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WHERE IS ANONYMOUS REPRODUCTION TAKING US NOW?

Susan L. Crockin, JD

Ten years ago I was asked to present a plenary address at the 11th World Congress on IVF and Human Reproductive Genetics, held in Sydney, Australia entitled “*Where is Anonymous Reproduction Taking Us?*” The question was both novel and provocative. I spent weeks pondering it and debating what, as an American lawyer who had decided to open an adoption and reproductive technology practice a decade earlier, I could contribute to answering it. Ultimately, my presentation evolved into an exploration of what I had for the past decade viewed as the increasingly intertwined practices of both adoption and reproductive medicine, of the many legal tensions that developed as family building added more participants and intricacies, and of what I hoped the future would bring—a child-centered, multi-disciplinary regulatory and policy framework.

I suggested the past should inform future practices, analogized sperm and egg donation to adoption--- drawing both parallels and distinctions, and argued that multi-disciplinary policies and regulations were necessary to protect first and foremost the resulting offspring. In the subsequently published plenary proceedings, my article concluded in part:

“The existing model of reproductive medicine, where patients with their physicians make private and unfettered decisions about their family building efforts, is beginning to show the strains of modern times . . . the legal tensions reflected in recent court battles illustrate that adding anonymous or known gamete or embryo donation to efforts to enable patients to have a child raises fundamentally different questions—and societally broader concerns.

...future ART policies and regulation in the US need not necessarily or beneficially follow the historical, medical model of secrecy-based anonymous donor insemination. Instead, the future of the ARTs could benefit from a more open, inclusive model—one that recognizes the legitimate concerns of donors and acknowledges the primacy of the needs and interests, not of the adult patients, but of the recipient children.

By looking carefully at the lessons of the past, and collaborating on interdisciplinary efforts looking toward the future, it is hoped that we can accept the challenge of creating a more thoughtful, consistent and comprehensive framework for the assisted reproductive technologies and, by doing so, protect the children that modern medicine has made possible.”¹

I was wholly unprepared for the audience’s reaction to my talk. As I finished, the side aisles filled with donor-conceived adults moving to the microphones. Tears streamed down the faces of several. The words of one man will never leave me: “Thank you for speaking for us, for listening and for caring about us.” Many told me, during both the formal question and answer period and afterwards, that they had never heard their concerns or their interests voiced in public before.

Fast forward a decade: the practice of reproductive medicine has undergone some remarkable changes and been remarkably resistant to others. Gamete donation is now big business, with a dizzying proliferation of match-makers known as “brokers,” “facilitators,” “recruiters” or self-identified but unregulated “agencies” (all referred to here as “recruiters”) and last year a new entity emerged offering “concierge” services to interface between recruiters and would-be-parents to assure they find “the one” right donor —for yet an additional fee.

In an odd asymmetry, we are simultaneously seeing a surge in: 1) professional interest in increased openness and the development of gamete registries; and 2) promises of anonymous gamete and embryo donation, including frozen eggs and donated embryos created from donor sperm and egg, with no plan or expectation for future contact or information sharing other than basic medical data. The disparity in these views reflects a remarkable schism in approaches.

THE STATE OF THE LAW:

Only a handful of states address egg donation practices, largely in the context of assigning parentage to recipients similar to more

¹ Susan L. Crockin, *Where is Anonymous Reproduction Taking Us?*, in *TOWARDS REPRODUCTIVE CERTAINTY: FERTILITY & GENETICS BEYOND 1999*, at 467, 472, 473 (Robert Jansen & David Mortimer, eds., 1999).

common and long-standing sperm donation statutes.² Until more states enact egg donation statutes, egg donation practices will continue, by analogy, to rely on sperm donation law. Recent proposed model acts reflect an increased interest in relying on intent-based parentage models and reducing or extinguishing distinctions based on marriage.³ Voluntary professional guidelines promulgated by the ASRM simply state that “[egg] donors and recipients and their partners, if applicable, should execute documents that define or limit their rights and duties with regard to any offspring.”⁴ No comparable provision appears in the guidelines for sperm donation.

