



# 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.

- Heterosexual couples may turn to ART to overcome infertility in one or both partners. Infertility occurs at equal rates in men and women, affecting about 12% of couples aged 15-44 in the U.S.<sup>1</sup>
- Single people, LGBTQIQ couples, women undergoing chemotherapy, and those interested in pre-implantation genetic diagnosis (PGD--see below) may also seek out ART.
- People may spend tens of thousands of dollars while trying to become pregnant. Most health insurance plans, whether public or private, do not cover infertility treatments or other ART procedures. This means that financial status often limits access to ART.
  - 14 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.<sup>2</sup>
  - Courts have found that infertility constitutes a disability under the Americans with Disabilities Act.<sup>3</sup> However, an insurer's exclusion of infertility treatment does not violate the ADA if infertile and fertile people receive the same benefits.<sup>4</sup>

## In Vitro Fertilization (IVF)

IVF technology allows fertilization to occur outside a woman's body. Eggs may originate from the woman who wishes to become pregnant or from a donor. Prior to egg retrieval, the donor undergoes several weeks of hormonal injections to produce multiple eggs in one cycle. A doctor then inserts a sonographically-guided needle through the vaginal wall to suction the eggs from the follicles (transvaginal oocyte removal, which involves light anesthesia.) The oocytes are fertilized in a Petri dish. About two days later, one or more viable pre-embryos are implanted in the uterus.<sup>5</sup>

## Sperm Donation

Sperm donation provides an option for heterosexual couples unable to conceive because of male infertility, single women, women in same-sex relationships, and trans people. 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. Since donors can easily provide sperm, the process involves less cost and fewer health risks than egg donation. However, it may still cost \$100-\$500 for a vial of sperm and \$200-\$600 for alternative insemination, plus fees.<sup>6</sup>

- In 2004, the FDA approved new regulations for sperm donation, recommending that sperm banks do not accept anonymous donations from men who have had sex with men in the last

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<sup>1</sup> U.S. Department of Health and Human Services, Infertility, <http://www.womenshealth.gov/faq/infertility.htm#c> (last visited Aug. 18, 2008), <http://www.asrm.org/Patients/faqs.html> (last visited Aug. 18, 2008); American Society of Reproductive Medicine, Frequently Asked Questions About Infertility, <http://www.asrm.org/Patients/faqs.html> (last visited Aug. 18, 2008).

<sup>2</sup> American Society of Reproductive Medicine, *supra* note 1, <http://www.asrm.org/Patients/faqs.html#Q8>: (last visited Aug. 18, 2008).

<sup>3</sup> *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 765 (W.D. Mich. 2001); *Saks v. Franklin Covey Co.*, 117 F. Supp. 2d 318, 326.

<sup>4</sup> Jessica Arons, FUTURE CHOICES: ASSISTED REPRODUCTIVE TECHNOLOGIES AND THE LAW 12 (Center for American Progress, Dec. 2007).

<sup>5</sup> Georgia Reproductive Specialists, In Vitro Fertilization (IVF-ET), <http://www.ivf.com/ivffaq.html> (last visited Aug. 18, 2008).

<sup>6</sup> SpermCenter.com, How Much Does Donor Sperm Cost?, <http://www.spermcenter.com/sperm-cost.htm> (last visited Aug. 18, 2008).



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five years to reduce the possibility of HIV transmission.<sup>7</sup> 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. Since the advent of current safety protocols, no cases of HIV transmission by donated sperm have been documented.<sup>8</sup>

## 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. The practice of egg donation remains largely unregulated.<sup>9</sup>

- Egg donors undergo hormonal stimulation and oocyte 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.<sup>10</sup>
- 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.<sup>11</sup> The American Society for Reproductive Medicine recommends that payments for egg donation should not exceed \$5,000 per cycle.<sup>12</sup>

## Alternative Insemination (AI)

Alternative insemination, sometimes referred to as artificial insemination, involves the placement of semen in the vagina or in the cervical canal by means other than sexual intercourse. A syringe filled with sperm is inserted into the woman's vagina and injected. AI can be performed successfully at home or in a clinic by a medical professional. 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. AI has about an 11% success rate.<sup>13</sup>

## Surrogacy or Gestational Agreements

In a surrogacy arrangement, 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 usually receives compensation for the expenses of the pregnancy.

- 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.<sup>14</sup>
  - 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, but no rights in the intended mother. Custody then hinged upon the court's

<sup>7</sup> The Henry J. Kaiser Family Foundation, 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, [http://www.kaisernetwork.org/daily\\_reports/rep\\_index.cfm?DR\\_ID=29867](http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=29867).

