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Introduction: Medical and Legal Advances in Fertility Preservation - Twenty-First Annual Law Review Symposium

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INTRODUCTION: MEDICAL AND LEGAL ADVANCES IN FERTILITY PRESERVATION

*Brittany Ann Heitz**

Medical advancements in the field of fertility preservation increase the reproductive options available to patients worldwide. In its most recent report on assisted reproductive technologies (ART), the Centers for Disease Control and Prevention (CDC) found that 2%, or 1.2 million, of the 62 million American women of childbearing age had made an appointment for infertility services in 2002.¹ It also found that ten percent of this same group received such services at some point in their lives.² As the number of persons affected by fertility increases, related legal issues arise with increasing frequency.

Fertility treatment often implicates numerous legal rights, such as the right to privacy, the right to equal protection, and the right to due process. Cutting-edge medical technologies are constantly evolving and raise new social, economic, political, and legal issues. The law must adapt to account for the intersection of these rights and issues, yet it remains a few steps behind.

The Twenty-first Annual DePaul Law Review Symposium examined the medical advancements in fertility preservation and their legal and social implications. The Symposium took a multidisciplinary approach to the topic, drawing upon the experiences of medical researchers who focus on ART and legal scholars and practitioners who explore their legal implications, as well as doctors who perform fertility preservation treatments and patients who have undergone them. After first considering the field of fertility preservation generally, the Symposium turned its attention to oncofertility, the “interdisciplinary

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1. CDC, ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORT 3 (2009), available at http://www.cdc.gov/art/ART2009/PDF/ART_2009_Full.pdf (reporting on data from the 2002 National Survey of Family Growth).

2. *Id.*

field at the intersection of oncology and reproductive medicine that expands fertility options for cancer survivors.”³

The Symposium opened with a presentation from Dr. Ina Cholst, an associate professor of obstetrics and gynecology and reproductive medicine at Weill Cornell Medical College. Dr. Cholst focuses her practice on the ethical and psychological issues arising from the use of egg donation. Her presentation laid the groundwork for the later presenters, and without her contributions we, as an audience, would not have been able to fully understand the issues at hand.

Dr. Cholst began by providing an overview of the various fertility preservation treatments, outlining the different options available to women and men, and adults and children. In doing so, she noted that many persons seeking fertility preservation treatment are individuals with benign diseases, females whose ovaries need removing, persons with genetic illnesses, or persons diagnosed with cancer. She then discussed more-common fertility preservation options, such as embryo freezing, detailing the many issues that these individuals may face in seeking treatment. Dr. Cholst also discussed more experimental techniques, such as the cryopreservation of ovarian tissue, which may eventually be used to preserve the future fertility options of children. Dr. Cholst concluded by exploring the social and cultural implications of using fertility preservation treatments with children.

Dr. Cholst's contribution to this Symposium Issue, entitled *Oncofertility: Preservation of Reproductive Potential*,⁴ builds on these points. Her article articulates the different treatment options available and connects these options to social and cultural issues. For example, Dr. Cholst notes the disparity in fertility preservation options between men and women. Her article also emphasizes the role of medical practitioners in the fertility preservation process, especially in the context of oncofertility, and advises doctors to take care not to harm the body more than necessary and approach patients with an understanding of what lies ahead.

The next presenter was Professor Nanette Elster, former director of the Health Law Institute at DePaul University College of Law. Professor Elster teaches numerous classes on reproduction, genetics, and

3. *About the Oncofertility Consortium*, ONCOFERTILITY CONSORTIUM, <http://oncofertility.northwestern.edu/about-us> (last visited May 19, 2012). Teresa Woodruff, director of the Oncofertility Consortium at Northwestern University, “coined the term oncofertility to describe a new discipline that bridges oncology and reproductive medicine in order to discover and apply new fertility preservation options for young patients with fertility-threatening diseases or treatments.” *Id.*

4. See Ina N. Cholst, *Oncofertility: Preservation of Reproductive Potential*, 61 DEPAUL L. REV. 763 (2012).

ethics, and she is also the Vice President of Spence & Elster, P.C., a Chicago-area law firm that focuses on fertility law. Professor Elster used her extensive experience and expertise to provide the audience with a general understanding of the legal issues surrounding the advances in fertility preservation including, most importantly, informed consent.