Egg donation litigation has been rare. There are only a handful of reported cases of which this author is aware involving custody disputes over children born via egg donation. All were aberrational in one or more respects, and three resoundingly rejected any greater claim by the biological parent. One involved divorcing spouses where the husband’s custody claim based on being the only genetic parent was rejected by the courts.⁵ In a 2007 case involving a non-married couple and their triplets, the court also rejected the biological father’s claim. Instead it found that the couple’s intent to create a family, their signed standard IVF consent form stating the woman (“wife” according to the form’s unaltered language) would be the mother, their agreement to list her as the mother on the children’s birth certificates, and her raising the children for several months supported a legal finding of maternity.⁶ In the fourth dispute, an unmarried couple who had used anonymous donor egg and a gestational carrier ended up in a bitterly contested, two-state, parentage and custody dispute with the gestational carrier who gained custody of the children at birth.⁷ The biological father and his partner ultimately enlisted their previously anonymous egg donor to assert a maternity claim on their behalf. The donor, a 21 year-old

² Del. Code Ann. tit. 13, §8-702 (2008); Fla. Stat. §742.11 (2007); N.D. Cent. Code §14

18-01 (2007); Okla. Stat. tit. 10, §554 (2007); Tex. Fam. Code Ann. §160.702 (2007); Utah Code Ann. §78-45g-702 (2007); Va. Code Ann. §20-156 (2008); Wash. Rev. Code

§26.26.705 (2008); Wyo. Stat. Ann. §14-2-902 (2007).

³ See, e.g.: Model Uniform Parentage Act §7600 et.seq.; ABA Model Act Governing Assisted Reproductive Technology (2008) §§ 601-607.

⁴ 2006 Guidelines for Gamete and Embryo Donation, ASRM Practice Committee, Vol. 86Sp4 Nov. 2006.

⁵ *McDonald v. McDonald*, 196 A.D.2d 7 (N.Y. App. Div. 1994).

⁶ *In re C.K.G.*, 173 S.W.3d 714 (Tenn. 2005).

⁷ *J.F. v. D.B.*, 116 Ohio St. 3d 363 (Ohio 2007); and, *Flynn v. Bimber*, 2005 Pa. Dist. & Cnty. Dec. LEXIS 188 (Pa. C.P. 2005)

unmarried Texan, stated clearly and publicly that she was asserting her claim solely to bolster the intended recipient couple's (ultimately successful) claim. In the fifth dispute, a former female couple litigated parentage and custody of five-year-old twins born to one of the women using the eggs of the other. Ultimately, the appellate court reversed lower court rulings that one of the women was simply a donor and awarded parental status to both women, despite standard IVF consent forms that identified the genetic mother as a donor and starkly differed from the original oral agreement.⁸

With the exception noted above where the donor asserted her rights at the request of the intended parents, there are no, reported cases of an egg donor attempting to assert legal maternity of a child born to an unrelated couple to whom she had previously and intentionally donated her eggs.⁹ There is one reported case of an egg donor objecting to a physician's splitting her eggs and providing them to a second couple without her knowledge and consent. The donor entered into an anonymous legal agreement with the first couple, but not the second. That claim settled with the second couple ultimately allowed to use the embryos created with the donor's eggs.¹⁰

The relatively rare litigation over children born via egg donation should alleviate many of the concerns raised by would-be parents. At the same time, the relatively non-existent state of the law creates an opportunity to explore both the remaining legal uncertainties and future directions that egg donation policies might take.

THE STATE OF THE LEGAL UNCERTAINTIES?

Egg donation presents other legal issues and vulnerabilities beyond custody of children. Although currently untested, the case law that has developed over control of frozen embryos between divorcing spouses suggests that a genetic stakeholder has a constitutional right of non-procreation sufficient to halt any use of embryos he or she helped create. In *A.Z. v. B.Z.*, the Massachusetts Supreme Judicial Court made

⁸ *K.M. v. E.G.*, 37 Cal. 4th 130 (Cal. 2005) [rehearing denied by *M. (K.) v. G. (E.)*, 2005 Cal. LEXIS 11804 (Cal. 2005)].

⁹ Beyond the scope of this article are cases involving 'mixed-up' gametes or embryos where, through professional mishandling, an intended parent's genetic material is inadvertently used to create a child for another individual or couple. In those cases, competing maternity and paternity claims present distinct, serious, and oftentimes heart-wrenching scenarios.

