**Human Reproduction** vol.15 no.3 pp.515–519, 2000

**OPINION**

**Gamete donation: when does consent become irrevocable?**

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*This opinion was previously published on Weitrack 94, November 19, 1999*

At what stage is consent for the use of donated gametes irrevocable? This question can be understood in two different ways, as a legal question, at what stage is consent for the use of donated gametes legally irrevocable and as an ethical question, when, if at all, is it morally wrong to withdraw consent? Arguably, moral questions are always open to interpretation, however, until recently in Victoria, Australia, so too was the legal question. This article addresses both questions with reference to the current legislation in Victoria and in the light of a recent instance of a sperm donor in Victoria who sought to withdraw consent after embryos had been formed from his donation. This case is used to highlight the difficulties underlie attempts to resolve competing claims over gametes and embryos.

Reproductive technology in Victoria is governed by the Infertility Treatment Act 1995 (the Act). This legislation incorporates an amended version of the 1984 (Medical Procedures) Act, the world’s first legislation on in-vitro fertilization (IVF). With regard to the present discussion, the relevant amendments to the Act include the provision for persons born from donated gametes, on turning 18 years of age, to seek information which will or may identify the donor. Along with the new statute, a new statutory body was established, the Infertility Treatment Authority (ITA), to administer infertility services in Victoria, Australia. Following an objection from a sperm donor to the use of embryos formed from his spermatozoa, the clinic storing the embryos in question sought clarification from the ITA, of the Act’s provisions for withdrawal of consent. The Act allows that gamete donors can withdraw consent at any time prior to the transfer of embryos. However, another interpretation would allow gamete donors to withdraw consent only for the use of their gametes, that is, until the time of fertilization. Given this ambiguity, where the interests of gamete donors and recipients (the couple commissioning the embryos) are in conflict, resolution requires a ruling on who has overriding claims over the embryos in question. This paper examines two well-known disputes over frozen embryos and three types of ethical arguments used to assign dispositional authority over embryos.

**Disputes over frozen embryos**

The case of a sperm donor objecting to the transfer of embryos formed from his donation can be likened to disputes over frozen embryos, where the sperm provider and the egg provider disagree over what should be the fate of their frozen embryos. Two such well-known disputes, fought in the US courts, serve to illustrate attempts to arbitrate conflicting claims over embryos.

In the case of *Davis v Davis* (discussed in Annas, 1989; Robertson, 1989; Colker, 1996), the custody of seven frozen embryos was contested in a divorce action. In a highly controversial decision the trial judge ruled that the embryos were ‘children in vitro’, and awarded custody to Mrs Davis (*Davis v Davis*, 1990). According to this decision, survival is in the best interests of embryos and therefore the wishes of the party desiring to reproduce prevail. On appeal this decision was later reversed. The judgment of the court of appeals (*Davis v Davis*, 1992) was that even though embryos have been accorded more respect than mere human cells they are not given legal status equivalent to that of persons already born. The Tennessee Supreme Court ruled that the party wanting to avoid reproduction should control disposition of the embryos, unless the other party has no other reasonable way of reproducing without the embryos in question. This decision relied on an understanding of a woman’s right to terminate a pregnancy as conferring on men the right not to become a parent.

In a similar divorce hearing in New York (*Kass v Kass*, 1998, discussed in Colker 1996; Annas, 1998), Maureen Kass attempted to gain sole custody of frozen embryos remaining after 10 unsuccessful IVF procedures. Her husband Steven Kass opposed her request. The Kass’s had signed a prior agreement stating that in the event that they no longer wished to initiate a pregnancy or were unable to make a decision regarding the disposition of their stored embryos, they approved of their disposal for research. The trial court awarded the frozen embryos to the ex-wife arguing that because it is the

*Presented in part at the 11th World Congress on In Vitro Fertilisation and Human Reproductive Genetics, Sydney Australia, May, 1999*
woman who is more directly affected by the pregnancy the balance weighs in her favour. The Kass court concluded based on abortion laws, that a woman has the exclusive right to determine the fate of an embryo even when that embryo lies outside her body. This decision was appealed and New York’s highest court affirmed that the couple’s prior agreement to donate the embryos to research should be enforced.

