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Egging On Lesbian Maternity: The Legal Implications of Tri-gametic In Vitro Fertilization

Kyle C. Velte

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EGGING ON LESBIAN MATERNITY: THE LEGAL IMPLICATIONS OF TRI-GAMETIC IN VITRO FERTILIZATION

KYLE C. VELTE*

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I. INTRODUCTION

A. *Families and Assisted Reproductive Technologies*

Over the past decade, new reproductive technologies have

*J.D. Candidate, Washington College of Law, American University, 1999; B.A., Hamilton College, 1993. I wish to thank Professor Nancy Polikoff for her insight and guidance in the development of this paper. My thanks also goes out to the many researchers, scientists and doctors who patiently guided me through the mysteries of reproductive biology and technology. Finally, I would like to thank my parents for their never-ending support and encouragement.

emerged and become widely available as a means of creating a family.¹ The resulting family structures have challenged the traditional meaning of family.² Beginning with Louise Brown in 1978,³ and continuing into the present-day debate over the possibility of human cloning,⁴ the discourse surrounding assisted reproductive technologies (ARTs) has moved away from the secrecy of scientific laboratories and into the very public arenas of popular culture, mass media, and the judicial system.⁵

This Comment addresses new and not yet widely used ARTs that utilize the genetic material from two women to create an embryo. Although these processes could theoretically be used by any two women to create a child, the techniques likely will be utilized most often by lesbian couples to create families that are based on biology and genetics, rather than the more legally precarious family structures that are currently available to lesbians and lesbian couples.⁶

1. See John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 912 (1996) (discussing the widespread availability of assisted reproductive technologies (ARTs) in the last ten years).

2. See *id.* (explaining the public's doubts and concerns about the moral, ethical and practical consequences of the widespread use of ARTs, including the effect on the children born from these technologies and the feminist concerns about the control and use of women as vehicles of reproduction); Lisa C. Ikemoto, *The In/Fertile, The Too Fertile, and The Dysfertile*, 47 HASTINGS L.J. 1007, 1033 (1996) (describing as "dysfertile" those rendered "socially sterile" because they are unmarried, lesbian, or gay); see also BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, NO. 447, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1990 AND 1989, at 2-3 (1990), cited in Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1311 (1997) (defining the "traditional nuclear family" as "a married couple and their biological child(ren)"). The growing availability of ARTs has allowed single women, lesbians and gay men, and lesbian and gay couples to create families, thereby challenging the traditional notion of family.

3. See John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 943 & n.2 (1986) (discussing the story of Louise Brown, the first known baby born in 1978 as a result of in vitro fertilization).

4. See Lawrence Hall, *A Culture So Cavalier About Life Can't Be Trusted To Tinker*, STAR-LEDGER (Newark, N.J.), June 11, 1997, at 25, available in 1997 WL 8079574 (describing the scientific breakthroughs of cloning a sheep in Scotland and a monkey in Oregon, the announcement by a Swiss religious cult to offer cloning services to gay couples, and the public outcry that cloning is morally unacceptable); see also Susan Cohen, *A House Divided*, WASH. POST, Oct. 12, 1997, (Magazine), at 12, available in 1997 WL 14706752 (describing the deliberations of the National Bioethics Advisory Committee, appointed by President Clinton, in devising federal guidelines for the use of genetic technologies, including cloning).

5. See Karen M. Thomas, *Artificial Insemination No Longer Shrouded in Secrecy*, GREENSBORO NEWS & REC., Dec. 5, 1997, at D2A (describing the portrayal of donor insemination on television, her own decision to reveal to her daughter that she was conceived through artificial insemination, and the trend towards "yes" donors who agree to allow the child created from their sperm to find out limited information about them when the child turns 18).

6. Lesbians who want to become mothers currently have few options available. In the past, most lesbians with children had their children in the context of a marriage before they discovered that they were lesbians. See Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-Traditional Families*, 78 GEO. L.J. 459, 464-65 (1990) (explaining that until recently, lesbian mothers were

B. *The New Procedures: Tri-Gametic In Vitro Fertilization*

With new advances in science, new reproductive technologies are being developed.⁷ Some new reproductive technologies involve eggs from two different women.⁸ They may also use a sperm casing.⁹ The result of these procedures is a child with genetic material from both women.¹⁰ Although debate in the scientific and medical communities about the feasibility of these procedures continues, several techniques to create a child who is the genetic and biological result of two women have been suggested.¹¹ Because these procedures are

predominantly mothers who gave birth in heterosexual marriages before they “came out” as lesbians). More recently, however, many lesbians have chosen artificial insemination by donor (AIDS) to create families. See Libby Brooks, *The Mother of All Dilemmas*, THE INDEPENDENT (London), May 11, 1997, at 19 (describing the process a woman goes through, and the amount of work and commitment she puts forth to conceive a child through artificial-insemination). However, because the current state of the law accords more weight to biology than intent, “the legal assignment of parental status may contradict and frustrate the original intentions of the AIDS participants.” Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking AID In The Law*, 44 DUKE L.J. 524, 538 (1994). See *infra* notes 42-47 and accompanying text (discussing the legal challenges faced by lesbian families).