¹⁰ *Options Nat. Fertility Registry v. Dr. Allon, et. al.* and related cases (Jud. Dis. 190th, Harris Cty, TX, 1/10/05).

it clear for the first time that a husband who no longer wanted his wife to use their embryos for procreation had a constitutionally protected right to stop her to avoid “forced procreation,” notwithstanding their prior consent forms allowing her to do so.¹¹ Following the same line of reasoning a year later, the New Jersey Supreme Court ruled that a wife could stop her ex-husband from *donating* their embryos for procreation, holding that creating biological parenthood, and not necessarily legal parenthood, also amounted to unconstitutional “forced procreation.”¹² It would certainly seem plausible that an egg donor who changed her mind about donation would similarly have a right to change her mind about biological motherhood through unwanted procreative use of embryos formed with her eggs prior to implantation. In such an event, it would seem both she and the intended, genetic father could block the use of the resulting embryos against the other’s wishes.

The evolving relationships in assisted reproduction also implicate sensitive informed consent issues. For example, a gamete donor who explicitly donates to a particular patient or for a particular couple or procedure has not necessarily consented to any subsequent decisions about the use or re-donation of those embryos in the event the designated recipient has no further need for them. Whether an original consent is broad enough or specific enough to cover re-donation or whether a donor needs to be re-consented at the time of such proposed future disposition may turn on both the language of the initial consent and any ensuing legal developments. In this author’s experience, older consent forms frequently did not address such potential subsequent uses, and re-donation may present substantial legal uncertainties for both prospective recipients and medical professionals.

Another area of legal uncertainty is the standard of care that professionals owe to gamete donors for recruitment, representation, legal arrangements, and medical treatment. In two court cases from the 1990’s, a state and federal appellate court each found that traditional surrogacy brokers, as well as the various medical and legal professionals involved, owed an affirmative duty of care to two healthy traditional surrogates the brokers had recruited.¹³ The courts rejected arguments made by the brokers (both lawyers) that because they primarily represented the intended parents, rather than the surrogate, they owed her no duty of care.

¹¹ *A.Z. v. B.Z.*, 431 Mass. 150 (Mass. 2000).

¹² *J.B. v. M.B.*, 170 N.J. 9 (N.J. 2001).

¹³ *Stiver v. Parker*, 975 F.2d 261, 268 (6th Cir. 1992); *Huddleston v. Infertility Ctr. of America, Inc.*, 700 A.2d 453, 460 (Pa. Super. Ct. 1997).

In the 1992 case, a traditional surrogate was inseminated with the sperm of an intended father who was not screened for cytomegalovirus (CMV). After the surrogate, Judith Stiver, gave birth to a severely affected child (because both she and the intended father had CMV), she sued. The Sixth Circuit ruled that the broker, doctor and lawyers involved all owed her an affirmative duty of protection to keep her from harm. (in this case, the harm clearly resulted in the surrogate delivering and raising a child with a severe genetic condition) “[t]his ... affirmative duty of protection, marked by heightened diligence, arises out of a special relationship because the defendants engaged in the surrogacy business and expected to profit thereby.”¹⁴ The court found that duty included an obligation to design and administer a program, including a requirement for appropriate testing---to protect the surrogate as well as the child and contracting parents from foreseeable harm caused by the surrogacy undertaking.

Five years later, a Pennsylvania court in a wrongful death suit brought by a traditional surrogate relied on *Stiver*'s reasoning also to find a higher affirmative duty of protection owed: “. . . we conclude that a business operating for the sole purpose of organizing and supervising the very delicate process of creating a child, which reaps handsome profits from such an endeavor, must be held accountable for the foreseeable risks of the surrogacy undertaking because a ‘special relationship’ exists between the surrogacy business, its client-participants, and most especially, the child”¹⁵ The surrogate, Phyllis Huddleston, argued the broker had breached that duty by not having investigated or counseled the intended parent—a single father—to ensure his fitness as a parent. The twenty-six-year-old man killed the five-week-old child by shaking him to death; the autopsy confirmed the child had preexisting injuries as well. Only after the fact did the surrogate learn that the father had recently lost his mother and had no child care experience. Her lawsuit was initially dismissed, but reinstated on appeal. The appellate court, citing *Stiver*, applied a higher, affirmative standard and ruled that brokers should be liable for the foreseeable consequences of a surrogacy arrangement, which it held included child abuse.

While it remains to be seen whether a similar affirmative, higher duty of care may be extended by other courts and to other forms of collaborative reproduction, including egg donation, the rationale behind these courts' rulings would seem applicable to similar

¹⁴ *Stiver*, 975 F.2d at 268.

¹⁵ *Huddleston*, 700 A.2d at 460.

relationships created between other recruited third parties and the multiple involved professionals.