<sup>8</sup> Rona Marech, FDA Sperm Donation Rule Upsets Gay Rights Groups, SFGate, May 6, 2005, <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/05/06/BAGC8CKV451.DTL>.

<sup>9</sup> 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/article.cfm?content\\_id=88](http://www.nwhn.org/newsletter/article.cfm?content_id=88).

<sup>10</sup> Arons, *supra* note 4, at 6.

<sup>11</sup> Arons, *supra* note 4, at 6.

<sup>12</sup> Anne Harding, Survey Belies Tales of Donor Egg Market Gone Awry, REUTERS NEWS SERVICE, May 31, 2007, <http://www.reuters.com/article/healthNews/idUSFLE16477220070531>.

<sup>13</sup> LGBT Health Channel, Alternative Insemination (AI) Overview, <http://www.reuters.com/article/healthNews/idUSFLE16477220070531> (last visited Aug. 18, 2008).

<sup>14</sup> Emily Galpern, Assisted Reproductive Technologies: Overview and Perspective Using a Reproductive Justice Framework, Center for Genetics and Society (2007), <http://geneticsandsociety.org/downloads/ART.pdf>.

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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.<sup>15</sup>

- 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.
  - The California Supreme Court ruled that a gestational surrogate had no parental rights to the resulting child, finding full parental rights in the intended parents.<sup>16</sup>
- Ethical controversy over surrogacy mainly arises from concerns about exploitation and commodification of motherhood or children. Opponents liken compensation for surrogacy above and beyond expenses of pregnancy to paying a parent to adopt their child.<sup>17</sup>
- Many people now hire surrogates in India. These women earn far less than U.S. surrogates, but far more than India's average daily wage. Ethical concerns about such "reproductive tourism" include the wage disparity and lack of legal and health protections for the women.
- The laws governing surrogacy agreements vary widely by state:<sup>18</sup>
  - Arkansas, California, and Massachusetts explicitly permit surrogacy contracts. Illinois permits only gestational surrogacy. New Jersey, Oregon, New Mexico, and Washington permit only uncompensated surrogacy agreements.
  - Arizona, Michigan, Louisiana, New York, North Dakota, Indiana, and the District of Columbia completely prohibit surrogacy. Nebraska prohibits surrogacy as well, but defines it as an arrangement for compensation.
  - Florida, Nevada, Tennessee, Texas, Utah, Virginia and New Hampshire explicitly permit surrogacy, but restrict access to married couples only.

### Access to ART for LGBTQIQ Persons

Many LGBTQIQ people seeking ART face discrimination from physicians who refuse to treat them, on top of 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. The men planned to impregnate a willing surrogate mother, but the clinic claimed FDA guidelines on anonymous sperm donations prevented the treatment.<sup>19</sup>
- In *Benitez v. North Coast Women's Medical Group*, a woman has sued a fertility clinic that denied her treatment because she is a lesbian.<sup>20</sup> Now before the California Supreme Court, the suit poses the question of whether religious convictions can exempt doctors from complying with a state law prohibiting discrimination by commercial businesses.<sup>21</sup>
- 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.
- States that prohibit surrogacy agreements for unmarried couples also prohibit same-sex marriage, effectively denying access to LGBTQIQ people. If courts find custody in a

<sup>15</sup> *In re Baby M.*, 537 A.2d 1227, 1253 (N.J. 1988).

<sup>16</sup> *Johnson v. Calvert*, 851 P.2d 776, 784 (Cal. 1993).

<sup>17</sup> *In re Baby M.*, *supra* note 16, at 1249-51.

<sup>18</sup> Human Rights Campaign, State Surrogacy Laws, [http://www.hrc.org/issues/parenting/surrogacy/surrogacy\\_laws.asp](http://www.hrc.org/issues/parenting/surrogacy/surrogacy_laws.asp) (last visited Aug. 18, 2008).

<sup>19</sup> Lambda Legal, *Barros v. Riggall*, <http://www.lambdalegal.org/our-work/in-court/cases/barros-v-riggall.html> (last visited Aug. 18, 2008).

<sup>20</sup> Lambda Legal, *Benitez v. North Coast Women's Care Medical Group*, <http://www.lambdalegal.org/our-work/in-court/cases/benitez.html> (last visited Aug. 18, 2008).

<sup>21</sup> National Center for Lesbian Rights, Case Docket, *Benitez v. North Coast Women's Care Medical Group*, [http://www.nclrights.org/site/PageServer?pagename=issue\\_caseDocket\\_benitez](http://www.nclrights.org/site/PageServer?pagename=issue_caseDocket_benitez) (last visited Aug. 18, 2008).



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traditional surrogacy arrangement based on the best interest of the child, institutional bias may lead to discrimination against gay or bisexual fathers.