

Reproductive Technology and the Law

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By Anna Stolley Persky



Enid Abrahami, a single mother by choice, conceived her first child with her own egg and a stranger's sperm, thanks to a fertility clinic in New York. Abrahami then gave birth to her son in Israel, where she lives these days. She had no trouble attaining her son's American citizenship. Abrahami, who has dual Israeli and American citizenship, grew up in both New York City and Tel Aviv.

When she decided to have a second child, Abrahami found that she was having trouble getting pregnant using her own eggs. So this time she used both somebody else's egg—called a donor egg—and sperm from the same donor used to conceive her son. Again, for her second child, a daughter, the embryo was transferred to her uterus in New York and the baby was born in Israel.

But this time, when Abrahami went to fill out the paperwork for her daughter's citizenship, a U.S. Embassy official learned that she was a single mom and had used donor sperm. The official then asked her, very directly, if she used a donor egg to make her baby.

"I literally felt like I left my body—it seemed so out of the blue," Abrahami says. "It was one of the most violating experiences I have ever been through. How could they ask me that?"

Abrahami was told that she could not transfer her citizenship onto her daughter. She was told that citizenship is transferred only through DNA, and that she needed proof that at least one of the donors was a U.S. citizen. Most donations are made anonymously.

Abrahami isn't the only U.S. citizen facing what appears to be a discrepancy in U.S. law. A child adopted overseas by an American is eligible for U.S. citizenship, but a child created from a donor egg and sperm and born overseas to a U.S. citizen must provide proof that one of the donors is a U.S. citizen.

"I grew this child in me. I gave birth to her. I'm breastfeeding," says Abrahami in a Skype interview. "I'm legally responsible for her, and yet I can't pass my American citizenship onto her?"

Abrahami's situation highlights the crux of a tangled problem: There is an ever-widening discrepancy between the laws on the books and assisted reproductive technology (ART), the flourishing science of creating babies. And with these scientific advances, we are forced as a society to face our beliefs about the creation of life, our definitions of parenthood, and where and with whom we want to draw ethical lines.

"Assisted reproductive technology and laws addressing reproductive rights, these are evolving areas," says Diane S. Hinson, founder of Creative Family Connections, a Chevy Chase, Maryland, law firm focused on issues pertaining to family-building. "The laws are all over the map. The [U.S.] State Department rule is a perfect example of a rule that is totally out of sync with modern technology. But trying to get the State Department to change a rule is like watching grass grow."

But the State Department is interpreting the Immigration and Nationality Act to require U.S. citizens to have a genetic connection to a child to transmit U.S. citizenship.

"Our role is to consistently and accurately administer the laws that Congress has enacted to the best of our abilities," says State Department spokesperson Elizabeth Gosselin. "Consular officials are responsible for confirming that all statutory requirements for the transmission of U.S. citizenship have been met by an applicant, including resolving any questions related to the identity of the applicant, the

relationship between the applicant and a U.S. citizen parent, physical presence or residence requirements, and other legal requirements.”

‘Political Implications’

The technology for treating infertility and facilitating the creation of babies is developing rapidly; some people who thought they couldn’t have children can have them, after all. About 7.3 million Americans, or one in eight couples, are infertile, according to RESOLVE: The National Infertility Association.

Although the procedures can be expensive, an increasing number of couples and individuals are undergoing treatment for fertility assistance. ART includes fertility treatments in which both a woman’s egg and a man’s sperm are handled. More than 1 percent of all infants born in the United States each year are conceived using ART, according to the Centers for Disease Control and Prevention (CDC).

In vitro fertilization (IVF) is a process by which an egg is fertilized by sperm in a petri dish. Once an embryo has been created, it is then transferred—inserted inside a woman’s uterus—for possible implantation. IVF also can be used with an egg donation, where the woman providing the egg does not gestate the embryo. Sometimes potential parents, also known as intended parents, use surrogates to carry the embryos to term.

“The concept of parenthood is changing these days,” says Naomi Cahn, the John Theodore Fey Research Professor of Law at The George Washington University (GW) where she specializes in family law and reproductive technology. “One major problem is the concept of an embryo comes with political implications.”