7. See *infra*, note 11.

8. See *infra*, note 11.

9. See *infra*, note 11.

10. See *infra*, note 11.

11. The term Tri-Gametic In Vitro Fertilization (TGIVF) best describes these processes, which involves three gametes—an egg from each of two women and the sperm from a donor. A gamete is a human sex cell (an egg or a sperm). See IRWIN SLESNICK, LEVON BALZER, ALAN J. MCCORMACK, DAVID E. NEWTON & FREDERICK A. RASMUSSEN, BIOLOGY 611 (1988). The process will most likely occur in vitro, due to its complexity. See Interviews with Dr. Charles Novotny, Professor of Microbiology and Molecular Genetics, and Dr. George Osol, Assistant Professor of Obstetrics and Gynecology, University of Vermont School of Medicine (Jan. 6, 1998) (on file with author). Although these procedures are not currently being offered in any major fertility clinic, there is anecdotal evidence that at least one procedure has been attempted by at least one lesbian couple. See Notes from the National Gay and Lesbian Task Force’s Creating Change Conference in Washington, D.C. (Nov. 1996) (on file with author). At this conference, a lesbian couple shared their story. The couple described this procedure as follows: The deoxyribonucleic acid (DNA) is removed from the donor sperm and discarded. *Id.* DNA contains coded biological information that is passed between generations. See generally SLESNICK, BALZER, MCCORMACK, NEWTON & RASMUSSEN, at 611 (defining a gamete). An egg is removed from the non-gestational mother, who will not carry the child, and that egg’s DNA is removed and placed into an “empty” sperm casing (a sperm cell with the DNA removed). The gestational mother’s egg is then fertilized by the sperm containing the non-gestational woman’s genetic material. See Notes from the National Gay and Lesbian Task Force’s Creating Change Conference in Washington, D.C. (Nov. 1996) (on file with author). The author has confirmed that the procedure is possible. See Interviews with Dr. Charles Novotny, Professor of Microbiology and Molecular Genetics, and Dr. George Osol, Assistant Professor of Obstetrics and Gynecology, University of Vermont School of Medicine (Jan. 6, 1998) (on file with author); see also Electronic Mail Correspondence with anonymous researchers (on file with author). Although some doctors confirm this procedure is possible, other doctors expressed skepticism and are not convinced that this procedure is possible. Many researchers and doctors contacted did express doubts as to the feasibility of this procedure, but others have made several suggestions concerning other procedures that would reach the same result. Several of the doctors and researchers contacted by the author requested anonymity regarding their comments on this topic. In order to respect this request, they remain unnamed throughout this Comment. More information may be available by reaching the author or the American

not yet available in any major fertility clinic in the country, and therefore have no official names, for purposes of this Comment this new set of technologies is referred to as Tri-Gametic In Vitro Fertilization (TGIVF).¹²

The embryo created through TGIVF is the genetic combination of the two women who are the intended parents. Given the political backlash that surrounds the use of more common ARTs by lesbians and gay men to create families,¹³ TGIVF introduces issues that are unique and potentially explosive in both the political and judicial

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One technique for TGIVF involves fertilizing an egg from the non-gestational mother with a donor sperm. At the point in the fertilization process in which the nuclei from both the egg and the sperm "decondense," or swell, the sperm nucleus is removed and discarded. At this point, the female nucleus from the non-gestational mother's egg is suctioned out and placed into the mature egg belonging to the gestational mother, which then progresses in the same manner as if fertilized by a sperm. See Electronic Mail Correspondence with anonymous researcher at the Cooper Institute for Reproductive and Hormonal Disorders (Jan. 8, 1998) (on file with author); Electronic Mail Correspondence with anonymous researcher at the University of Georgia (Oct. 24, 1998) (on file with author).

Yet another option may be to activate an egg to begin the chromosomal reduction process, in which the oocyte, or egg, reduces to one set of chromosomes, known as the "haploid" stage. Once the oocyte is reduced to two "polar bodies" in this haploid stage, each of which contains the appropriate number of chromosomal sets, one of the polar bodies is placed into the sperm head, which is then used to fertilize the gestational mother's egg. See Electronic Mail Correspondence with anonymous researcher from Albany Medical Center (Oct. 23, 1998) (on file with author).