Resolving disputes over frozen embryos

The above cases serve to illustrate three types of arguments brought to bear in attempting to resolve disputes over frozen embryos: arguments which make the rights of embryos, donors, or recipients overriding; arguments which arbitrate on the basis of who incurs the greatest burdens and arguments for enforcing prior agreements. Each of these arguments will be considered in turn.

Protecting embryos

In the Kass case, the trial judge attempted to resolve the dispute over the frozen embryos with reference to the moral status of embryos and their interest in continued existence. However, claims about the moral worth of embryos do not help resolve disputes over embryos. For the sake of argument, if, as is the case in Victoria, the recipients had learned of the sperm donors’ later objection and decided that they no longer wished to use the embryos in question, there would have been no opposition to a request to discard the embryos. In Victoria, as in many other jurisdictions, couples can discard their embryos, at any time, simply by fulfilling the requirements for mutual written consent. Thus even if there is a prevailing disposition to preserve or protect embryos, it is already legally permissible that where both gamete providers agree, their embryos can be discarded. This entails that it is not the moral status of the embryo that in current IVF practice and legislature determines its fate, but the wishes of the persons who created the embryo. Even if we accept that embryos should be preserved, we also accept that the couple’s wishes are overriding and therefore that it is not true that an embryo’s existence should always be preserved. Therefore, if the moral status of the embryo is not overriding it cannot be used to arbitrate disputes between those wishing to reproduce and those wishing to avoid reproduction.

Protecting reproductive autonomy

With regard to reproductive rights, the Kass and Davis cases also illustrate attempts to answer the question ‘Does the desire or right to reproduce override the desire or right not to reproduce?’ However, the answer to this question does not necessarily resolve disputes over frozen embryos either.

In the Davis case parallels were made between a woman’s right to abortion and a man’s right not to have children. It was argued that a woman’s right to decide the fate of her pregnancy implies her right of veto over embryos. But in Victoria a woman’s right to abortion is based on her right to protect her mental and physical health. Similarly in the US, a woman’s right to abortion is implied from her right to privacy or to control her own body. Abortion rights are generally enacted to protect bodily autonomy. As argued by Colker (1996) and Robertson (1989), laws permitting abortion are not relevant to extracorporeal embryos and cannot be taken to mean that women have exclusive rights in deciding the fate of embryos lying outside their bodies.

Reproductive rights can be implied from laws which protect against bodily intrusion, such as laws which ensure that gametes cannot be forcibly removed or that women cannot be forced to terminate or continue gestating their pregnancies. The freedom or right to become a parent does not relate to or help clarify who has dispositional authority over embryos. Similarly, reproductive freedom does not entail that a desire to avoid reproduction gives gamete donors claims over embryos already transferred and implanted.

Attempts to force women to terminate pregnancies or to prevent women from seeking abortions have consistently failed, reflecting the legal right of women to decide the fate of their pregnancies (e.g. Planned Parenthood v Danforth, 1976). This legal right illustrates a deeply held conviction that a woman’s bodily autonomy is overriding despite the wishes of other parties contributing to the pregnancy. The importance given to individual bodily autonomy entails that gamete donors cannot withdraw consent for the use of embryos formed form their donations after such embryos have been transferred.

Who is most harmed?

