

ALL IN THE FAMILY

Legal blog on all aspects of Family Law and Divorce in Massachusetts and Rhode Island

Important Questions to Consider When Obtaining a Divorce While Pregnant

BY CATHERINE E. SPANU • DECEMBER 10, 2024

In Massachusetts, it is possible to get divorced while pregnant or while your spouse is pregnant, although it adds some complexities to the divorce process. In some other states (including Arkansas, Mississippi, California, Florida, Missouri and Texas), spouses are not permitted to get divorced until after the baby is born. If you're divorcing while pregnant, there are a few important questions that may arise and that you may need to consider.

CAN WE ADDRESS PARENTING AND CHILD SUPPORT FOR AN UNBORN CHILD?

If you are pregnant while divorcing or divorcing a pregnant spouse, the Court will not issue an Order or Judgment relating to custody or support for the unborn child. Even if you and your spouse are in agreement regarding custody, a parenting plan and child support, the Court will not approve a written divorce agreement that addresses those issues for a child who has not yet been born. Other issues such as dividing marital assets and debts, custody and support for children who are already born, and alimony, can still be addressed. As a result, spouses who are divorcing while pregnant may need to return to the Court to address custody and support for the unborn child if the divorce is finalized before the child is born. At minimum, after the child is born, divorced spouses should file a written agreement addressing custody and support for that child and ensure the agreement is incorporated into an enforceable Judgment of the Court.

If you think that you and your spouse are generally in agreement about custody and support for your unborn child, you should discuss those issues and ideally develop a parenting plan for the child before the child is born, even though any parenting plan you agree to before the child is born won't be a legally enforceable agreement. Running into Court to ask a judge to address a parenting plan for a newborn may be extremely stressful during a time when a parent is recovering after giving birth or even dealing with post-birth complications of the child, and when both parents would probably prefer to be enjoying time with their newborn. If agreement isn't possible, one or both parents may need to take quick action after the baby is born to ensure that an enforceable parenting plan is established.

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WHAT IF MY SPOUSE IS PREGNANT AND THE BABY ISN'T MINE (OR I'M PREGNANT AND THE BABY ISN'T MY SPOUSE'S)?

Under Massachusetts law, a child born to a married woman is presumed to be the child of her spouse if the child is born while the spouses are married or within 300 days after the marriage is terminated by death, annulment or divorce. The statute currently uses the terms "mother" and "father" but applies to same-sex couples as well. As of January 1, 2025, the Massachusetts Act to Ensure Legal Parentage Equality becomes effective and the relevant statute will no longer include "mother" and "father" and will instead use gender neutral terms such as "the person," "the parent" and "the person who gave birth to the child."

A spouse can seek to be removed from a child's birth certificate under certain circumstances. Both spouses can sign an Affidavit denying parentage of the spouse, provided that:

- Both of the child's biological parents have signed and filed a Voluntary Acknowledgement of Parentage; or
- A Court has issued a Judgment of Parentage (formerly called a Judgment of Paternity) determining that another person, not the spouse of the birth parent, is the biological parent of the child; or
- A Court has issued a Judgment of Non-Parentage (formerly Nonpaternity) determining that the spouse of the birth parent is not the biological parent of the child.

If the birth parent refuses to sign an Affidavit denying that their spouse is the biological parent of the child, or if the birth parent and the child's other biological parent refuse to sign a Voluntary Acknowledgement of Parentage, the spouse may need to file an action seeking a Judgment of Non-Parentage. The spouse does not have standing to file an action seeking a Judgment of Parentage determining that someone else is in fact the parent of the child born to their spouse. However, the birth parent can file an action against the other biological parent in order to obtain support for the benefit of the child if the Court determines that the spouse is not the parent of the child – child support would be paid by the person determined to be the child's other parent.

Under *current* Massachusetts law in effect until January 1, 2025, the same law that applies to opposite-sex couples applies to same-sex couples who are divorcing when one of them is pregnant. Both parents' names may appear on the birth certificate, depending on how the child was conceived. However, if parents conceive through traditional surrogacy in which one parent's sperm is used to conceive a child and the egg is provided by the surrogate, the names of the parent who provided the sperm and the surrogate will appear on the child's birth certificate. The biological parent's spouse (i.e., the child's other intended parent) will not appear on the birth certificate, and the spouses will need to file a Petition for Adoption, sometimes referred to as a Second Parent Adoption. Once the adoption is finalized, the surrogate's parental rights are terminated, and the intended parents become the child's legal parents. The Massachusetts Act to Ensure Legal Parentage Equality will change this – subscribe to this blog for future posts explaining the impact of the Act on actions involving the parentage of children in future.

Any spouse who is divorcing while pregnant (and the other parent of the child, if applicable) should seek advice from experienced family law counsel to help navigate these complex legal issues, which can include multiple actions such as divorce and parentage actions.

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