

Legal Overview

On January 1, 2005, the Domestic Partner Rights and Responsibilities Act of 2003 (AB 205) went into effect. Under this statute, all legal presumptions that apply to married couples under the California Family Code will apply equally to registered same-sex domestic partners. In theory, this means that a gay male couple having a baby together after January 1, 2005, should both be presumed to be legal parents, the same way that married couples having babies through surrogacy are.

In reality, family law is considerably more complex than that. Applying the legal parentage presumptions to married, heterosexual couples is not always easy where the husband is not the biological father of the child—there are often competing presumptions of parentage, leading to uncertainty. For this reason, it is strongly recommended that gay male couples using surrogacy to become parents seek the advice of knowledgeable counsel to insure that their legal relationships with their children are protected.

Protecting Your Family

A Legal Guide for
Gay Male Couples
Using Surrogacy



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Deborah Wald is a Bay Area attorney with over ten years experience representing lesbian and gay parents and their children. The following are some of the questions about surrogacy she hears most frequently in her practice, and her answers to them.

Q. What is the legal status of surrogacy in California?

A. California remains officially ambivalent on the subject of surrogacy. While surrogacy is clearly legal in California, the legislature has not set rules for how these cases should be handled. This means that they are being handled by the courts on a case-by-case basis, without clear guidelines in place. To further complicate things, no appellate court has yet found surrogacy contracts to be legally enforceable. Instead, the courts are applying general family law rules—including rules related to adoptions—to figure out who parents are in the surrogacy context.

Q. What is the difference between “gestational” and “traditional” surrogacy?

A. With traditional surrogacy, the baby is conceived using the surrogate’s own eggs. With gestational surrogacy, the woman carrying the baby (the “gestational surrogate” or “gestational carrier”) has no genetic connection to the baby. Based on California law as it now stands, a traditional surrogate is almost certainly a mother, with the accordant rights and responsibilities—including the right to change her mind when the baby is born. It is less clear whether a gestational surrogate would have this right.

Q. My partner and I want to mix our sperm so that either one of us could be the genetic father of our baby. Does this create any legal complications?

A. Mixing sperm does create legal complications, because several of the methods available to establish your legal parentage will require you to be able to state under oath who the “natural” or genetic father is. Without knowing who the genetic father is, you are likely to have a harder time establishing legal parentage when the time comes.

Q. Does it matter if our surrogate is married?

A. As a general rule, it is considered safer to use a married surrogate who already has her own children, as her own family stability decreases the chances that she will change her mind later. That said, there is a legal presumption that the husband of a woman giving birth is the father of the child, and that presumption will have to be rebutted for you to become your baby’s legal father.

Q. I have heard that my partner and I can get a pre-birth judgment declaring that we are both our baby’s parents, and then get our names on the original birth certificate. Is this true?

A. There are a couple of judges in Southern California who are granting pre-birth parentage judgments to gay male couples having their children through surrogacy. To the best of my knowledge, no northern California judge will grant these judgments, because of the lack of clear law in the area. In other words, there is genuine concern as to whether these judgments are valid, and whether they would withstand a challenge at some later date.

For this reason, many courts—including all northern California courts to date—prefer to establish the paternity of the genetic father (which generally can be done either before or at the time of birth) and then complete an adoption for the genetic father’s partner. This method, while more time-consuming, is considered the safest way of establishing both fathers as full legal parents.

Q. Does it matter if my partner and I are registered as domestic partners with the State of California?

A. Although there may be some legal arguments for you both being parents that depend on your being registered as domestic partners, the decision whether or not to register is sufficiently complex that I would not make it on this basis. Rather, I recommend consulting with experienced legal counsel and/or a tax advisor/accountant before deciding whether to register. Once you have made that decision, then you can figure out how best to protect your parental rights with regard to your child.

Q. Does it matter what state our surrogate lives in?

A. YES! Different states have very different laws about surrogacy—in some states, it is even illegal. Since the initial parentage determination will be made wherever your baby is born, it is very important to be familiar with the laws of the state in which your surrogate lives.