



## **Am. H.B. 102**

126th General Assembly

(As Reported by S. Health, Human Services, & Aging)

**Reps. Wolpert, Faber, Core, Seaver, Willamowski, Raussen, Combs, G. Smith, Martin, Hoops, Reidelbach, Harwood, Allen, Buehrer, Cassell, Coley, Collier, Domenick, C. Evans, Flowers, Gibbs, Gilb, Hagan, Hood, Hughes, McGregor, Schaffer, Setzer, White, Williams**

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### **BILL SUMMARY**

- Provides that a woman who gives birth to a child as a result of embryo donation is the child's natural mother.
- Provides that a husband who consents to the implantation of a donated embryo in his wife is the child's natural father and rebuttably presumes that a husband who does not consent to be the child's father.
- Provides that a donor of genetic material used to create a donated embryo has no parental rights or responsibilities with respect to a child resulting from the donation.
- If one of the two individuals, who donated genetic material used to create an embryo dies, authorizes the surviving individual to consent to donate the embryo.

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### **CONTENT AND OPERATION**

#### **Current law**

Ohio law provides guidelines for non-spousal artificial insemination, including provisions that specify who may perform the procedure, the persons from whom consent must be obtained and the contents of the consent form, medical history and examination requirements of the donor, and confidentiality and retention of information requirements concerning the insemination. The Revised Code also clarifies the paternity of children resulting from artificial insemination: the woman giving birth to the child is the mother and, if her

husband consented to the artificial insemination, the husband is the father.<sup>1</sup> But the Revised Code does not address other forms of assisted reproduction, including embryo donation.

Under current law, the parentage of children born as a result of embryo donation is ambiguous. Under the Revised Code, a woman can demonstrate that she is a child's natural mother by proving that she gave birth to the child. The same statute permits a woman to establish that she is a child's mother by proving through DNA testing that she is the genetic mother of the child. Therefore, in the case of embryo donation, the child has two potential mothers. With respect to paternity, a man is presumed to be a child's natural father if he is married to the child's mother at the time of the child's birth, the child is born within 300 days after the marriage is terminated,<sup>2</sup> or the man attempted to marry the child's mother but the marriage is or could be declared invalid. But a presumption of paternity can be rebutted through genetic testing, so the legal rights and obligations of the intended father in the case of embryo donation also are unclear. (R.C. 3111.02, 3111.03, and 3111.09.)

There is no controlling case law in Ohio that concerns the issue of which "mother" would be considered the child's legal mother in a contested custody dispute in which a donated embryo was gestated and birthed by a woman who intends to raise the child as her own. Nor is there controlling law addressing how the intended father is to be treated legally. Case law is conflicting, with different courts using a variety of legal standards to determine parentage under a variety of fact scenarios, including intent, genetics, the child's best interest, and the common law theory of promissory estoppel.<sup>3</sup>

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<sup>1</sup> *The semen donor is never considered the father (R.C. 3111.95(B)).*

<sup>2</sup> *The marriage could be terminated by death, annulment, divorce, dissolution, or legal separation.*

<sup>3</sup> *See for example, In re C.K.G., 2004 Tenn App LEXIS 394 (Tenn. Ct App. June 22, 2004) and In re Buzzanca, 61 Cal. App, 4th 1410 (1998)(intent); Belsito v. Clark, 67 Ohio Misc. 2d 54 (1994)(genetics); Davis v. Davis, 842 S.W.2d 588 (Tennessee Supreme Court 1990) (best interest); In re Parentage of M.J., 203 Ill. 2d 526 (2003) (promissory estoppel).*

## The bill

### Parentage

The bill clarifies the parentage of certain children born as a result of embryo donation.<sup>4</sup> Under the bill, a woman who gives birth to a child born as a result of embryo donation is treated as the natural mother of the resulting child, and the child is the natural child of that woman. The woman's status as the child's mother cannot be changed by filing a parentage action, and the genetic mother of the child is therefore eliminated as a potential legal mother. The bill does not deal with surrogacy contracts, because it applies only to embryo donation for the purpose of impregnating a woman so that she can bear a child that she intends to raise as her own. (R.C. 3111.97(A) and (E).)

Further, if a woman who gives birth to a child through embryo donation is married, *and her husband consents to the embryo donation*, the husband is treated as the natural father of the child. A presumption of a father and child relation that arises from the man being married to the woman<sup>5</sup> is conclusive with respect to this father and child relationship, and no action or proceeding under the parentage law can affect the relationship. (R.C. 3111.03(B) and 3111.97(B).) However, *if the husband has not consented to the embryo donation*, the presumption can be rebutted by clear and convincing evidence that includes the lack of consent to the embryo donation (R.C. 3111.97(C)).

The bill does not address the paternity of children born as a result of embryo donation when the intended parents are not married. Unless the intended father files an acknowledgment of paternity or adopts the child, it does not appear that he would automatically be considered the child's legal father in the event of a custody dispute.

### Donors

The bill defines a "donor" as an individual who produced genetic material (semen or an egg) used to create an embryo, consents to the implantation of the embryo in a woman who is not the individual or the individual's wife, and, at the time of the embryo donation, does not intend to raise the resulting child as the

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<sup>4</sup> *The bill does not define "embryo donation."*

<sup>5</sup> *Including situations in which (1) the child was born within 300 days of the termination of the marriage by reason of death, annulment, divorce, dissolution, or separation, or (2) the man and woman attempted to marry and the marriage is, or could be, declared invalid.*

individual's own.<sup>6</sup> The bill provides that a donor is not to be considered as a parent of a child born of the donation and has no parental rights or responsibilities with respect to such a child. Moreover, if a person who produced genetic material used to create the embryo dies, the other person whose genetic material was used to create the embryo may consent to donate the embryo.<sup>7</sup> (R.C. 3111.97(D).)

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## HISTORY

ACTION	DATE
Introduced	03-01-05
Reported, H. Health	04-28-05
Passed House (97-0)	05-11-05
Reported, S. Health, Human Services, & Aging	01-19-06

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<sup>6</sup> *The "intent" component of the definition appears to be intended to prevent a situation in which an unmarried couple has a child using the man's semen and another woman's egg and the man later argues that he was merely a donor in order to avoid parental responsibility. Existing law governing non-spousal artificial insemination, however, contains no similar restriction, and if the other requirements of that law are met, he might be considered a donor under that law.*

<sup>7</sup> *In these circumstances, the deceased individual is deemed to be a donor.*