Golden Gate University Law Review

Volume 22
Issue 3 *Women's Law Forum*

Article 7

January 1992

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IN VITRO FERTILIZATION THROUGH EGG DONATION: A PROSPECTIVE VIEW OF LEGAL ISSUES

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I. INTRODUCTION

It is estimated that 10-20% of the couples desiring to have children are unable to do so because of infertility.[1] For these couples, the opportunity to bear children is now available through the use of numerous noncoital[2] reproductive techniques. These "new" techniques, designed as an alternative to infertility, include in vitro fertilization (IVF),[3] artificial insemination,[4] and surrogacy.[5] Although adoption is still a viable alternative, it has become less available due to a decrease in "adoptable" babies relative to demand.[6] In addition, many couples desire to produce a child that is genetically related to at least one parent, and many women desire to go through the experience of bearing and raising a child whether or not that child is genetically related to them.

As reproductive techniques continue to advance, many legal and ethical questions surrounding the use of some of these techniques remain unanswered. One such technique is IVF through the use of egg/oocyte[7] donation. The lack of legal or statutory parameters regarding the use of IVF egg donation

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1. Giesen, *International Medical Malpractice Law*, 628 (1988).

2. "Coitus" means sexual intercourse; a sexual union between male and female. STEDMAN'S POCKET MEDICAL DICTIONARY 151 (1987).

3. "In vitro" is defined as an artificial environment...as in a test tube or culture media. *Id.* at 384.

4. "Artificial insemination" is the introduction of semen of the husband or of another into the vagina other than through the act of coitus. *Id.* at 379.

5. A "surrogate" is a person who functions in another's life as a substitute for some third person. *Id.* at 719.

6. American Fertility Society, Ethics Committee: *Ethical Considerations of the New Reproductive Technologies*, 46 Fert. and Steril. 37s (Supp. 1, 1986).

7. Trouson & Wood, *Extra Corporeal Fertilization and Embryo Transfer*, Clinics in Obstetrics and Gynecology, Dec. 1981 at 1. An oocyte is an egg, or ovum, that is removed directly from the ovary. It is mature oocytes that are transfered from ovarian follicles and matured in vitro.

is a direct consequence of judicial and legislative failure to promulgate guidelines regarding noncoital reproduction. As many judges continue to point to legislators for guidance, proposed bills stagnate at the hearing stage.[8]

This article focuses on a specific hypothetical that has yet to be litigated in California or in any other state or federal court in the United States. Imagine a situation in which a married couple[9] wishes to bear a child but discovers that the woman is infertile. The woman expresses a desire to gestate[10] the offspring herself, so the couple decides to undergo IVF by use of egg donation. At this point they have two alternatives. First, the couple could go to a clinic that provides donated eggs, and pay for the use of these eggs in the fertilization process. Alternatively the couple could find a woman with whom they have some relationship, and contract with her to donate eggs in the fertilization process. Many couples are using the eggs of sisters, cousins, or close friends because they are more aware of the biological attributes and medical history of the donating woman.

In the first scenario, a subsequent custody battle over the child is not likely for the same reasons a subsequent lawsuit involving a "stranger" donating sperm is not likely to occur. When an anonymous donor is involved, there are a large number of potential biological offspring that may be involved. In this situation the donor may not feel compelled to sue for custody of any of the resulting children, even if she later discovers that she has become infertile. In the second alternative it is easy to see why a subsequent lawsuit for custody of the child may result. Assume the donee couple has undergone successful IVF with donated eggs of the relative or friend. The donor then decides she wants to have her own child, but

8. In California, the legislators adopted part of the Uniform Parentage Act in Civil Code Sections 7000-7021 in 1975, but no new legislation in regards to techniques such as egg donation has been enacted since that time.

9. Although this article will focus on the legal rights of married couples desiring to use egg donation, it is my view that these rights should be shared by unmarried and same-sex couples as well. The reason for this limited focus is simply that historically, courts have not been willing to take such a big step in granting equal rights. If these rights can be granted to a married couple initially, the same rights should logically follow to other groups of infertile women through constitutional protections. For a discussion of whether IVF should be restricted to married couples see Annas & Elias, *IVF and Embryo Transfer: Mediolegal Aspects of a New Technique to Create a Family*, 17 Fam. L. Q. 211 (1983).

10. "Gestation" refers to pregnancy in viviparous animals. STEDMAN'S POCKET MEDICAL DICTIONARY at 307.

discovers she has become infertile. Here, the donor is much more likely to sue for her biological offspring. How should a California court decide?

In either situation, and without legislative guidance expressly directed at egg donation, the court must make a number of difficult decisions on a number of issues. First, since one woman is the donor/genetic mother and the other is the recipient/gestational mother, the court must decide who is the "natural" mother of the child. Second, the court must decide whether or not the donor/genetic mother may terminate her parental rights in the offspring through contractual agreement. Lastly, the court must decide whether or not custody should be granted to the donor/genetic mother, or to the recipient couple that includes the gestational mother and genetic father.

