

## Third-Party Conception: Finding the Legal Balance

By Tracy Morris

The first successful human eggs donation with IVF was reported in 1983. Since then, the practice – using one woman’s donated eggs to help another woman to give birth to a child – has flourished. The most recent statistics available from the Society of Assisted Reproductive Technology (SART) report over 12,400 transfers of embryos made from donor eggs were performed in 2004. Success rates measured as live births are consistently higher with donor egg for many reasons. Donor egg transfers resulting in live births in 2004 weighed in at an impressive 50.4 percent.

Donor eggs are used in cases of primary ovarian failure (POF) and diminished ovarian reserve. It may also be offered in cases of multiple failed IVF cycles and when women seeking pregnancy are known carriers of adverse genetic conditions. Similar conditions and others may lead to the choice of using a surrogate carrier.

The population that turns to third party reproduction is comprised of people for whom there was very little hope of biological parenthood in years past. Given that fact and the high success rates for all third party techniques, its easy to understand why this particular branch of fertility treatment is considered so miraculous by many. It may also be easy to see why this could be an especially vulnerable group of “intended parents” or “IPs,” a phrase and acronym used to refer to the recipients of donated eggs, sperm, embryos, and infants born to surrogates.

### Patchwork Laws

The medical specialists who have almost mastered the treatment itself are usually not in a position to assist with the unique, crucial legal matters related to using a third person to create a child. The United States’ laissez faire approach to regulation of this medical arena has resulted in family situations that are uncomfortable at best and traumatizing at worst. However, more stringent attempts overseas at legalizing or restricting who can use a given fertility technique have resulted in couples and individuals country-hopping to squeeze through loopholes. An entirely new industry, medical tourism, is growing rapidly to meet their needs.

For example, a May 2006 article in the Guardian Unlimited reported that the U.K.’s recent ruling that stripped anonymity from donors has led to such a substantial decrease in both sperm and egg donors that British intended parents are heading to Spain and a few other European countries in droves. To cope with the migration of the infertile Brits, Spanish clinics are responding by trying to recruit more fair-skinned donors from eastern European countries. Italy provides the most glaring example of laws that push patients across borders. IVF is only available in Italy to married, heterosexual couples whose own egg and sperm are used, the transfer of only three embryos per IVF is allowed, and there is no legal embryo freezing at all. Naturally, Spain has become one of the go-to

spots (the U.S. is hot, too, for those who can afford it) for Italians wanting to use third party reproduction.

Though geographically in reverse, Tammy Gifford's story as a traditional surrogate demonstrates what could be the future for American patients if certain laws are passed. Gifford, who lives with her husband and children in Alaska, is embarking on her first international surrogacy program with a couple from Belgium, where the practice is illegal. After three unsuccessful and costly attempts with a Canadian gestational surrogate using a donor egg and, therefore, requiring IVF, the couple found Tammy, who has already helped an Ohio couple via traditional surrogacy. Traditional surrogates provide the egg, so impregnation can occur with far less costly intrauterine insemination.

None of the expected barriers – such as language or time difference - were a problem for either Tammy or the Belgium couple. To spare further expenses from travel, the couple chose to have their frozen semen samples banked and transported with the help of a reputable Danish company. Then, assuming all goes well and a baby is born from this coordination of effort, the IP's would be present in Alaska for the birth.

However, the most notable barrier for everyone involved in this complex family-building plan, the geographical distance itself, resulted in an unforeseen setback when the couple's 84 frozen samples were held up in U.S. Customs.

“The tank was supposed to be frozen for three weeks,” an exasperated Tammy reports. “It arrived on day 19 of those three weeks, and it was thawed out completely.” The medical staff at the receiving clinic observed that the tank appeared to have been opened by either the FDA or Customs officials, rendering the samples useless.

Should fertility patients in the U.S. be concerned about what's going on legally on the other side of the world? Does the complicated mix of laws have any bearing at this time on Americans who may be looking for their answer overseas?

Steven Snyder knows of at least one U.S. agency that recruits egg donors from South Africa. The reason: even with associated travel and lodging expenses, suing a donor from abroad is still a bargain as compared to using an American.

Snyder, who is the Executive Director of the International Assisted Reproduction Center, is one of few attorneys in the United States who has devoted his practice to the largely gray area that is reproductive law. While he's focused on the legal side of family-building for well over a decade, Snyder says the last five years have seen steady growth in surrogacy-related travel between Europe (and to a lesser extent, other countries) and America.

While there are no guarantees in this business, Snyder says that fertility patients are only fully educated to the extent that they have knowingly assessed and accepted the risks. He and other long-time reproductive law advocates worry about the potential for abuse by opportunist entrepreneurs.

“I take my hat off to those who are motivated by trying to reduce the access price point of the procedures for parents.” Says Snyder, “but others are in it because they see an income-generating opportunity based on people’s fundamental and overwhelming desire to procreate.”

