



ALL IN THE FAMILY

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The Massachusetts Parentage Act and the Automatic Genetic Material Restraining Order

BY CHARLES R. HUNSINGER • DECEMBER 18, 2024

The new Massachusetts Parentage Act goes into effect in less than a month, on January 1, 2025. While much of the conversation has appropriately been around the changes it brings to laws for LGBTQ+ families, the bill also brings significant changes for any couple using Assisted Reproductive Technology (ART), like in vitro fertilization. The rise of ART and its increasing use by families of all types makes these provisions important to understand. This post focuses on a particularly interesting provision in the new Parentage Act for married couples who begin divorce proceedings while using ART.

Section 27(n) of the Massachusetts Parentage Act (MPA) contains two significant provisions that apply to this scenario.

First, the MPA requires a party who files for divorce or who has been served with a complaint for divorce to wait sixty days from the date of service of the complaint for divorce before commencing ART. The MPA then establishes a presumption that the other spouse – the one who is not pursuing ART – is NOT the parent of the child born by ART unless, “both parties consent in writing to be parents of the child after commencement of the divorce action.” This is a huge change in the current law, under which any child born during the marriage or within 300 days of a judgment of divorce is presumed to be the child of both spouses unless the mother and her spouse (or former spouse) sign an affidavit denying parentage. See G. L. c. 209C, § 5.

Second, Section 27(n) also provides that a spouse who opts to go forward with ART CANNOT use their spouse’s genetic material after filing or service of a divorce complaint unless the spouse consents in writing.

What do these two provisions mean in practice? In certain circumstances, it is too soon to tell, but in others, we can predict some best practices. Let’s consider the following scenario: Mary and Roger have decided to use IVF to try to have a child, however, after the genetic material is harvested and before the embryo is implanted (IVF by definition involves fertilizing an egg with sperm outside someone’s body), Roger decides to file for divorce. The moment Roger files his complaint, he is not permitted to use the genetic material. Mary is not bound until she is served with the

complaint for divorce. It is in Roger's interest to obtain the summons and serve his complaint as soon as possible if he wants her to refrain from using the available genetic material. After all, Mary is not bound until she receives notice of the divorce.

Once Mary is served with the divorce complaint, she cannot use Roger's genetic material unless he consents. However, under the MPA, she can use her own genetic material. If she does, she must wait sixty days after she is served, but then her child will not be a marital child unless Roger "consent[s] in writing to be [a] parent[]." If Roger does not so consent, presumably he will have no parental rights or responsibility for child support, but the MPA is not clear. What if Roger does not consent but then the parties' divorce drags on for five years with Mary and Roger living in the same house? What if during that time Roger acts as a parent?

If Roger does consent to Mary using his genetic material, he will be a parent of the child. Best practice is likely to be for Roger to give very specific permission to Mary, in writing, to use his genetic material if he wants to agree to be a parent of the child. Unfortunately, best practice may also involve a DNA test, if Roger does not trust Mary and is not willing to have a non-biologically related child.

Put in writing that the other party has permission to use genetic material or does not have permission to use genetic material. Serve the divorce complaint as soon as possible. Notify the fertility center that your permission has been revoked. Written notice is going to be crucial to ensure divorcing couples are complying with what might be called the MPA's automatic genetic material restraining order. Most importantly, if you find yourself in this scenario or related scenarios, consult with an experienced divorce attorney, like those here at Bowditch.