This article attempts to predict the outcome of these decisions as they specifically relate to IVF by use of egg donation. My initial prospective conclusion, based on case law already litigated in the areas of surrogate mothering,[11] artificial insemination,[12] gestational surrogacy,[13] and the best interests of the child, is that a California court would find the recipient/gestational mother to be the "natural" mother. In addition, the court would uphold the contract if the donor/genetic mother gave her informed consent to terminate any parental rights she might have to the child. Finally, the court would grant custody to the recipient couple, taking into account not only the biological and gestational tie the child has with the couple, but also the IVF contract and most importantly the best interests of the child.

This article will take you through the analytical process I followed in reaching my conclusion. First, for those unfamiliar with in vitro fertilization, it is important to understand the medical procedure and the role each individual has in the birth of the IVF child. This explanation is followed by a discussion of four areas of law that the court will most likely consider when analyzing the legal issues surrounding IVF egg donation: surrogacy, artificial insemination, gestational surrogacy, and the "best interests of the offspring." Finally, this

11. Matter of Baby M., 537 A.2d 1227 (N.J. 1988). Adoption of Matthew B., 232 Cal. App. 3d 1239 (1991).

12. Jhordan C. v. Mary K., 179 Cal. App. 3d 386 (1986).

13. Anna J. v. Mark C., 91 Daily Journal D.A.R. 12433 (1991). It should be noted that this case is currently under review by the California Supreme Court.

author argues that until the court decides otherwise, all rearing and custodial rights should be placed with the recipient couple. Moreover, new legislation, rather than judicial directives, should be the first step in avoiding ugly court battles in the future.

II. MEDICAL BACKGROUND AND PROCEDURE OF IVF

A. Female Infertility[14]

Infertility in women may be caused by lack of ovarian function due to gonadal dysgenesis,[15] an insensitive ovary, or autoimmunity.[16] Ovarian function may also be absent due to premature menopause,[17] surgically absent ovaries, chemotherapy or other radiotherapy-induced ovarian failure.[18] Women with normal ovarian function may be infertile because of blocked fallopian tubes or abnormal oocytes.[19] IVF, described in more detail below, gives these women the chance to become pregnant and carry a child to term, whereas without the use of this technique it would be physically and biologically impossible for them to do so.

B. IVF Procedure

Egg donation can be used by couples to achieve parenthood when the woman is infertile. IVF through egg donation generally involves two initial steps: 1) the donor's ovaries are hyperstimulated by fertility hormone drugs to produce several mature eggs for ovulation;[20] and 2) egg retrieval is performed

14. "Infertility" is defined as, "relative sterility; diminished or absent fertility; in the female it indicates adequate anatomical structures and equivocal function, with the possibility of pregnancy that may or may not proceed to term." STEDMAN'S POCKET MEDICAL DICTIONARY at 375.

15. "Gonadal dysgenesis" refers to defective development of the gonads (reproductive glands that include the ovaries and testes). *Id.* at 226.

16. In immunology, "autoimmunity" is a condition in which one's own tissues are subject to deleterious (harmful) effects of the immunological system. *Id.* at 78.

17. "Menopause" is the permanent cessation of the menses or menstral flow. *Id.* at 446.

18. Rosenwaks, *Donor Eggs: Their Application in Modern Reproductive Technology*, 47 Fert. and Steril. 895, 897-98 (1987).

19. *Id.*

20. "Ovulation" is the release of an ovum from the ovarian follicle. STEDMAN'S POCKET MEDICAL DICTIONARY at 542.

surgically either by laparoscopy[21] or through transvaginal ultrasonographic[22] methods.[23]

An average of ten eggs[24] are then placed in a petri dish with the male's sperm to effect fertilization. If fertilization occurs, the resulting conceptus[25] is transferred to another dish.[26] After the eggs have divided twice (the "four-cell stage"), the physician transfers approximately five blastocysts through the cervix to the uterus of the recipient/gestational mother. If the transfer is successful, the blastocyst will attach to the uterine wall as if natural conception had occurred.[27]

C.. Cryopreservation

In vitro fertilized eggs that are not transferred to the uterine cavity may be frozen by use of a procedure called "cryopreservation."[28] There are many medical advantages in preserving and later using the extra-embryos: an 8-12% increase in IVF pregnancies; physical, psychological and financial cost reduction of IVF treatment; and an embryo selection increase by recipient couples for transfer on genetic grounds.[29] Although

21. This is one form of peritoneoscopy that examines the contents of the peritoneum (the smooth transparent serous membrane that lines the cavity of the abdomen) with a peritoneoscope passed through the abdominal wall. *Id.* at 782.