### New Places, Same Old Confusion

The legal conundrum isn’t only related to international; third party ART, but state-to-state as well.

Surrogates like Tammy Gifford stay in touch with each other and the changing laws. She says that she knows of many international family-building stories that work out well, and that aside from the usual language barrier, it’s the confusion among U.S. state laws that create the most problems.

“Sometimes at the birth, the state doesn’t know how to handle the birth certificate and might require an adoption take place,” says Tammy. “When dealing with international parents, it can get very expensive and time-consuming.”

For now, Tammy says that California is reputed to have the best surrogacy laws, “Hands down – to avoid any difficulty, I would go there for contracts and birth.” Donor egg users too can be caught in a jumble of legal stances.

“If you go for ovum donation across state lines in the United States,” attorney Snyder explains, “your parental rights and the genetic link and the right of the ovum donor to assert her parental rights, all vary from state to state.” Only a handful of states currently have legislation that automatically terminates an egg donor’s right to claim parental rights. Related sperm donation laws, on the other hand, have been settled since the 1980’s.

The frequency and seeming ease at which donor ART is both recommended by physicians and used by patients makes all appear quiet on the legal front. Attorney Snyder concedes that the actual potential for future repercussions is slight. Still, he says today’s IPs have a right to know, for example, that if they use a known egg donor, or future legislation unveils anonymity as in the case of Great Britain, “the possibility exists that those residual genetic links could in some unusual case result in a contest over parentage that was never anticipated.”

“I’m not sure parents are fully aware of that legal gap,” Snyder says. “I think it’s a small likelihood of impact on any individual program, but I think people are entitled to make informed decisions so they’re not surprised if they are the one in a million or a hundred thousand that it does impact.”

The same confusion that exists at present between states certainly is present when extrapolated to the globe.

## Changing Attitudes

Snyder says that a lot of parents are relying on a fundamental “fact” – that if they use an anonymous donor, no one will have the information required to enable impact on their future life. Disclosing the use of a donor by an IP is in no way a requirement in the United States.

However, as more is learned about the emotional needs of humans, the more child development experts are pressuring for regulations that foster connections, at least of the most minimal information sharing, between individuals and their biological – i.e. genetic – parents. Such concerns are in large part what have steered the creation of anonymity-stripping laws across the sea. Here in the U.S., there is a slow and growing movement by the many now-adult children of donor gametes to know their genetic heritage, if not more.

Today’s third party ART parents could learn a bit by looking back at how adoption was once carried out in a systematically secretive manner and seeing that veil of secrecy pierced over time as attitudes changed.

“What’s a reasonable expectation on the part of parents using ART procedures today may or may not be considered reasonable over time,” warns Snyder. “They need to understand political climate changes and related risks can impact an individual, the related legal risks can be jarring to a future family.

People using anonymous donor eggs or surrogates aren’t the only ones at risk for future problems. Snyder expresses surprise at the number of patients who believe that by using family or friends as donors, their risk is lessened, thereby reducing their need for legal guidance. He tells them that the cases that blow up most frequently are those involving relatives. “You don’t know it yet,” Snyder explains, “but there’s going to be a profound shift in your relationship and of all people, relatives need a contract. Otherwise it’s common for them to enter into a vague agreement where expectations are assumed and not clearly communicated.”

So, to whom do IPs turn for their answers?

Unfortunately, some distressed couples find the proposal of a promising resolution via third party ART to be so enticing, they simply aren’t getting beyond questions about the medical how-to. Most IPs know that there are indeed some social and legal matters to pursue, but that doesn’t necessarily mean their questions are being answered sufficiently by clinic staff. After all, it’s hard to search for answers without knowing the questions.

Steve Snyder tells a story about a recent conference in the United States at which he spoke to infertile couples. “Two facts became apparent to me. One is that the most frequently asked question is whether there are any legal issues related to anonymous ovum donation about which the intended parents should be aware.” The other thing that

was revealed when he talked with these couples was that they were being given inaccurate information about the legality of using surrogacy in that particular state. When Snyder filled in the gaps with legal realities for the audience, the group informed him that their clinics had said otherwise, specifically that there were no outstanding issues that warranted their concern as potential IPs.

Snyder recognizes that medical staff is instructed to say that there are no potential problems with anonymous donor egg use because of the low likelihood of issues developing, issues that might just scare away inquiring parents-to-be. The confusion about surrogacy lies in the fact that while it is not illegal in many states, some clinics refuse to work with surrogate arrangements based on fears about what might happen. Their refusal is sometimes incorrectly translated by either clinic staff or patients as “surrogacy isn’t legal here.”

