Adoptions and Sperm Donors

**Note, since this post was published, North Carolina laws on statutory construction were amended. Effective July 12, 2017, the terms "husband and wife" and other terms suggesting a lawful marriage must be construed to include any two individuals who are then lawfully married to each other. See S.L. 2017-102, sec. 35 creating G.S. 12-3(16). This impacts the analysis of G.S. 49A-1, where it does apply to a mother and her spouse. For a further discussion, see* New Legislation Acknowledges Same-Sex Marriage*, posted by our colleague Cheryl Howell on Aug. 8, 2017.*

Since our blog post, Same-Sex Marriage and Adoptions of a Minor by a Stepparent, we have received several inquiries about the role of a sperm donor in an adoption proceeding. Although General Synod of the United Church of Christ v. Resinger, 12 F. Supp. 3d 790 (W.D.N.C. 2014) and Fisher-Borne v. Smith, 14 F.Supp. 3d 695 (M.D.N.C. 2014) held NC's ban on same-sex marriage is unconstitutional, they did not specifically address parentage when a child is conceived or born during a same-sex marriage. And, although **artificial reproductive technology** has advanced in the last 20 years, the laws in NC have not fully addressed these advances and how they impact parentage.

G.S. 49A-1 Does Not Apply

Although there is a tendency to want to rely on the one NC statute that addresses **artificial insemination**, it is very narrow in its scope. Enacted in 1971, G.S. 49A-1 states, "Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique."

If a statute is clear and unambiguous, the courts must apply its plain and unambiguous meaning. The courts are "'…without power to interpolate, or superimpose, provisions and limitations not contained therein.' (citations omitted). This is especially true in the context of adoption, which is purely a creation of statute." Boseman v. Jarrell, 364 N.C. 537, 545 (2010).

Although some may question the constitutionality of G.S. 49A-1 as it applies to same-sex marriages, its language is clear and unambiguous. This statute only applies when there is a marriage between a husband and wife, and therefore, does not apply to unmarried persons or same sex marriages. No other NC statute addresses children conceived by **artificial reproductive technology.** In fact, the entirety of G.S. Chapter 49 is contained in this one sentence in this singular statute.

In practice, what does Ch. 49A-1 mean? The statute treats the child as if the child was conceived through natural means during a marriage between a man and woman. "Heterologous" means the sperm came from a man that was not the woman's husband. A husband cannot subsequently challenge the paternity of a child conceived by his wife through **heterologous artificial**

insemination. It also means if an adoption proceeding for this child is initiated, both the husband and wife must consent to the adoption or relinquish their parental rights unless those rights were terminated by court order. Furthermore, notice to the heterologous donor is not required as the child is "considered at law in all respects the naturally conceived legitimate child of the husband and wife."

What does the NC adoption law require when a child is conceived by artificial insemination when G.S. 49A-1 does not apply?

There is no definitive answer. The NC statutes do not address assistive reproductive technology or parentage when there are two spouses of the same gender, a single woman, or an individual who has used an egg donor and/or gestational carrier.

An Anonymous Sperm Donor

There is not a NC statute or case that addresses an anonymous sperm donor's rights or lack thereof to notice and/or consent for an adoption of a child conceived with his sperm. Some may look to Section 702 of the Uniform Parentage Act, which states "[a] donor is not a parent of a child conceived by means of assisted reproduction." However, the UPA has not been adopted in NC. It has been adopted in a minority of states, including Alabama, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming.

We know of only one case in the country that directly addresses the question of whether an anonymous sperm donor must be served in an action involving the custody of his biological child conceived through artificial insemination. The Maine Supreme Court addressed this issue in In re Guardianship of I.H., 834 A.2d 922, 927 (Me. 2003). In that case, a child was conceived by a woman through artificial insemination with an anonymous sperm donor from a sperm bank in California. At the time of conception, she was not married to but was in a monogamous committed relationship with another woman. The Maine Supreme Court held that the court may waive service on an anonymous sperm donor when the evidence shows the biological father is an anonymous sperm donor. The court's stated rationale for its holding was two-fold:

- the improbability of actually notifying an anonymous sperm donor of a guardianship petition, and
- the fact that anonymous sperm donors wish to remain anonymous.

It is possible a NC court would look to this holding for guidance and reach the same conclusion. However, presently there is not a binding decision in NC or a NC statute that provides guidance on the issue of sperm donors in adoption proceedings. Two key issues arise in adoption proceedings involving an anonymous sperm donor: (1) who must receive **notice** and (2) whose **consent** is required. It is important to note that notice and consent are different, and, although it is counterintuitive, a court may find notice may be required even when consent is not.

Notice

The petitioner is required to **notice** various people identified at G.S. 48-2-401. Subsection (c)(3) requires **notice** be provided to "any possible biological fathers who are unknown or whose whereabouts are unknown." This appears to encompass an anonymous sperm donor. However, notice is not required to "a man who has executed a consent, a relinquishment, or a notarized statement denying paternity or disclaiming any interest in the minor, or a man whose parental rights have been legally terminated…." G.S. 48-2-401(c)(3). If the petitioner does not file with the court a consent, relinquishment, notarized statement, or order terminating parental rights, notice on the unknown possible biological father is required. However, the notice may be **waived** by either:

- The person entitled to receive it if made in open court, or at any time if made in writing and signed by the person entitled to receive it, or
- An agent authorized by that person if made in open court.

