



Natalie Gamble is founder of the UK's first specialist fertility law firm Natalie Gamble Associates



Breaking up after fertility treatment

Infertility treatment is incredibly stressful. The roller-coaster of the treatment process itself, the lack of control and the emotional pain would strain anyone's relationship; it is not surprising that some relationships do not survive.

But, from a purely legal perspective, what happens when a couple breaks up after fertility treatment? Are you just the same as any other couple getting divorced, or are there special issues to be thought about?

There are, undoubtedly, many issues which are the same. A divorce (or civil partnership dissolution) process has to be followed to bring your legal relationship to an end. This will include consideration of how your assets are to be divided, and what arrangements are to be made for any existing children. For cohabiting couples, there is no formal divorce process, but you will need to sort out jointly owned assets, and who owns what share in your home, as well as arrangements for any existing children.

But following fertility treatment, there are often some very particular issues which need to be handled carefully.

Embryos or donor gametes in storage

Fertility treatment often leaves couples with embryos in storage. These may be embryos created with your own gametes, or with donated eggs or sperm (or both). They may be stored in the UK or abroad. You may also have stored donor sperm (or, less likely, donor eggs) to use to conceive a genetically matched sibling for an existing child.

Embryos and gametes are not treated as assets, in the way that your home, investments, pension and business and trust interests are. You do not own them, which means that possession is not transferred from one spouse to another along with your other assets when you get divorced.

This makes it critical to think about things carefully as part of any separation process. If embryos are stored in the UK, either genetic contributor can (at any time) ask for them to be destroyed. In these circumstances, there is a formal process which UK clinics have to follow, including a twelve month cooling off period.

There is no such formal process as to what should happen where embryos are stored outside the UK (where foreign laws may also apply), where the partner who wants to destroy the embryos is not a genetic contributor, or where donor gametes are stored to which neither partner can claim a genetic connection. For example, we often see issues arising in practice between lesbian couples who have donor sperm in storage for siblings and questions arise as to which partner, if either, should be allowed to use the sperm to conceive another child.

In either situation, there is plenty of scope for long and protracted disputes if things cannot be agreed, and of course once embryos or gametes have been destroyed they cannot be brought back. It is always best for this to be managed proactively if you are

separating – to try and agree what should happen and, whether or not you can agree, to notify the storing clinic of the position. This avoids either one partner proceeding with treatment using them against the other's wishes, or one partner unexpectedly asking for the embryos or gametes to be destroyed in a way that heightens tension in other areas.

Am I a parent to the same extent as my partner is a parent?

This may sound like an odd question, but for couples who have conceived with donated gametes or through surrogacy, it is very often a real concern. We are often asked by clients we are representing in relationship breakdown situations whether it makes a difference if you are a non-biological parent, and whether if you conceived with donated eggs or sperm or through surrogacy you will be in a less favourable position in terms of your children if you separate.

The answer to this question depends in part on what legal status you have. The law has for over twenty years protected heterosexual couples conceiving with donated eggs or sperm (or both) to ensure that both partners are full and equal parents, and treated in just the same way as biological parents. For unmarried couples conceiving with donated sperm, conception has to take place at a UK licensed clinic and since 2009 has to involve the signature of certain forms. Lesbian couples have had similar protection for children conceived since April 2009, but the new rules are not retrospective so those with older children will not both be legal parents unless they have gone through an adoption process.

For parents through surrogacy (whether in the UK or abroad) having a UK parental order is key to ensuring that both partners are parents for UK legal purposes. A foreign birth certificate or court order is not enough to secure your joint parentage in the UK. Without a UK parental order, not only will one or both of you not have legal status, but the surrogate mother will remain your child's legal mother and will need to be involved in any UK court process relating to arrangements for your children.

As you can see, the legal position can be complex, but even where you both have formal status as legal parents, more subtle issues can arise in parent versus parent disputes where there is a battle over who should have main care. Every dispute over custody (now called residence) is fact specific so there are no hard and fast rules, but there is some case precedent in the context of lesbian parent cases to say that birth/biological parentage is of significance in deciding who a child should live with. However, the bigger problem is not so much the legal position as the way in which angry partners can seek to use a lack of biological parentage as a weapon and a point of vulnerability, which can make disputes even more bitter and hard to manage.

So if you are separating after fertility treatment, it is important to bear in mind these issues, and to realise that your situation may not be quite as simple as that of other couples. Understanding this from the outset, and dealing proactively with the additional issues you face, is the best way of making your break up as easy as it can be.