Additionally, a procedure known as "cytoplasmic transplant" has been suggested. In this procedure, each woman provides an egg. The nucleus of one is removed and placed in the denuded egg of the other, so that the DNA comes from one partner and the cytoplasm with mitochondrial DNA comes from the other, thus giving each partner a physical, biological, and genetic connection with the resulting child. See Electronic Mail Correspondence with Professor John Robertson, University of Texas School of Law (Jan. 12, 1998) (on file with author); Electronic Mail Correspondence with anonymous researcher at the University of Wisconsin (Oct. 30, 1998) (on file with author). Note that this procedure does not involve sperm in any way.

Finally, one researcher has suggested a method in which the non-gestational mother's egg is activated, not with sperm, but parthenogenetically, and then the pronuclei is removed. Next, the gestational mother's egg is fertilized with a sperm, after which the male pronucleus is removed, and the non-gestational mother's pronucleus is injected into or fused with the gestational mother's egg, and the resulting offspring comes from an egg crossed with another egg. See Electronic Mail Correspondence with anonymous researcher at the Samaritan Institute of Reproductive Medicine, Phoenix, Arizona (Jan. 8, 1998) (on file with author).

12. See *supra*, note 11.

13. See Deborah Bradley, *A New Kind of Family: Some Gays, Lesbians Turn to Artificial Insemination*, DALLAS MORNING NEWS, July 16, 1995, at A1, available in 1995 WL 9048164 (noting the growing number of lesbians and gay men utilizing ARTs to create families, the backlash from the Religious Right, and the hesitancy of legislatures and courts to recognize lesbian and gay families); see also Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 625 (1996) (documenting the controversial nature of lesbian and gay parenting as presented in the popular press in the last several years, as well as the introduction in some jurisdictions of legislation restricting the rights of lesbian and gay parents).

arenas.¹⁴

This Comment explores the unique legal issues that may emerge from TGIVF. Part II consists of a brief summary of the now-common and widely accepted ARTs, a synopsis of their historical uses, and a discussion of legislative and judicial treatment of these ARTs. Part III analyzes the legal issues involved in artificial insemination by donors and surrogacies, and the legal issues that may emerge with TGIVF. This analysis addresses the various rights, obligations, and responsibilities of parents; the judicial definitions of family; and how the current legal landscape may treat TGIVF. Part IV recommends that families created by TGIVF be legally recognized by legislatures and courts. There are two distinct family structures that may result from TGIVF, both of which should be legally recognized. The first alternative is a child with two legal mothers. The second alternative is a child with three legal parents—two mothers and one father. This Comment argues that a family with three parents should be recognized only if such a family structure is intended by the two genetic mothers. Part V concludes with thoughts and reactions to TGIVF; its place in the past, present and future of reproductive technology; and the legal and political struggles over control and definitions of family.

II. HISTORICAL DISCUSSION OF ARTs AND THE NOTION OF THE FAMILY

Several reproductive technologies currently exist and are widely used to achieve conception. These techniques include in vitro fertilization (IVF),¹⁵ embryo transfer,¹⁶ gamete intrafallopian transfer

14. For example, children born through TGIVF will all be girls because women's genes carry only female chromosomes. See SLESNICK, BALZER, MCCORMACK, NEWTON & RASMUSSEN, *supra* note 11, at 161. Further, if a genetic component to homosexuality is ever discovered, the children of TGIVF may have an increased chance of being lesbians. See generally John Gallagher, *Gay for the Thrill of It*, THE ADVOCATE, Feb. 17, 1998, at 33 (reviewing the current social and scientific debates about a possible biological origin to homosexuality); Simon LeVay & Dean Hamer, *Evidence for a Biological Influence in Male Homosexuality*, SCI. AM., May 1994, at 20 (describing the current state of scientific research on homosexuality).

15. In vitro fertilization involves the removal of a woman's mature egg and its placement in a test tube, or similar laboratory medium, with a sperm. After fertilization occurs, the embryo is implanted back into the egg provider or into the womb of a surrogate. See Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 670 (1985) (defining in vitro fertilization).

16. Embryo transfer occurs most commonly in a heterosexual couple when the woman cannot produce eggs. In this process an "ovum donor," or a woman who is fertile, is inseminated with the sperm of the infertile woman's husband or partner. After a few days, the embryo is flushed out of the ovum donor's uterus and placed in the uterus of the woman who intends to gestate and raise the child. See *id.* (explaining the process of embryo transfer).