G.S. 48-2-406.

Therefore, to resolve the issue of notice the court must determine whether the donor falls into one of three categories and find sufficient evidence as described below to allow the adoption to proceed:

1. **Notice is required and was not waived.** If the donor falls in this category, then the clerk must find satisfactory proof of service of the notice on the donor. Given that the donor is anonymous, this means that service likely would be by publication. G.S. 48-2-404. The practical problem with service by publication is the petitioner will only have information, if any at all, provided by the sperm bank, such as an assigned donor identification code or general information such as race, ethnicity, age, height, eye color, sperm bank, date(s) of sperm donation, etc. The information provided by the sperm bank may be insufficient for a donor to identify himself in a notice by publication, which is required under the statute. G.S. 48-2-404(b).
2. **Notice is required and was waived** in accordance with G.S. 48-2-406. If the donor falls in this category and does not appear in court, either personally or through an authorized agent to waive notice, the petitioner must submit the written waiver signed by the anonymous donor. This obviously presents challenges and may be an impractical option given the donor's anonymous status and obligations the sperm bank may have to ensure that the donor remains anonymous. It may be possible for the sperm bank to appear as the donor's agent and waive notice in open court if the terms of any donation agreement signed by the donor allow it. The clerk in such a case would want to review the agreement or other evidence giving the sperm bank agency status and the authority to waive notice on the donor's behalf.
3. **Notice is *not* required** if the donor executed a consent, relinquishment, or notarized statement denying paternity or disclaiming interest in the minor, or the petitioner files a

certified copy of an order terminating his parental rights.

- **Consent**
  - The consent filed by the petitioner must comply with the requirements set forth in G.S. 48-3-606, which among other things requires that the donor sign the consent under oath and contain information about the child and the donor.
- **Relinquishment**
  - The relinquishment filed by the petitioner must comply with the statutorily proscribed requirements at G.S. 48-3-702 and 48-3-703, which among other things requires that the donor sign the relinquishment under oath and contain information about the child and the donor.
- **Notarized Statement**
  - The adoption statutes do not dictate the form or content of the notarized statement other than requiring that the donor sign it, it be notarized, and it contain a statement that he denies paternity or disclaims any interest in the child.
- **Termination of Parental Rights**
  - After filing an adoption petition, the petitioner may initiate a termination of parental rights proceeding on an unknown parent pursuant to Article 11 of G.S. Chapter 7B in district court. Upon the entry of the order terminating parental rights, the petitioner must file a certified copy of that order with the clerk in the adoption proceeding. G.S. 48-2-305(3).

It is in the clerk's discretion to determine whether a sufficient consent, relinquishment, or notarized statement is filed. The clerk may find the donor executed a proper consent, relinquishment, or notarized statement pursuant to evidence presented by the petitioner that demonstrates the donor did actually execute one of the three. This may include, but is not limited to, oral testimony or a written affidavit from the sperm bank that is the custodian of the donor's consent, relinquishment, or notarized statement.

Consent

The second issue triggered in the case of an anonymous sperm donor is **consent. Consent** is governed by G.S. 48-3-601 and 48-3-603. Unlike notice, there is no authority in the statute for the court to waive consent of a parent when it is required. However, an anonymous sperm donor's consent is not required unless the donor before the filing of the adoption petition, either:

- Legitimated the child,
- Acknowledged paternity and either entered a written agreement or have a court order requiring him to support the child,
- Acknowledged paternity, provided reasonable and consistent payments for the support of the mother, the child, or both, and regularly communicated or visited (or attempted to do so) with the mother during the pregnancy, with the child, or with both the mother and child, or

- Received the child into his home and openly held the child out as his biological child.

G.S. 48-3-601(2)(b); G.S. 48-3-603(a). Because it is unlikely that an anonymous donor did any of these things, consent will most likely not be required in most cases involving an anonymous donor. In addition, an anonymous sperm donor's consent is not required if he signed a relinquishment or if his parental rights were terminated by court order.

A Known Sperm Donor

A similar analysis regarding notice and consent for an anonymous sperm donor applies to a known donor. A known sperm donor is a known putative father. The petitioner is required to provide him notice as a "man who to the actual knowledge of the petitioner claims to be or is named as the biological or possible biological father." However, notice is not required if the petitioner files the known donor's executed consent, relinquishment, or notarized statement denying paternity or disclaiming any interest in the minor, or a court order terminating his parental rights. G.S. 48-3-401(c)(3). As a result, a person who is seeking sperm from a known donor may, at the time of the transaction, want to request the man execute one of these required documents.

As with an anonymous sperm donor, a known donor's consent is not required if he did not take specific steps enumerated at G.S. 48-3-601(2)(b), or if he has signed a relinquishment or if his rights were terminated by court order. G.S. 48-3-603(a).

Transfer to District Court

It is important to note that the two issues highlighted in this post: (1) who is entitled to notice and (2) whose consent is required may be posed as a question of fact or raised as an equitable defense or request for equitable relief. If an issue of fact, an equitable defense, or a request for equitable relief is raised in the adoption proceeding, the clerk must transfer the proceeding to district court. G.S. 48-2-601(a1). Upon transfer, the district court may either hear and determine the entire action, or decide the discreet factual question or equitable claim raised, such as who is entitled to notice, and remand the special proceeding to the clerk. Id., G.S. 1-301.2(b), (c).