In the United States, state, not federal, law governs most reproduction and fertility–related questions. Each state has taken its own approach to scientific advances in baby-making as well as the burgeoning interest in surrogacy and nontraditional parenting options.

In addition, unmarried individuals such as Abrahams and gay couples are increasingly turning to fertility clinics to make their baby dreams come true. With donor sperm, donor egg, and surrogate arrangements, inevitably there are questions about what makes a person legally a parent. Is a parent a person who donates an egg? Is a parent the woman who carries a baby created with donated egg and sperm? Experts say, most states have yet to delve into the issues that are inevitably following the technological advances.

Scholars specializing in fertility law say that state laws conflict with each other. Some states avoid addressing the issues that come up with ART, such as battles over parentage of children conceived using assisted reproduction; other states have outlawed surrogacy agreements or complicated the process.

In addition, fertility rights activists and fertility specialists have taken issue with laws that label embryos as people, in part, because they believe these laws would impede fertility clinics.

Barbara Collura, president and chief executive officer of RESOLVE, says the majority of bills she has seen recently being introduced in state legislatures create more problems than clarity for fertility treatments, surrogacy arrangements, and other related issues.

“Here’s the real truth: When we look up these bills and they don’t provide better outcomes or safety, we wonder, What is the real purpose?” Collura says. “And it’s something else—they don’t like all these embryos being created.”

Bioethicist Arthur Caplan, head of the division of medical ethics at New York University (NYU) Langone Medical Center, says state legislatures are failing to prepare for the future.

“With the capability of freezing eggs in a way that becomes more reliable, we will face the question of how long can you store reproductive material and make a baby from it? Can a third party make a baby

from stored embryos if both parents die?” Caplan asks. “What if a person, like a sister or mother, gets the sperm and egg and wants to make five children? These questions are not being addressed seriously by legislatures, but they will come up.”

Procreating With Dignity

Some scholars and religious organizations have concerns with different aspects of assisted reproduction. Particular religious organizations, such as the Catholic Church, have taken an official position against the use of IVF. And pro-life organizations have been advocating for personhood laws declaring embryos human beings. Many pro-life advocates also argue that fertility clinics at the very least should be regulated to ensure they are not being reckless with embryos.

“Human beings are entitled to be protected [under] the law at every stage of their development, including the embryonic stage,” says Kristi Hamrick, spokesperson for Americans United for Life in Washington, D.C. “There is considerable legal authority—such as prenatal injury law, fetal homicide law, wrongful death law—for protecting human beings from conception. Such legal protection would require fertility clinics to protect embryonic humans as human beings.”

Hamrick says ART should be regulated “in large part to protect the health of mothers and the children conceived and to preserve parental relationships and the dignity of human procreation.”

Sean Tipton, director of public affairs for the American Society for Reproductive Medicine (ASRM) in Washington, D.C., objects to any notion that fertility clinics aren’t appropriately regulated or aren’t taking the creation of embryos seriously.

“Reproductive medicine has the same regulatory framework as every other kind of medicine in the country: Federal regulation of the drugs and devices, including tissues; state licensing of the clinical professionals; and then a strong dose of professional self-regulation,” Tipton says.

The ASRM and the Society for Assisted Reproductive Technology are responsible for promulgating professional standards for the medical field.

But there are some legal areas, Tipton says, that are ripe for change, so long as it is done carefully. Tipton says the fertility specialists he represents would welcome thoughtful attempts to update the laws concerning parentage.

“Now, thanks to advances in medicine, there doesn’t have to be a relationship between being a genetic parent and an intended parent,” Tipton says. “We would welcome attempts to clarify parentage laws. We need states to adopt clearer statutes, making it clear what parental rights and obligations are, and how to obtain or relinquish them.”

The Birth of IVF

For as long as people have been having children, they also have had struggles with infertility. Artificial insemination—inserting sperm into a woman’s uterus—dates to the early 1900s. In those days, sperm was inserted using something fairly similar to a turkey baster.

But certainly since the 1950s the field of assisted reproductive technology has advanced at a rapid pace, with procedures involving more high-tech instruments and with increasingly complex scientific developments.