As anonymous egg donation began to take off in the 1990's, these and other uncertainties about the legality of these families and the vulnerabilities of the participants—recipients, donors, and offspring began to bubble to the surface. With only a handful of state laws addressing egg donation, a number of lawyers—including this author—developed the practice of encouraging private legal agreements between intended parents and donors in an attempt to at least partially fill in those gaps. While it was impossible to predict with any certainty that such agreements would be enforceable, at a minimum they provided a written record of the parties' timely, negotiated, intentions. Attorneys in this field drafted clauses to clarify the respective legal status of the child, intended parent(s), and donor, as well as to address payment issues, disposition of excess embryos and the donor's role—if any—in such a decision. These terms also sought to address prospective future contact for myriad potential reasons at the request of any of the parties or the resulting offspring. I recommended to all of my recipient clients that they consider making arrangements for future contact for a variety of reasons: medical information (relevant to the donor or child), social information, a meeting if their child wished it, or even to request a donor re-donate for a subsequent child. We negotiated with donor counsel (which we required donors to retain) and wrestled with issues ranging from emotional decision-making over reasons for future contact to pragmatic logistics of who would maintain the contact information for the next twenty-one years or beyond.

Today, egg donation has grown from a handful of stand-alone recruiters and small recruiting services within ART medical programs, to become a *very* big business and growing bigger all the time with over 80 recruiters listed on ASRM's website.¹⁶ While research or stem cell egg donors are virtually nonexistent due to current payment restrictions, fertility or procreation donors are routinely recruited and paid a minimum of \$5,000 per donation, and often much, much more. Egg donation has become so prevalent that stand-alone recruiting businesses have virtually replaced medical IVF programs' donor coordinators in most areas of the country. In just this past year, an even newer independent entity—concierge services—has arisen, which offers, for yet another fee, to help would-be-parents navigate the increasingly crowded field of recruiting programs to find their “one”

¹⁶ ASRM, Egg Donor Agencies, *available at* http://www.asrm.org/Patients/eggdonor_agencies.pdf (last visited on May 2, 2008).

perfect donor.¹⁷ Potential parents may have to pay their donor, donor recruiter, donor recruiter finder, and doctor if they live in a state without mandated infertility coverage or do not qualify for insurance coverage for the medical procedures involved. In the past few years, these stand-alones have gone from being labeled (somewhat pejoratively) “brokers” to “recruiters” to the adoption-invoking “agencies.” But, unlike adoption or other forms of legally recognized family building, egg donation still has few rules or regulations, and even fewer laws, protecting the participants or resulting offspring.

The legal agreements many of us once saw as protections seem increasingly quaint if not antiquated. Today, donor attorneys typically receive a minimal flat fee (\$250-\$400 in the Boston area) to represent their clients, and the legal services may be performed via a single telephone consultation. I have had prospective recipient clients call and demand to pick up the “legal paper” from my receptionist, or who want to do “the paperwork” with me over the phone. I recently learned of a donor who called the recruiter to ask them to explain what she had just signed¹⁸ Recently a newer recruiter refused to allow a donor and her attorney (who was selected by the recruiter and appeared on its website) to even review my proposed contract without the recruiter first previewing and approving it. The explanation given was that this was simply done in order to “avoid stressing her out,” but the process removed any pretense of objectivity and triggered serious conflict-of-interest concerns.

As stand-alone recruiting entities continue to proliferate and in some instances standardize how such agreements are entered into and assert control over issues surrounding terms, legal representation and fees for both donors and intended parents, it remains to be seen whether such agreements will indeed be found to protect the parties as was initially envisioned.

On the other hand, experience continues to reinforce my belief that models that encourage or require recipients and donors to communicate with one another in advance of a donation cycle, including over issues of future contact, are preferable to a hands-off approach. I received a series of emails that reinforced my belief that

¹⁷ See, e.g. www.donorconcierge.com (last visited on May 2, 2008).

¹⁸ A disconcerting occurrence when the donor had just signed a binding legal agreement, with the intended benefit of independent legal representation whose role was to ensure she understood the issues, had a full opportunity to both ask and have any questions answered and to negotiate on her behalf terms and an agreement with which she was comfortable.

this remains at least a small step in the right direction. First, my recipient clients expressed both their openness and ambivalence about including a provision in the agreement to address future contact; the donor responded through her attorney. An excerpt of that exchange follows:

“. . . We do not know if we will be telling our child they were conceived using donor but, based on what psychological professionals are currently stating, it is important to try to leave that door open. We pictured it as analogous to an open sperm donation where at 18 the child can contact the donor agency and then see if donor can be contacted/willing to meet . . . we understand if she wishes to take this off the table but wanted her to at least consider this if it seems to be in the best interests of the child.

