministry of Children and Youth Services, more than 1,500 babies were born through *in vitro* fertilization in Ontario in 2006, the most recent year for which data is available. Babies born through all assisted-reproduction mechanisms now represent about one to two per cent of all live births in Ontario.

"There's a lot of uncertainty out there," says Daitchman.

"I don't know if it's just something that the government doesn't want to deal with or what, but a lot of laws say to refer to the regulations. Well, the regulations just aren't there yet. Where does that leave us?"

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