In 1959 Chinese scientist Michael Chang succeeded in producing the first IVF births, initially using rabbits. On July 25, 1978, Louise Joy Brown became the first baby successfully born through IVF. The term used at the time was “test tube baby.”

In 1992 Congress enacted the Fertility Clinic Success Rate and Certification Act, which requires the CDC to collect and publish the success rates of each fertility clinic. According to the CDC’s 2010 Preliminary ART Success Rates, 154,417 ART cycles were performed at 443 reporting clinics,

resulting in 47,102 live births.

The CDC's Division of Reproductive Health oversees issues involving reproductive concerns. The Federal Trade Commission also monitors and has intervened in cases involving allegations of false advertising by fertility clinics.

Increasingly Popular

One reason for the increase in fertility treatments is that more women are waiting longer to have children. The proportion of first births among U.S. women aged 30 years or older increased from 5 percent in 1975 to 26 percent in 2010, according to recent national health statistics.

In general, a woman's fertility peaks in her 20s, and declines after that. Studies suggest that a healthy, 30-year-old woman trying to get pregnant has about a 20 percent chance of becoming pregnant every month. By age 40, that chance declines to about 5 percent per month.

"So when you look at the demographics and what's happened in terms of fertility potential, you have the perfect storm of fertility chances," Collura says. "Odds are fairly good that a great number of women, if they are waiting longer, are potentially going to be impacted by infertility."

While advanced maternal age accounts for some of ART usage, there are many other reasons for infertility such as low sperm count and blocked fallopian tubes. Clinics report that couples seeking a baby can have more than one fertility issue impeding their efforts.

There are some concerns about the safety of ART procedures. CDC studies show that IVF pregnancies can have increased risk of complications, such as preterm delivery and preeclampsia.

"Like any medical procedure, assisted reproduction carries some risks, and it's important that patients understand those risks before they decide to undergo the treatments," Tipton says.

There are also a few studies that reflect an increased risk of birth defects.

"Infertility treatments are used to help people overcome medical problems; you cannot compare them to a healthy population and expect the results to be the same," Tipton says. "Pointing out that the children who required medical help to be conceived are not as healthy as those who [were conceived naturally] is a little like criticizing hospitals because they are full of sick people."

'Dignitas Personae'

While ART is increasing in popularity, there is still ambivalence in the United States over the procedures and their implications. Organized religions differ in their approach to ART. The Protestant Church, for example, officially accepts some ART procedures, but it prohibits the use of sperm or egg donation.

Reform Judaism allows for ART so that couples can fulfill the biblical commandment to "be fruitful and multiply." In recent years, some fertility clinics have established programs to ensure that Orthodox Jews can follow their religious laws and still go through an ART procedure.

But some organized religions, such as the Roman Catholic Church, oppose all types of ART. In fact, Pope Benedict XVI has publicly restated the Catholic Church's opposition to IVF because it replaces, rather than facilitates, sexual activity between a couple.

In "Dignitas Personae," a 2008 instruction, the Vatican's Congregation for the Doctrine of the Faith took a stand against selective reduction, genetic engineering, and embryo donation.

Those who go through ART also can have mixed emotions about the process. Some people who have struggled with infertility can then have accompanying feelings of confusion, embarrassment, and even humiliation. Individuals who choose ART can be reluctant to talk about it publicly or, for some, even

privately.

“What we can learn from this is that there has been shame and stigma associated with infertility and the use of donor sperm,” says GW’s Cahn. “The feeling of shame is dissolving and will continue to do so, but it isn’t completely gone yet.”

Embryos as People

Perhaps even more controversial than fertility treatments is the notion of abortion. In recent years, abortion foes have succeeded in bringing bills to legislatures throughout the country. States such as Georgia, Oklahoma, South Carolina, and Virginia have become engulfed in efforts to pass constitutional amendments or laws that would declare a fertilized human egg to be a legal person.

Fertility law experts like Cahn point out that, in addition to affecting abortion, these laws “defining embryos as persons could have major consequences for assisted reproduction.”

For example, defining embryos as people could expose patients and clinics to criminal charges, including potentially murder.