“The medical community seems to be giving legal advice when they shouldn’t,” Snyder charges, “and in some cases, bending it to their own needs.” He emphasizes that while he has direct knowledge of some instances, he is not indicting the entire fertility industry. Still, he estimates that possibly less than one percent of third party ART patients are accessing accurate information through a skilled attorney. Part of the problem is that clinics use their own formal documents which look to eager parents like legally binding contracts, when, often, they are “informal, secular statements of intent that are not binding in any court of law and, at best, are allowable as evidence in a proceeding but will not necessarily determine or guarantee the outcome of that proceeding.”

### Translating Laws Into Reality

After speaking to people whose lives are all about the subject, an impression easily forms of individuals and couples, longing for babies via third-party ART, stranded in reams of paper, a legal quagmire without even a conformed starting point. Or worse - pioneering families who’ve forged ahead in the name of love, only to be ripped apart by the legal limbo and ensuing confusion.

The problem is compounded by a simple lack of availability of services. There are a handful of experienced attorneys practicing reproductive law in any given state; some states will have none at all.

Depending on how you frame it, the United States legal system is either woefully behind the times or appropriately cautious when it comes to addressing the needs of all parties involved. The American Bar Association, the country’s esteemed organization of legal professionals, has drafted a recommendation on cloning (they support its prohibition,) but has remained thus far quiet on the real matters at hand in reproductive law. They are, however, working on it.

Snyder, as the Vice Chair of the ABA’s Family Law Section Committee on Genetics and Reproductive Technologies, says he’s constantly trying to attract more attorneys to the cause. His goal is to develop a coordinated national network among professionals, for the

primary purpose of helping parents engage safely in cross-state third-party ART. Another active group, the American Academy of Adoption Attorneys, is also working diligently to raise practitioner members' awareness of the needs. Yet another type of attorney, those involved in estate planning and probate law, could stand some education on the complex matters not addressed by U.S. law related to stored embryos and inheritability issues.

With so many new parents in a quandary still over disclosing such private aspects of their use of donor gametes or a surrogate, the chances of their bringing up those facts during construction of a will are slight. "If state attorneys aren't proactive in getting that information out of clients, it won't be addressed. That's why we have those cases pop up from time to time in which someone's use of their frozen embryos is challenged because another party has since become deceased... Every time they cross an international or state boundary in the process, the issues become even more complex." Again, related questions as they apply to sperm donor use have been settled in the majority of states' statutes – but not for the use of donor eggs or surrogates.

As states wrestle with political factors that seem to stand in the way of common sense, the ABA Committee on Genetics and Reproductive Technologies is working to finalize a "model code" that would provide guidance vis a vis a model act on which to base legislation to present to state governments. Approval of the model code is hoped for by 2007.

### What To Do

While some third-party patient advocates, most of whom have personal experience in the technique's uses, will tout a do-it-yourself approach through research and self-education, professionals tend to lean toward encouraging intended parents to procuring the services of trained and devoted experts.

Finding a family law attorney is usually as easy as thumbing through the Yellow Pages or surfing the Net. Finding one who is well-versed and experienced in the practice of reproductive law is more of a challenge. The ABA does not publish a list of related Committee members; neither does the ASRM. Various advocate websites, usually created and maintained by either individuals or small matching agencies, can give you an idea of which attorneys with website's members recommend or not via their bulletin boards. Both RESOLVE and the American Fertility Association (AFA) are working to provide more easily accessible lists of attorneys who specialize in reproductive law. At the moment, only paying members of RESOLVE receive directories that include information on attorneys who are also members of the organization. The national group's plan is to add Internet links to [www.resolve.org](http://www.resolve.org) in the near future. Likewise, the AFA expressed intentions to publish names of all attorneys on the ABA Committee on Genetics and Reproductive Technologies sometime in 2007. Until then, consumers can get referrals by calling the AFA support line at 888-917-3777.

At a minimum, people who are thinking about using third party ART that involves travel across jurisdictions should consider:

What kind of screening is preformed on the donors? Genetic, medical, psychological, suitability...

With screening rules and procedures in mind, what is the potential for donors to be taken advantage of within the system? Are they fully informed of all risks?

All medical services carry a certain amount of risk for adverse events, whether there are physical conditions or legal. Each jurisdiction will dictate exactly where the resolution must occur for such events. IPs should know before signing their clinic's agreement which country will be the one in which disputes are handled.

Just as different insurance entities will cover different treatments and not others, so is the case with malpractice insurance. A clinic on one country may or may not have such coverage for their patients from abroad. IPs need to know up front.

#### Future Outlook

Should Americans be wary of the increasing regulations seen across the ocean in regards to third party reproduction? Probably not. Stringent restrictions are not likely to happen here for many reasons. Given the Constitutional freedoms that we enjoy in the U.S., general availability of the procedures, consumer expectations...

What is likely to happen: more avoidance of legislation that will provide predictability of outcomes for hopeful parents. A polarized stalemate exists because of competing political forces – neither prohibitory nor regulatory legislation can get through the system. For most parents-to-be via third party ART, that's a good thing. For an unfortunate few, it could mean personal catastrophe.