



Assisted Reproductive Technology (ART)

ART Generally

ART commonly refers to treatments used to facilitate reproduction. ART treatments include medications to induce ovulation, in vitro fertilization, and other methods discussed below.¹

- Heterosexual couples may turn to ART to overcome infertility in one or both partners. About 12% of women aged 15-44 in the U.S. have an impaired ability to have children.² About one-third of the time, this is due to female infertility, another third of the time to male infertility, and the other one-third of the time to a mix of factors or to unknown factors.³
- Single people,⁴ LGBTQIQ couples,⁵ women undergoing chemotherapy,⁶ and those interested in pre-implantation genetic diagnosis⁷ (PGD—see Emerging Issues fact sheet) may also seek out ART.
- People may spend tens of thousands of dollars while trying to become pregnant.⁸ Most health insurance plans, whether public or private, do not cover infertility treatments or other ART procedures.⁹ This means that financial status often limits access to ART.
 - Fourteen states (AR, CA, CT, HI, IL, MD, MA, MT, NJ, NY, OH, RI, TX, and WV) require some coverage of infertility diagnosis and treatment by insurers.¹⁰
 - Courts have found that infertility constitutes a disability under the Americans with Disabilities Act.¹¹ However, an insurer's exclusion of infertility treatment does not violate the ADA if infertile and fertile people receive the same benefits,¹² nor does it violate Title VII's Pregnancy Discrimination Act because men and women are equally affected by infertility.¹³

In Vitro Fertilization (IVF)

IVF, which accounts for less than 5% of all infertility treatment, is a process by which an egg is fertilized outside a woman's body. A doctor will retrieve eggs from the donor – either the woman who wishes to become pregnant or a separate donor – through an outpatient procedure. The eggs will then be mixed with sperm in a Petri dish. About two days later, the eggs are examined to determine viability and, if successful, one or more viable pre-embryos are implanted in the uterus.¹⁴

Sperm Donation

Sperm donation provides an option for single women, women in same-sex relationships, transgender people, and heterosexual couples unable to conceive because of male infertility.¹⁵ Those wishing to use donated sperm for alternative insemination (AI) or IVF may seek out a known donor or purchase sperm from an anonymous donor to a sperm bank.¹⁶ Since donors can easily provide sperm, the process involves less cost and fewer health risks than egg donation.¹⁷ However, it may still cost \$100-\$500 for a vial of sperm and \$200-\$600 for alternative insemination, plus fees.¹⁸

- Although the retrieval of sperm is much simpler than egg retrieval, the time commitment required by sperm donors is significantly greater (typically a year) and they are paid only when their samples meet the required standards, unlike egg donors, who are paid regardless of outcome.¹⁹ Sperm donors are also often much less prepared for the consequences of donating their genetic material.²⁰
- In 2004, the FDA approved new regulations for sperm donation, recommending that sperm banks not accept anonymous donations from men who have had sex with men in the last five years to reduce the possibility of HIV transmission.²¹ LGBTQIQ advocates argue that the new rules promote stereotypes about gay men, basing eligibility for donation on sexual orientation rather than scientifically determined risk factors.²² Since the advent of current testing procedures – rather than donation criteria – no cases of HIV transmission by donated sperm have been documented.²³

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- Donated sperm is currently used almost exclusively for lesbian couples and single women. Due to advances in technology that allow doctors to use sperm that traditionally could not be used, male infertility rarely prevents reproduction.²⁴ Through a procedure called intracytoplasmic sperm injection (ICSI), embryologists can inject a single sperm into an oocyte (egg), eliminating the need for the sperm to be capable of accomplishing this feat without technological aid.²⁵

Ova/Oocyte or “Egg” Donation

If the would-be parent or parents cannot provide their own eggs, they can use ova donated by a third party for IVF.²⁶ The practice of egg donation remains largely unregulated.²⁷