“. . . [I]t is entirely up to the [recipients] as parents if/when they decide to tell their child they were conceived using an egg donation. Whenever they make that decision, the door is always open for them to contact me through [the recruiter]—whether they determine it to be before or after the child turns 18. I am always here, and I am always open to that. And please tell them that just that one paragraph that they sent me made me happier than you can imagine—not because there is a chance to meet the child, but because they, as parents, are putting that much thought and love into what they are deciding for their child. Their child will be very lucky to have such caring parents”

These emails illustrate the benefits of an individualized and hands-on approach. Had the parties not been counseled, represented and encouraged to address issues of future communication, it is difficult to see how the opportunity for this personal interchange would have presented itself. Guidelines or requirements for addressing these issues would provide such an opportunity.

There are other signs that gamete donation is ripe for voluntary guidelines and at least minimal legal protections, if not comprehensive regulation. Concerns include multiple donations, misrepresentation on recruiter websites of donor identity and age, genetic abnormalities discovered in donors or donor offspring, consanguinity risks, and the

potential implications of future egg freezing on a large scale similar to frozen sperm banking.

To date, egg freezing is too recent a development in the US to have fostered litigation, but the growing interest in commercial egg freezing for both fertility preservation and donation will inevitably present challenges to those administering, offering or hoping to receive such genetic material. This evolving field is likely to confront issues related to whether frozen donor eggs must be quarantined, structuring compensation to donors and payments by intended parents, how donors, intended parents, and future children may access information about one another, and whether donors may change their mind as to eggs that have been donated and frozen but not yet thawed or fertilized. On the one hand, as the technology advances, there will be little question that frozen eggs are likely to replace fresh egg cycles as the preferred means of achieving pregnancies. On the other, such developments will invite a return to the old sperm donor models that so many in the field are currently challenging as insensitive to the growing sense that these families have and should have an established means of staying connected to some, as yet undefined, degree.

LOOKING AHEAD:

So, if tracking gamete donation is advisable, what are the challenges ahead? Unfortunately, from a policy perspective, there appear to be many.

What are the impediments to sharing information that donor offspring can access? First is likely defining both the purpose and scope of such data: is the purpose to provide information to offspring, to track donor or offspring health issues, or to address potential donor fraud? Is the scope limited to medical information, or does it extend to identifying donor and genetic sibling information? The second challenge is to examine and define the relevant privacy rights involved. Do donors and recipients have privacy rights springing from their constitutionally protected right to privacy and procreation? Or do offspring have independent rights to the biological background? Under existing laws from state to state, what are the vulnerabilities of sharing information? Might offspring or donors have claims in states that do not apply sperm donation models to egg donation? Might a donor open herself up to liability or child support obligations? Fundamentally, is it fair to establish a registry if the legal landscape is inadequate to protect the participants? The third challenge is to determine how such

information can be shared but limited to the intended recipients of the information—even if there is agreement to provide some amount of data for an agreed upon purpose to a specified set of recipients. Inadvertent information disbursements of genetic information, or loose controls of otherwise private health information, are practical impediments that cannot be ignored. And finally, what of the donors or recipients who wish to choose not to share such information?

CONCLUSION:

The opportunity to reframe the practice of gamete donation is here and now. The experiences with adoption and sperm donation, and increasingly from egg donation and the intertwined issues from all forms of collaborative reproduction, provide lessons that we would be well-advised to incorporate in establishing a new framework for gamete donation. Some of the fears of would-be-parents, including custody challenges, have not materialized but still likely influence policies surrounding anonymity. Other concerns, such as legally sound assurances that intended parents are legal parents and that donors are not, need to be addressed with clearly drafted legislation. While the policy challenges are not to be minimized, years of experiences with these families by parents, donors, offspring, and all sorts of professionals and intermediaries can be harnessed to at least attempt to create a comprehensive framework within which to practice these evolving forms of family building.

If professionals—be they doctors, lawyers, facilitators, brokers, or concierges—are willing and permitted to promote anonymous arrangements with no expectation, plan, consensus, or requirement for future contact or even permanent preservation of information, we are likely destined to create another generation of offspring looking for their genetic ties and thinking none of us who helped create them are listening or care.

The time and opportunity to learn from the past to create thoughtful, ethical, and child-centered policies in gamete donation for future generations is, still, here and now.