The field of fertility preservation borrows its concept of informed consent from the area of medical malpractice, established in the seminal case of *Canterbury v. Spence*, and requires that consent be knowing, informed, and voluntary.⁵ Professor Elster emphasized that when working with persons still deciding whether to undergo fertility treatments, especially those dealing with cancer and other medical conditions, obtaining informed consent from the patient should require an ongoing dialogue. She urged that these conversations include lawyers, doctors, clergymen, ethicists, and psychologists, who should discuss the impact of undergoing fertility treatments, their associated costs and potential success rates, and whether other treatments may compromise the patient's fertility. For previvors, defined as persons who have not yet been diagnosed with cancer but have a predisposition to cancer,⁶ the discussion should also include geneticists to better understand how their condition may affect their offspring. Although little legal guidance exists regarding fertility preservation, the discussions must be thorough and are a necessary step prior to undergoing any treatment.

After providing this general overview, Professor Elster then highlighted the complex legal issues arising from freezing children's embryos for future use. Given the scarce legal guidance in this area of the law, many questions remain unanswered. Being aware of potential legal issues is the first step in combatting them as they arise in the future, and Professor Elster's presentation provided the necessary guidance to do so.

The latter half of the Symposium dealt primarily with oncofertility. To contextualize the subject, a panel of medical researchers provided unique and diverse perspectives. Dr. Lisa Campo-Engelstein, a post-doctoral fellow with the Department of Medical Humanities & Bioethics at Northwestern University Feinberg School of Medicine, discussed the issue of insurance coverage for conditions induced by cancer treatment, comparing fertility preservation to reconstructive surgery following breast cancer. Dr. Campo-Engelstein fully explores

5. 464 F.2d 772 (D.C. Cir. 1972).

6. *Cancer Previvors*, FORCE, http://www.facingourrisk.org/info_research/previvors-survivors/cancer-previvors/index.php (last visited May 19, 2012).

this topic in her submission to this Issue, entitled *Insurance Coverage for Cancer Treatment-Induced Conditions: Comparing Fertility Preservation Technology and Breast Reconstructive Surgery*.⁷

In both her presentation and her commentary, Dr. Campo-Engelstein focuses on handling fertility preservation treatment in practice. She highlights the impact that subtle decisions made by medical practitioners and insurers have on patients.⁸ Dr. Campo-Engelstein's analysis provides a practical analysis of what patients face when determining whether to undergo these types of treatments.

Next, Dr. Patricia Hershberger, an assistant professor of nursing and affiliate professor of medicine at the University of Illinois at Chicago, spoke about young women diagnosed with cancer and their decision-making processes regarding fertility preservation. Dr. Hershberger further explored the concept of informed consent described by Professor Elster earlier in the day. She provided quotes and stories from young women deciding whether to undergo fertility preservation. Her presentation highlighted the gravity of their mental and emotional states before, during, and after making such decisions.

To conclude the oncofertility panel's discussion, Dr. Sarah Rodriguez, a postdoctoral fellow in the Department of Medical Humanities & Bioethics at Northwestern University Feinberg School of Medicine, examined conception and cancer from a historical perspective. Dr. Rodriguez focused her discussion on the biomedical model of cancer and the tendency of practitioners to devote their efforts solely to treatment options for cancer, rather than preventative solutions. She then linked this biomedical model and solution-based approach to the increased awareness of the potential infertility of children and young adults. Dr. Rodriguez also provides a written conclusion to this Issue, entitled *Cancer, Infertility, and the Narrative of Progress*.⁹ Her commentary challenges readers to reconsider the attention given to cancer treatment and advocates instead for a preventative approach.

The Symposium's keynote speaker was Professor Dorothy Roberts, a Kirkland & Ellis Professor at Northwestern University School of Law. Professor Roberts has written and lectured extensively on the interplay of gender, race, and class in legal issues concerning repro-

7. Lisa Campo-Engelstein, *Insurance Coverage for Cancer Treatment-Induced Conditions: Comparing Fertility Preservation Technology and Breast Reconstructive Surgery*, 61 DEPAUL L. REV. 849 (2012).