- Egg donors undergo hormonal stimulation and oocyte (egg) extraction. Far more invasive than sperm donation, the short-term health risks of egg donation include ovarian hyperstimulation syndrome, which can cause serious health complications. Limited follow-up research has left the long-term health implications essentially unknown.²⁸
- Women usually receive \$5,000-8,000 to donate their ova to assist others in their attempt to procreate, and some individuals or couples may offer up to \$100,000 for eggs from women with particular characteristics.²⁹ The American Society for Reproductive Medicine recommends that payments for egg donation should not exceed \$5,000 per cycle.³⁰

Alternative Insemination (AI)

Alternative insemination, sometimes referred to as artificial insemination, involves the manual placement of semen in the vagina or in the cervical canal.³¹ A syringe filled with sperm is inserted into the woman’s vagina and injected.³² AI can be performed successfully at home or in a clinic by a medical professional.³³ Some women combine AI with fertility medications to stimulate increased egg production, increasing the likelihood that one or more of the eggs will be fertilized.³⁴ AI’s success rates range from 8% to 15%.³⁵

Surrogacy or Gestational Agreements

In a surrogacy agreement, a woman agrees to carry and give birth to a child for others to raise. There are two primary types of surrogacy agreements; in both circumstances, the woman who gives birth often receives compensation for the expenses of the pregnancy, ranging anywhere from \$40,000 to \$100,000 for a U.S. surrogate.³⁶

- In a traditional surrogacy arrangement, a woman agrees to be alternatively inseminated, carry the resulting pregnancy to term, and give the baby to the intended parents. In this situation, the surrogate is both the genetic and gestational mother of the baby.³⁷
 - In a custody dispute between the intended parents and a surrogate, a New Jersey court found equal parental rights in the genetic surrogate and the biological father,³⁸ but no rights in the intended mother.³⁹ Custody then hinged upon the court’s judgment of the child’s best interests, which it found lay with the biological father and intended mother based on the specific facts of the case.⁴⁰
- A gestational surrogacy arrangement uses eggs from the intended mother or a donor, fertilized by IVF and implanted into the gestational mother’s uterus. The surrogate agrees to carry the resulting pregnancy to term and to give the baby to the intended parents. In this situation, the gestational mother has no genetic relationship to the baby.⁴¹
 - The California Supreme Court ruled that the gestational surrogate and the genetic mother both have legitimate claims to maternity, so intent became determinative of the parental rights question in the case.⁴²
- Ethical controversy over surrogacy mainly arises from concerns about exploitation and commodification of motherhood or children.⁴³



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- Many people now hire surrogates in India.⁴⁴ These women earn far less than U.S. surrogates, but far more than India's average daily wage, typically between \$5,000 and \$12,000.⁴⁵ Ethical concerns about such "reproductive tourism" include the wage disparity and lack of legal and health protections for the women.⁴⁶
- The laws governing surrogacy agreements vary widely by state:⁴⁷
 - AK, CA, and MA explicitly permit surrogacy contracts.⁴⁸ Illinois permits only gestational surrogacy.⁴⁹ NJ, OR, NM, and WA permit only uncompensated surrogacy agreements.⁵⁰
 - AZ, MI, LA, NY, ND, IN, and D.C. completely prohibit surrogacy.⁵¹ NE prohibits surrogacy as well, but defines it as an arrangement for compensation.⁵²
 - FL, NV, TN, TX, UT, VA and NH explicitly permit surrogacy, but restrict access to married couples only.⁵³

Access to ART for LGBTQIQ Persons

Although rapid progress is being made in this area, many LGBTQIQ people seeking ART still face discrimination from physicians who refuse to treat them, in addition to discriminatory regulations, statutes, and legal precedent.