“Depending on the wording of the law, it would almost certainly make treating an ectopic pregnancy illegal, which is very dangerous and most likely fatal for the mother,” Tipton says. “It would make illegal a number of forms of contraception. We don’t think it would make IVF illegal. It would just make doing it in the safest and most effective way illegal.”

NYU’s Caplan points out that the statutes could require women who are of childbearing age and having sex to “behave as if they were pregnant at all times.”

These laws also could specifically affect the process of embryo freezing. In ART procedures patients often try to create extra embryos for use at a later time, especially if initial efforts fail, or for subsequent children. For the most part, fertility clinics keep cryopreserved embryos in short-term storage. But some frozen embryos are left unused and are either donated for research or discarded.

And thus far it’s unclear, Tipton says, whether personhood laws would make freezing embryos or destroying them, either deliberately or accidentally, a criminal act.

“You can’t put adults in freezers because they die. Most embryos survive freezing and thawing, but not all do,” Tipton says. “Would that loss during a freeze constitute a homicide? I don’t know of any physician who wants to be a test case for that.”

Tipton also believes that under personhood laws, more clinics and their patients would choose to transfer the embryos rather than risk criminal charges.

RESOLVE’s stated position is that “[T]he effect of Personhood Legislation would be to threaten a medical treatment that has, since being pioneered in 1978, brought some four million babies to loving infertile couples around the world.”

Big Business

While personhood laws could affect patients, it could also hurt the multi-billion-dollar fertility industry. Patients can and do go into debt trying to have children. According to the ASRM, an average IVF cycle costs around \$12,400. Additionally, IVF procedures can be accompanied by the cost of donor eggs, donor sperm, and surrogacy arrangements.

Says Tipton: “Reproductive medicine is as much, or as little, an area of commerce as any other field of medicine. Yes, money is changing hands, as it does when someone gets a bypass or has a broken bone set. The big difference is, most people with health insurance won’t have to pay those bills, but they will have to pay for their infertility care.”

While some insurance plans cover fertility treatments, many do not. A handful of states, such as New Jersey and Massachusetts, mandate coverage of IVF and other procedures, but most states do not. With high costs, ART remains an option only available to a limited number of individuals and couples.

“Access to assisted reproductive technology varies based on income and education,” says Cahn, who urges increased coverage for reproductive health care.

Truth in Advertising

Under ASRM guidelines, a woman who donates her eggs can be compensated as much as \$10,000 per cycle. Sperm donors are paid less than \$100 per sample. Egg donation involves ovarian stimulation and retrieval, while sperm donation involves a far simpler process.

Ethicists such as Caplan are concerned that egg and sperm donation is more accurately defined as egg and sperm selling.

But Tipton responds that the professional guidelines are “clear that the compensation is for the time and inconvenience associated with the donation.”

Pro-life advocates such as Hamrick of the Americans United for Life say that egg donation is, in effect, “the systematic exploitation of young women,” and, the process involves health risks to the patient. Hamrick adds that paying young women to “place their health and lives at risk is exploitative at its very core.”

Both Caplan and Hamrick say that brokers and clinics should ensure that women agreeing to allow their eggs to be harvested understand the risks involved with using fertility drugs. ASRM guidelines do state that egg donors be advised explicitly of the risks and adverse effects of donation.

In addition, there also are concerns that egg and sperm donors believe they will remain anonymous, but as recent trends in adoption show, that may not always be the case.

Caplan strongly urges regulation of genetic testing. “Those who want to sell eggs or sperm should routinely be tested for genetic issues such as sickle-cell anemia or cystic fibrosis,” Caplan says.

But Tipton responds that, given present technology, it is impossible to test every donor for every disease.

“Fertility clinics already do extensive screening and testing on prospective donors,” he says.

Clinic Regulation

In a highly publicized case, Nadya Suleman gave birth to eight children in January 2009 at a hospital in Bellflower, California. Suleman, a single mother, already had six other children.

The Medical Board of California eventually revoked the license of Suleman’s fertility doctor, Michael Kamrava, finding that he committed “gross negligence.”

Since the Suleman case hit the press, there have been increased efforts to further regulate clinics. Other countries, including the United Kingdom and Australia, have passed legislation affecting clinics, including setting a limit on the number of embryos transferred at one time.