22. An "ultasonography" locates, measures or delinates deep structures by measuring the reflection or transmission of high frequency or ultrasonic waves. Id. at 782.

23. The growing trend is to retrieve the eggs through transvaginal ultrasound, where the physician can guide a catheter through a small scope to gather the eggs. Sauer, Paulson, and Lobo, *A Preliminary Report On Oocyte Donation Extending Reproductive Potential To Women Over 40*, 323:17 New Eng. J. Med. 1157 (1991); hereinafter Sauer, Paulson, and Lobo, *A Preliminary Report On Oocyte Donation*. This is a popular method because it does not require the use of anesthesia and therefore may encourage more women to become donors. Garcia, *Reproductive Technology For Procreation, Experimentation, and Profit*, 11 J. Leg. Med. 1, 14 (1990).

24. Sauer, Paulson, and Lobo, *A Preliminary Report On Oocyte Donation*, supra note 23, at 1158.

25. The term "conceptus" is used to refer to the product of conception; here it refers to the product of any union of human sperm and human ova, occuring in vitro. STEDMAN'S POCKET MEDICAL DICTIONARY at 157.

26. At this point, the fertilized eggs undergo a number of cell divisions forming a blastodermic vessicle, called the blastocyst, consisting of the inner cell mass and a thin trophoblast layer. Id. at 92.

27. Throughout the first trimester, the recipient female will undergo estrogen and progesterone replacement in order to maintain the pregnancy. Sauer, Paulson, and Lobo, *A Preliminary Report On Oocyte Donation*, *supra* note 23 at 1157-58.

28. Robertson, *Decisional Authority Over Embryos and Control of IVF Technology*, 28 Jurimetrics J. 285, 287 (Spring 1988); hereinafter Robertson, *Decisional Authority Over Embryos*. The eggs are frozen so that they may be used in further egg and embryo donation and gestational surrogacy.

29. *Id.*

these interests are arguably compelling to the medical profession, cryopreservation raises many legal issues.

The first issue raised by cryopreservation involves the right to terminate the frozen, pre-implantation embryos. Because the United States Supreme Court believes that fetuses are not "persons" within the meaning of the Fourteenth Amendment[30] and therefore not entitled to Due Process or Equal Protection guarantees, it is hard to imagine how a fertilized embryo would be allowed these constitutional guarantees. However, some protection may be afforded to a frozen embryo because the donor/genetic mother, who is not carrying the embryo, may not be able to raise the claim of "health of the mother."[31]

A second issue involves custody of the frozen fertilized eggs during separation or divorce of the recipient couple. Who should have the rights to, and the rearing duties of the IVF offspring?[32] These issues, while better addressed in an article solely dedicated to their analysis,[33] deserve to be stated here because of their potential importance in the framing of legal rights surrounding egg donation.

With a basic understanding of IVF medical procedure, let us consider the hypothetical couple who goes through IVF egg donation and is subsequently sued by the egg donor. Because the outcome of this litigation depends entirely on analogy, a California court would most likely consider the reasoning of previously litigated "reproductive" cases in order to render its decision. I will next analyze four areas of "reproductive" cases in an attempt to provide a prospective view of the court's final determination.

III. SURROGATE MOTHERING CASES

Surrogate mothering raises questions beyond those related to IVF egg donation, because only two people are involved

30. *See* Roe v. Wade, 410 U.S. 113, 158 (1973).

31. The Court states in *Roe* that it is, "reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right she possesses must be measured accordingly." *Id.*

32. *See* Davis v. Davis, No. E-14496, slip op. (Tenn. Cir. Ct. Sept. 21, 1989), 1989 Tenn. App. LEXIS 641. The court in *Davis* held that seven cryogenically frozen embryos produced by in vitro fertilization of woman's ova with her estranged husband's sperm are human life whose best interests require that they be made available, despite the husband's objection, for implantation in the woman to give them the opportunity to be born

33. *See* Robertson, *Decisional Authority Over Embryos*, supra note 28.

in the "reproduction" of the child. In a "pure surrogacy" situation, a woman contracts with a couple to carry a child to term for them. The surrogate is artificially inseminated with the male's sperm and becomes pregnant. She then carries the offspring through gestation and birth, whereby she gives the child over to the recipient couple per the terms of the contract. The only two individuals directly involved in the creation and birth of the child are the surrogate and the man whose semen is used to impregnate the surrogate.

Remember, in IVF egg donation, the donor/genetic mother provides the egg that is fertilized with the male's sperm. Then a third person, the recipient/gestational mother, is implanted with the fertilized embryo. In IVF egg donation, three individuals are directly involved in the creation and birth of the child. This distinction may be important when considering the persuasiveness of "pure surrogacy" cases when applied to the IVF custody battle.