- In *Barros v. Riggall*, a man and his partner filed a complaint with the Orlando Human Rights Board after a Florida clinic refused to offer them fertility treatment.⁵⁴ The men planned to impregnate a willing surrogate mother, but the clinic claimed FDA guidelines on anonymous sperm donations prevented the treatment.⁵⁵
- In *Benitez v. North Coast Women's Medical Group*, a woman sued a fertility clinic that denied her treatment because she is a lesbian.⁵⁶ The California Supreme Court held that because compliance with the anti-discrimination law only incidentally affected the free exercise of religion, religious conviction cannot exempt a physician from compliance.⁵⁷
- The FDA continues to recommend that sperm banks do not accept donations from any man who has engaged in homosexual sex in the previous five years.⁵⁸

¹ The definition given here is common, but broader than most official uses. For example, the Centers for Disease Control and Prevention limits the definition of ART to only those procedures that involve the handling of both the egg and sperm and, thus, would not include sperm donation or artificial insemination. CDC, Assisted Reproductive Technology: Home, <http://www.cdc.gov/ART/index.htm> (last visited June 3, 2009).

² CDC, Infertility, <http://www.cdc.gov/nchs/fastats/fertile.htm> (last visited June 3, 2009).

³ U.S. Dep't of Health and Human Servs., Infertility, <http://womenshealth.gov/faq/infertility.cfm#p> (last visited June 3, 2009); American Society of Reproductive Medicine, Frequently Asked Questions About Infertility, <http://www.asrm.org/Patients/faqs.html> (last visited June 11, 2009).

⁴ LIZA MUNDY, EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING OUR WORLD 154-76 (2007).

⁵ *Id.* at 108-53.

⁶ See AM. SOC'Y FOR REPROD. MED., PATIENT'S FACT SHEET: CANCER AND FERTILITY PRESERVATION (2004), available at <http://www.asrm.org/Patients/FactSheets/cancer.pdf>.

⁷ AM. SOC'Y OF REPROD. MED., PATIENT'S FACT SHEET: GENETIC SCREENING FOR BIRTH DEFECTS (2005), available at http://www.asrm.org/Patients/FactSheets/genetic_screening.pdf.

⁸ American Society of Reproductive Medicine, Frequently Asked Questions About Infertility, <http://www.asrm.org/Patients/faqs.html> (last visited June 12, 2009) [hereinafter ASRM Frequently Asked Questions].

⁹ RESOLVE: The Nat'l Fertility Ass'n, Health Insurance 101, http://www.resolve.org/site/PageServer?pagename=lrn_ic_101 (last visited June 9, 2009).

¹⁰ ASRM Frequently Asked Questions, *supra* note 8.

¹¹ *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 763 (W.D. Mich. 2001); *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 801 (N.D. Ill. 1996).

¹² *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 678 (8th Cir. 1996).

¹³ *Saks v. Franklin Covey Co.*, 316 F. 3d 337, 346 (2d Cir. 2003).



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¹⁴ ASRM Frequently Asked Questions, *supra* note 8; Georgia Reproductive Specialists, In Vitro Fertilization (IVF-ET), <http://www.ivf.com/ivffaq.html> (last visited Aug. 18, 2008).

¹⁵ IVF-Infertility.com, Sperm Donation, <http://www.ivf-infertility.com/donation/sperm/index.php> (last visited June 4, 2009).

¹⁶ *Id.*

¹⁷ Letisia Marquez, UCLA Study Looks at Sperm Donation, UC NEWSROOM, May 23, 2007, <http://www.universityofcalifornia.edu/news/article/9238> (citing Rene Almeling, Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material, 72 AM. SOC. REV. 319 (June 2007)).

¹⁸ SpermCenter.com, How Much Does Donor Sperm Cost?, <http://www.spermcenter.com/sperm-cost.htm> (last visited June 11, 2009).

¹⁹ Marquez, *supra* note 17.

²⁰ *Id.*

²¹ FDA, GUIDANCE FOR INDUSTRY: ELIGIBILITY DETERMINATION FOR DONORS OF HUMAN CELLS, TISSUES, AND CELLULAR AND TISSUE-BASED PRODUCTS (HCT-PS) 14 (Aug. 2007), available at <http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Tissue/ucm091345.pdf>.

²² The Henry J. Kaiser Family Found., National Politics and Policy: FDA To Implement Guidelines Banning Men Who Have Sex With Men From Donating Sperm Because of Perceived HIV Risk, KAISER DAILY WOMEN'S HEALTH POLICY REPORT, May 6, 2005, available at http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=29867.