According to the above analysis, with regard to frozen embryos, reproductive rights are not absolute. Competing claims such as, the desire to reproduce versus the desire not to, cannot be arbitrated without regard to the consequences of ruling one way or another. In the Davis case the Tennessee Supreme Court ruled that the party wanting to avoid reproduction should control the fate of the embryos, unless the other party has no other reasonable way of reproducing without the embryos in question. Similarly legal theorist, Robertson (1989) argues that the wishes of the party avoiding reproduction should prevail because the burdens of unwanted reproduction outweigh the burdens of non-transfer. According to Robertson, a person who objects to the uterine transfer of embryos from his or her gametes may experience significant ‘psychosocial burdens’ if these embryos lead to offspring, even if no child supporting obligations are incurred (as is the case for gamete donors in Victoria). He cites the example of a failed marriage ‘...that would have produced biological offspring, for which the unconsenting partner may have strong feeling of attachment, responsibility, guilt etc.’ (Robertson, 1989). He adds that if embryo transfer and birth occur, this partner is irreversibly harmed because the burdens of unwanted parenthood cannot be avoided. However, without empirical studies on the consequences of unwanted parenthood for gamete donors, it is difficult to equate the burdens of unwanted parenthood for them with those of estranged partners, or donors who do incur duties towards their offspring. There are studies suggesting that gamete donors do not construe their donation as parenthood (Cook and Golombok, 1995; Daniels et al., 1996) and one
study from Western Australia suggests that many gamete donors see their donation as equivalent to donating blood (Walker and Broderick, 1999). However, it is not known to what extent gamete donors who cannot remain anonymous construe their donation as parenthood, nor if the burdens associated with unwanted parenthood would be greater for these donors than for anonymous gamete donors. In any event, even if we acknowledge a significant burden associated with unwanted offspring for gamete donors, it is not clear that this would be significant for all donors, nor that such burdens would always be greater than the burdens of non-transfer.

With regard to the burdens of non-transfer, there are many accounts from IVF patients on the anguish associated with failed cycles (Salzer, 1991; Bialosky and Schulman, 1998). That there are burdens associated with non-transfer of embryos, where this is desired by one of the parties, can be taken for granted. However, as Robertson (1989) argues, frustrating this desire in the case of particular embryos will not in most instances prevent a couple from trying again. As long as the party wishing to reproduce could, without undue burden, create other embryos, the desire to avoid offspring, he reasons, should take priority over the desire to reproduce with the embryos in question.

This reasoning is complicated by the fact that there could be many recipient couples involved for any one gamete donor. Thus the harms attributable to non-transfer are magnified according to the number of embryos and recipient couples involved. However, it is unlikely that the burdens of unwanted offspring would be equally magnified for gamete donors, because <30% of embryo transfers result in live births. Moreover, very few recipients of donor spermatozoa currently reveal, or plan to tell this fact to the resultant offspring (Klock and Maier, 1991; Walker and Broderick, 1999). Further, since the creation of future embryos cannot be guaranteed, even if the recipient couple were prepared to undergo a further IVF cycle, it could be that the loss of the embryos in question would indeed amount to an irreversible loss. With regard to creating further embryos without undue burden, there are many that would argue that each cycle of IVF imposes very great emotional, financial and personal burdens with serious associated costs. A non-transfer cycle will for many couples reduce their reproductive potential and for some it could make their infertility irreversible.

It has been argued, with regard to the custody of embryos, that sperm donation and egg donation are disanalogous because egg donation involves significantly more discomfort and risk than does sperm donation (Annas, 1998). The fact that there may be more harm associated with egg retrieval than sperm retrieval might support an egg providers claim over embryos for her own fertility treatment, on the basis that she incurs greater burdens than the sperm provider, in creating further embryos. However, with regard to withdrawal of consent to the use of embryos formed from egg donations, if an egg donor intends to veto embryo transfer to a recipient, the risks and harms associated with egg donation do not automatically entail that an egg donors wishes are overriding. As Robertson (1989, p.7) argues ‘Great differences in physical burdens do not require that divorcing mothers always receive custody of children’.

Obviously the burden associated with embryo transfer or non-transfer when sperm providers and egg providers disagree, will vary from case to case and for different donors and recipients. Decisions about the dispositional authority over embryos based on the burdens or harm done, to either the gamete donor or recipients, are difficult to justify when the extent to which these harms will manifest is unpredictable. If the extent of the burdens incurred varies between individual cases, it may be that conflicting claims on embryos should be decided on a case by case basis.