Bioethicist Caplan thinks that further clinic oversight should be discussed. “Clinics should be regulated, but it’s tricky,” Caplan says. “You don’t want to infringe on individual rights and the practice of medicine, but you don’t want people having seven or eight kids all at once. So some statutory limits restricting super pregnancies make sense to me.”

And there are some who wonder if clinics should be regulated as to how they screen women offering to enter into surrogacy arrangements.

“There is no federal law on the subject of assisted reproduction, as it is a state law issue, but perhaps there should be some regulation at the state level of surrogacy agencies, as with adoption agencies,” says Sogand Zamani, a partner at Zamani & Scott LLP in Washington, D.C., where she specializes in assisted reproductive law. “What type of screening is being done? How are they recruited? There is a lack of uniformity in standards.”

To Tipton, any suggestion that state or federal laws further regulate clinics, such as by limiting the number of embryos to be transferred, takes away the ability of the specialists to focus on the best medical decision for each individual patient, and for the patient to choose a course of treatment based upon the best available options.

“There are people and groups in this country that would like to have the government make individuals’ reproductive decisions for them,” Tipton says. “This might apply to whether you terminate your pregnancy or with whom you have your children. We think those are all private decisions better left to individual families.”

Changing Definitions

One major legal issue involving ART is that many jurisdictions, and even the federal government, are using definitions of parenthood in making determinations that fail to take into account the complexities of modern pregnancy.

“It used to be that the birth mother was always the legal mother, and the law was based on that,” says Maureen McBrien, a family law attorney at Boston-based Todd & Weld LLP and coauthor of *Assisted Reproductive Technology: A Lawyer’s Guide to Emerging Law and Science*. “Now, the birth mother might not be the intended mother. The woman giving birth to the child may have no intent to be the legal parent.”

On the other hand, the State Department finds that when it comes to U.S. citizenship, giving birth does not mean that one is a parent. The State Department says it is interpreting sections 301 and 309 of the Immigration and Nationality Act to require that the U.S. citizen parent must be either the sperm or egg donor to transmit U.S. citizenship to a child conceived through ART. In other words, although Abrahami, the single mother with dual citizenship, was pregnant with her daughter and then gave birth to her, because she can’t claim an egg relationship to the child, Abrahami can’t transmit her U.S. citizenship to her.

As Abrahami puts it, “I’m planning on moving back to the states in a few years. So now I have a real problem. Will I have to get her a visa? What message does that send to my daughter? That she doesn’t belong to me, that she’s apart?”

As *Washington Lawyer* went to press, Abrahami’s daughter still had not received citizenship.

Custody and Survivor Benefits

With advances in fertility treatments, babies can be born after someone dies or after a couple has divorced. Courts and legislatures are struggling with the consequences of babies born without specific consent or approval from one of the parents.

There have been a number of high-profile cases over the past few decades with divorced couples battling over frozen embryos. But courts are also dealing with what to do when one parent reneges on a contract. The few states that have dealt with the issue have tended to find that parenthood should not be forced upon one party.

But, in April, the Pennsylvania Superior Court sided with a woman who wants to try to get pregnant using frozen embryos that her estranged husband wants destroyed. Andrea Lynn Reiss and Bret Howard Reber underwent in vitro fertilization after she was diagnosed with breast cancer. They froze the embryos, and she then went through surgery, chemotherapy, and radiation.

The three-judge Superior Court panel affirmed a trial court's reasoning that Reiss's interest in the embryos as her only way to procreate outweighs Reber's disinterest in procreation.[\[1\] \(#n1\)](#)

These days, most clinics require that both parties creating embryos sign a contract agreeing to the disposition of any leftover embryos. But the ethical and legal implications of contracts that spell out what to do with the embryos in cases of divorce or death are still a matter of debate. While some states have enacted statutes addressing the disposition of frozen embryos, there are no federal laws providing a uniform standard.

Another question is whether children born after a parent's death can inherit; state laws differ on the issue. In May the U.S. Supreme Court found children born 18 months after a man's death were not entitled to his Social Security survivors benefits.