²³ Rona Marech, FDA Sperm Donation Rule Upsets Gay Rights Groups, S.F. CHRON., May 6, 2005, at B3, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/05/06/BAGC8CKV451.DTL>.

²⁴ MUNDY, *supra* note 4, at 83.

²⁵ *Id.* at 78-79.

²⁶ AM. SOC'Y FOR REPROD. MED., THIRD PARTY REPRODUCTION (SPERM, EGG, AND EMBRYO DONATION AND SURROGACY): A GUIDE FOR PATIENTS 4 (2006), available at <http://www.asrm.org/Patients/patientbooklets/thirdparty.pdf> [hereinafter THIRD PARTY REPRODUCTION].

²⁷ Emily Galpern, Beyond Embryo Politics: Women's Health and Dignity in Stem Cell Research, WOMEN'S HEALTH ACTIVIST, May/June 2006, http://www.nwhn.org/newsletter/article1.cfm?newsletterarticles_id=88.

²⁸ JESSICA ARONS, CTR. FOR AM. PROGRESS, FUTURE CHOICES: ASSISTED REPRODUCTIVE TECHNOLOGIES AND THE LAW 6 (2007), available at http://www.americanprogress.org/issues/2007/12/pdf/arons_art.pdf.

²⁹ *Id.*

³⁰ American Society for Reproductive Medicine, Financial Compensation of Oocyte Donors, 88 FERTILITY AND STERILITY 305 (Aug. 2007), available at http://www.asrm.org/Media/Ethics/financial_incentives.pdf.

³¹ EMILY GALPERN, CTR. FOR GENETICS AND SOC'Y, ASSISTED REPRODUCTIVE TECHNOLOGIES: OVERVIEW AND PERSPECTIVE USING A REPRODUCTIVE JUSTICE FRAMEWORK 9 (2007), available at <http://geneticsandsociety.org/downloads/ART.pdf>.

³² THIRD PARTY REPRODUCTION, *supra* note 26.

³³ GALPERN, *supra* note 31, at 9.

³⁴ *Id.*

³⁵ THIRD PARTY REPRODUCTION, *supra* note 26, at 12.

³⁶ GALPERN, *supra* note 31, at 11.

³⁷ THIRD PARTY REPRODUCTION, *supra* note 26, at 3.

³⁸ *In re Baby M.*, 537 A.2d 1227, 1247 (N.J. 1988).

³⁹ *Id.* at 1244.

⁴⁰ *Id.* at 1258-59.

⁴¹ THIRD PARTY REPRODUCTION, *supra* note 26, at 3.

⁴² *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

⁴³ E.g., *In re Baby M.*, 537 A.2d at 1249-51.

⁴⁴ See Amelia Gentleman, India Nurtures Business of Surrogate Motherhood, N.Y. TIMES, Mar. 10, 2008, available at <http://www.nytimes.com/2008/03/10/world/asia/10surrogate.html?pagewanted=1&r=1>.

⁴⁵ GALPERN, *supra* note 31, at 12.

⁴⁶ Gentleman, *supra* note 44.

⁴⁷ Human Rights Campaign, State Surrogacy Laws, http://www.hrc.org/issues/parenting/surrogacy/surrogacy_laws.asp (last visited June 8, 2009).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*



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⁵³ Id.

⁵⁴ Lambda Legal, *Barros v. Riggall*, <http://www.lambdalegal.org/our-work/in-court/cases/barros-v-riggall.html> (last visited June 8, 2009).

⁵⁵ Id.

⁵⁶ *North Coast Women's Care Med. Group, Inc. v. Super. Ct.*, 44 Cal. 4th 1145.

⁵⁷ Id.

⁵⁸ FDA, GUIDANCE FOR INDUSTRY: ELIGIBILITY DETERMINATION FOR DONORS OF HUMAN CELLS, TISSUES, AND CELLULAR AND TISSUE-BASED PRODUCTS (HCT-Ps) 14 (2007), <http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Tissue/ucm091345.pdf>.