

Making a Will after fertility treatment

As a lawyer, you won't be surprised to hear me say that everyone with assets or children should make a will. For parents, it can ensure that your loved ones will inherit your money and assets if you die, and that you appoint people you trust to give effect to your wishes and to look after any substantial assets for children until they are old enough to do so themselves. You can also appoint guardians to assume the day-to-day responsibilities of looking after your young children.

This is good general advice, of course, but if you have been through fertility treatment, is there anything in particular you need to think about?

What will happen to any frozen embryos after my death?

Embryos in storage are not property in the conventional sense, so cannot be gifted to someone else as part of your will in the way your other assets are. However, if you would want your embryos to be used after your death, it is important that you leave a clear written (and signed) record of your wishes, and that you are as specific as possible. For example, if you are consenting to your male partner using your embryos if you die, it is important to say specifically that you are happy for him to use the embryos with a surrogate.

Although standard consent forms provided by fertility clinics are the usual way to record these wishes, rather than putting this in a will, there have been a number of recent cases in which the forms have not been clear enough about what the deceased person wanted. When you are making a will (and otherwise thinking about what would happen in the event of your death), it is therefore good practice to review whether your consent forms are up to date, and whether they clearly enough set out your wishes as to what should happen to your stored embryos.

Am I my child's legal parent?

This is an important question in inheritance terms, since whether someone is a legal parent will dictate whether a gift in a will to 'my children' applies to them. If there is an issue around your legal parentage then you should make a will and take extra care to name your child specifically or to define 'my children' in a way that includes them. Your partner might also need to nominate you as your child's legal guardian to protect your right to look after your child if she dies.

For most parents conceiving through IVF this is not an issue, and no special issues arise just because children were conceived through fertility treatment. There is also not an issue for most parents who conceive through egg or sperm donation. However, the rules on legal parenthood can be complicated so it's important to know whether they apply to you.

If your child was conceived with an egg donor, then you are the legal mother if you gave birth.

If your child was conceived with a sperm donor then in most cases the (non-biological) father will be your child's

legal father. This applies if you were married at the time of conception, or if you conceived at a UK fertility clinic and signed all the correct forms to nominate him as the legal father. There have been a number of recent cases in which errors in the clinic paperwork have been found (although the parents affected by this should now all have been notified). The situations to watch out for are generally those involving unmarried couples conceiving with donor sperm where conception takes place outside the UK or outside a licensed clinic – here, the father may not be your child's legal father, and you need to take care that your will is carefully prepared.

If you are a same-sex couple, then the same rules apply to make both partners legal parents for children conceived after April 2009. If you have a child conceived before April 2009, or if you are unmarried and conceived outside a UK licensed fertility clinic, then the non-birth mother will not be a legal parent. Again, you will need to take special care with your wills.

Children born through surrogacy

If your child was conceived with the help of a surrogate (whether in the UK or overseas), then the surrogate and her spouse will be treated as your child's legal parents. Although the intended parents can apply for a parental order to rectify this, the process takes at least 6-12 months, and some parents (particularly those with children born overseas) do not apply. In the meantime, your child may not inherit from you if you die without a clear will benefiting them. This is why parents through surrogacy are routinely advised to put a will in place. It is also important to appoint guardians to look after your child if you die, so that your surrogate would not be left responsible.

On the flip side, it is important for surrogates and their partners to put wills in place to make sure that your child would not inherit from them (which would reduce the amount going to their own family) if they were to die before legal parenthood was properly transferred.



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