The case involves twin boys born using the frozen sperm of Robert Capato, who died of esophageal cancer. The Supreme Court found that the U.S. Social Security Administration must follow the applicable state inheritance law. Capato died a Florida resident; Florida law specifically bars children conceived posthumously from inheritance unless they are named in a will.[\[2\] \(#n2\)](#)

Surrogacy Questions

Certainly, there have been a number of lawsuits already over surrogacy arrangements, and experts expect many more to come as surrogacy continues to be an option for infertile couples and individuals.

There are two types of surrogacies: traditional surrogacy is when the surrogate mother is also the child's genetic mother; gestational surrogacy is when the surrogate is implanted with an embryo that was not made with her egg.

Possibly the best-known surrogacy case, that of Baby M, involved a traditional surrogacy arrangement. The surrogate, Mary Beth Whitehead, decided to keep the baby she carried for William and Elizabeth Stern. The Supreme Court of New Jersey found that the surrogacy arrangement was invalid due to public policy concerns. The court recognized Whitehead as the mother, but it still awarded custody to William Stern, as being in the best interest of the child.[\[3\] \(#n3\)](#)

The laws for surrogacy are different in every state with some jurisdictions, like the District of Columbia, outlawing surrogacy agreements.

Melissa Brisman, an attorney specializing in reproductive law from her office in Montvale, New Jersey, says that state laws should specify that intended parents are legally responsible for the baby they create.

"People always think of the issue, What if the surrogate wants to keep the baby?" Brisman says. "But there's also the concern that an intended parent might abandon the baby. What if the baby is born with a defect, and the intended parents decide they don't want to take responsibility? You have the surrogate who gave this wonderful gift, and now she's stuck with parental rights and responsibilities."

Memorialize Intent

Lawyers who specialize in surrogacy say that while the law is evolving, certainly parties entering into surrogacy arrangements are better off with a contract than without anything. Hinson of Creative Family Connections advocates hiring lawyers to write up a contract to ensure that the parties have an agreement in writing on the issues that could crop up later.

Surrogacy contracts, lawyers say, can be more than 50 pages long and extremely detailed. Lawyers are very careful to explain in surrogacy contracts the terms of compensation so as not to run afoul of state law restrictions.

"With respect to compensating a gestational carrier, the contract should indicate that the compensation is for the inconvenience of being pregnant," says Sara S. Scott of Zamani & Scott.

Both Scott and Zamani say that surrogacy contracts often include specific details, such as travel restrictions, consent to drug testing, and a limit to the amount of caffeine the surrogate can consume.

“We must memorialize intent carefully, including items like selective reduction and how many embryos will be implanted,” Zamani says.

Inclusive and Flexible

While some states are attempting to legislate in the area of surrogacy arrangements, Hinson says these attempts appear to make the surrogacy process more difficult by creating extra administrative hurdles or confusing definitions that fail to clarify the issues.

“The thing about legislation is legislation is good if it’s good legislation—if it’s inclusive and flexible,” Hinson says. “But if the result is bad legislation, if the result is something awful, that’s worse than leaving it to the courts.”

Hinson points to a Virginia statute as an example of a problematic law addressing surrogacy and ART. Some states provide pre-birth orders, which clarify who the parents will be after a baby is born to a surrogate.

The Virginia statute allows for a court to grant a pre-birth order validating a surrogacy contract. However, to get the pre-birth order, a trial-like hearing must occur before the embryo or embryos are even transferred.

“They created this procedure to get prior approval, but the process is so cumbersome that nobody ever does it,” Hinson says. “By the time you decide you want to use a surrogate, you want a baby yesterday. You don’t want to have to wait to go through a complicated process.”

In addition, the Virginia statute is only applicable to heterosexual married couples, which bothers Hinson. “So, if you are a single parent or a same-sex couple, it doesn’t apply,” Hinson says. “If that’s the kind of statute we get, I’d rather not have a statute addressing the issue at all.”

Anna Stolley Persky reported on the Penn State scandal and child abuse reporting laws in the June 2012 issue.

Notes

[1] (#note1) *Reber v. Reiss* (2012 Pa. Super. 86).

[2] (#note2) *Astrue v. Capato*, No. 11-159.

[3] (#note3) *In re Baby M*, 537 A.2d 1227, 109 N.J. 396 (1988).