8. For example, the difference between coding a treatment as a cancer treatment rather than procreative management. *Id.* at 854.

9. Sarah Rodriguez, *Cancer, Infertility, and the Narrative of Progress*, 61 DEPAUL L. REV. 861 (2012).

duction, bioethics, and child welfare. Professor Roberts utilized the unique socioeconomic perspective she has cultivated in her award-winning books and articles to discuss the social, economic, and political context of fertility preservation. Her presentation directed the audience to analyze the societal effect of fertility preservation and childbearing.

Professor Roberts's thought-provoking contribution to this Issue, entitled *The Social Context of Oncofertility*,¹⁰ focuses on three societal inequalities that may result from fertility preservation: gender inequality, economic inequality, and racial inequality. With respect to gender inequality, her article questions whether fertility preservation reinforces gender norms by fulfilling the expectation that women will reproduce, or whether it simply expands women's choices in making decisions regarding childbearing in the future. With respect to economic inequality, Professor Roberts highlights the sometimes-prohibitive cost of using fertility preservation methods. Finally, with respect to racial inequality, she analyzes whether ART permits women to have children who are genetically related to them. She argues that these technologies emphasize society's preference for genetic relatedness over adoption when choosing how to become parents. Professor Roberts's contribution to the Symposium and this Issue asks listeners and readers to think critically about the societal implications of fertility preservation, and she made the event a tremendous success.

The final panel of speakers at the Symposium rounded out the day by providing a "patient's perspective." Kristin Smith, a patient navigator at Northwestern Memorial Hospital, discussed her experiences working with patients who are either currently undergoing or deciding whether to undergo fertility preservation. Joining her were two of her patients who underwent fertility preservation treatment, Bonnie Goldsborough and Holly Manprasio. The panel offered the most intimate contribution of the day and provided a personal touch to the Symposium's legal, medical, and ethical dilemmas. The practitioners, doctors, lawyers, and scholars in attendance were able to hear first-hand the stories of two individuals who underwent such invasive and overwhelming treatments. Their willingness to share such personal experiences is something for which we cannot thank them enough. The day simply would not have been the same without them.

This Issue also contains an article by an author who did not present at the Symposium, *Be Fruitful and Multiply, by Other Means, if Neces-*

10. Dorothy E. Roberts, *The Social Context of Oncofertility*, 61 DEPAUL L. REV. 777 (2012).

sary: *The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements* by Paul G. Arshagouni.¹¹ Professor Arshagouni sets his sights on gestational surrogacy, yet another issue raised by the ever-advancing reproductive options available to those unable or unwilling to conceive a child through traditional means. In his article, he argues that gestational surrogacy is not necessarily the deleterious practice that critics contend and that such contracts should be valid and enforceable. Underscoring the importance of this issue and the myriad implications flowing from the medical advancements in fertility preservation is a comment authored by *Law Review* member Chelsea VanWormer, who advocates for amending Michigan's gestational surrogacy law to recognize and regulate gestational surrogacy contracts.¹²

Finally, I would be remiss if I did not give a special thank you to the many people without whom the Symposium and this Issue would not have occurred. First, Nanette Elster was an invaluable mentor throughout this entire process. She provided guidance, innovative ideas, and mentorship throughout the every stage of planning this Symposium. Her teaching personality and dedication to this field of law gave me the foundation needed to create such a great event. Thank you also to all of the speakers at the Symposium, as well as the authors in this Issue, for taking time out of their busy schedules to make both the Symposium and this Issue such a great success. Also, I am so grateful for the Volume 60 Editorial Board's suggestions, support, patience, and willingness to help. Thank you to the Volume 60 staff members who provided extra sets of hands on the day of the Symposium. And last, but certainly not least, thank you to the Volume 61 Editorial Board for their tireless efforts in publishing this Issue. Their contributions have memorialized the topics of discussion from this Symposium for future debate as emerging issues continue to arise.

11. Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799 (2012).

12. Chelsea VanWormer, *Outdated and Ineffective: An Analysis of Michigan's Gestational Surrogacy Law and the Need for Validation of Surrogate Pregnancy Contracts*, 61 DEPAUL L. REV. 911 (2012).