**Advance directives**

Attempts to ensure advance directives for the disposition of embryos reflect a desire to avoid just such case by case arbitration. In the Kass case the court held that an agreement made between the parties prior to the commencement of IVF procedures should be carried out. Indeed some commentators have suggested that the best way to avoid disputes over gametes and embryos is for IVF clinics to require advance directives and for courts to consider them legally binding (Roberstsson 1989,1996, Pennings 1997).

Although this may prove to be a legally expedient rule it does not help to resolve issues where no explicit agreement was made or where the party is requesting the legal right to break the contract. Moreover, as Annas (1998) and Capron (1992) argue, agreements involving personal relationships are not equivalent to contracts involving property. We already accept that contracts made involving personal human relationships can be broken, as exemplified by divorce, custody disputes and more recently surrogacy contracts (discussed in Robertson, 1994). In these cases legal disputes are not settled solely with reference to prior agreements, the current interests of the parties involved and changes in their life’s circumstances are given due consideration.

Legal issues aside, there are ethical arguments, which may make prior agreements morally binding.

**Consenting as promising**

It could be argued that an agreement to donate gametes is best characterized as an act of promising (Pennings, 1997) rather than of giving informed consent. Promising can be distinguished from consenting by the lack of obligation attached to consenting (Gillam, 1994). Informed consent as normally understood implies the right to withdraw consent. For example, if a person consents to taking part in a research project this does not imply any continuing obligation. The right to withdraw consent and to cease to take part in the project is uncontroversial. But, in the case of gamete donation, the donor is promising to become a parent (of sorts) and the donor’s undertaking creates expectations on the part of the recipient couple. That is, gamete donors put themselves under certain obligations, as is the case when making a promise and the recipient couple act on the assumption that the promise will be kept (Robertson, 1989).
Given that donating spermatozoa or eggs can be equated with making a promise, are there instances where this promise can justifiably be broken? It has been suggested that a promise only creates an obligation if the promise actually places reliance on the promisee (Bronaugh, 1992). In the case of sperm donation for the purpose of IVF, the recipients place different degrees of reliance on the promise at different stages of their IVF process. Prior to the use of the frozen spermatozoa, it could be said that withdrawing consent for its use wrongs the clinic or the hopeful recipients. However, in general, clinics and donor sperm recipients place no reliance on particular donors since the sperm donation is replaceable. The recipients rely on the fact that the clinic can match them with an existing suitable donor. However, a degree of reliance does exist in cases of known egg or sperm donors or where particular donations have been reserved for subsequent use. In Victoria, the buying and selling of eggs is prohibited and the waiting list for anonymous egg donors is more than five years. The majority of egg donations involve known donors, usually sisters or friends. Therefore egg donation often places a stronger degree of reliance on the donor. Similarly, once an embryo has been formed from donated gametes, the recipients have a large emotional and probably financial investment in the promise being fulfilled.

Although obligations to keep a promise are not regarded as absolute, when a strong reliance is placed on the donor keeping the promise then a later mere unwillingness to do so would not normally justify breaking it. It has been claimed that gamete donors should have the right to change their minds because they cannot predict how they may later feel about passing on their genes. But this is precisely the risk that is taken in promising anything where the actual outcomes are unknown. The fact that there is some unpredictability associated with gamete donation, such as uncertainty about future emotional responses or life circumstances does not automatically entail that all such promises can therefore justifiably be broken. Promises involving uncertainty about the future are not less binding because of this ‘unpredictability factor’ (Gillam, 1994). There may be some cases where a gamete donor’s objection to the use of subsequent embryos is justified, but without empirical knowledge (for example, evidence that harm is associated with unwanted ‘parenthood’ for gamete donors), it is not morally justifiable as a general rule.

**Acknowledgements**

Thanks are due to ITA and Monash IVF for helpful discussion relating to this publication. I also wish to thank Professor Helga Kuhse and Dr. Carol Holden for their comments in the preparation of this manuscript and I am indebted to Ms. Lynn Gillam for an understanding of consenting as promising.

**References**


Withdrawal of consent and gamete donation