A. Matter of Baby M.

The leading case regarding "pure surrogacy" is the landmark decision *Matter of Baby M.*[34] In 1985, William Stern and Mary Beth Whitehead entered into a surrogacy agreement whereby Mrs. Whitehead would provide gestational services to the Sterns in exchange for $10,000.[35] After giving birth, Mrs. Whitehead realized that she could not part with the child. She felt a bond with the child that developed during her pregnancy.[36] A custody battle ensued, and the Supreme Court of New Jersey decided the matter. In a unanimous decision, the court concluded that the surrogacy contract was invalid, because it conflicted with both existing statutes and public policies of the State.[37] The court stated that a contractual agreement to abandon one's parental rights would not be enforced.[38] Although the court ultimately gave sole custody of the child to the Sterns under the "best interests of the offspring" argument,[39] it refused to terminate Mrs. Whitehead's parental rights.

34. 537 A.2d. 1227 (N.J. 1988).
35. *Id.* at 1234.
36. *Id.* at 1236.
37. *Id.* at 1240.
38. *Id.* at 1243.
39. The court based this conclusion on the instability of the Whitehead family and the financial difficulties they had incurred. For instance, Mrs. Whitehead's sister was in the process of foreclosing on her second mortgage; Mr. Whitehead's employment was always at risk because of his alcoholism; and Mrs. Whitehead had not worked for some time. *Id.* at 1258.

Throughout its opinion the court focused on the fact that Mrs. Whitehead was the "natural mother," and stated that the father's paternal right was no greater than the mother's.[40] By stating that Mrs. Whitehead was the child's "natural mother," the court seemed to give great weight to the fact that Mrs. Whitehead was both the biological mother and the gestational mother, who had undergone an emotional bond with the offspring prior to its birth. Despite acknowledging Mrs. Whitehead as the "natural mother," the court held that the interest of the natural father and adoptive mother is the predominant interest to be taken into consideration.[41]

B. California Surrogacy Cases

In a recent California case dealing with "pure surrogacy," the California Court of Appeals came down with the same result as the *Baby M.* case, but under different reasoning. On July 31, 1991 the California Court of Appeals decided the *Adoption of Matthew B.*,[42] and denied the surrogate's petition to withdraw her consent to give up parental rights based on the legality of the contract. The court stated that the parties had assumed the risk of illegality when entering into the contract[43] and that the best interests of the child favored leaving him with his natural father and adoptive mother.[44]

Using these "pure surrogacy" cases as persuasive authority in deciding our IVF hypothetical, a California court would probably grant custody of the child to the recipient couple for the following reasons. First, the donor/genetic mother, citing to *Baby M.*,[45] would argue that contracting away one's parental rights is invalid, and therefore, as the "natural mother" she should retain custody of the child. Yet the term "natural mother" as used in *Baby M.*, is misleading in the context of IVF through egg donation. In IVF, the donor/genetic mother is only

40. *Id.* at 1247.

41. *Id.* at 1248.

42. 232 Cal. App. 3d at 1239.

43. *Id.* at 1256.

44. The court stated, "[o]ur conclusion is consistent with the Supreme Court's direction that courts should not construe adoption consent requirements in favor of the rights of the natural parent, but should liberally construe them so as to further the main purpose of the adoption statutes: promoting...'the welfare of children, bereft of the benefits of the home and care of their real parents, by the legal recognition and regulation of the consummation of the closest conceivable counterpart of the relationship of parent and child.' " *Id.* at 1257.

45. 537 A.2d at 1227.

the biological donor; she does not carry the offspring nor does she give birth to it. It is the recipient/gestational mother who undergoes the nine-months of pregnancy and feels the emotional "bond" with the child which the surrogate experienced in *Baby M.* The recipient/gestational mother has an equal, and perhaps greater argument that she is the "natural mother" of the offspring, even if she is not biologically related.

Second, a California court may use the reasoning of *Matthew B.*,[46] and simply uphold the contract. Assuming the donor/genetic mother gives informed consent to use her donated eggs in the recipient's IVF treatment, and she is fully compensated according to the terms of the contract, the court would find full performance of the contract. In doing so, the court would uphold the contract in favor of the recipient couple, even if the contract is deemed illegal.[47]

Finally, and perhaps most importantly, the court may look to the "best interests of the offspring" to grant custody to the recipient couple. Although the donor may argue that *Baby M.* dealt with an unstable family in the Whitehead's,[48] this is probably not enough to overcome the language in *Matthew B.*[49] The court stated that the adoption statutes should be construed liberally by recognizing that the closest counterpart to the relationship of parent and child weighs heavily in favor of the recipient couple. The recipient couple has psychologically and economically planned for the birth and care of the child from the beginning. They have undergone the nine months of pregnancy together, with the recipient female actually giving birth to the child. These factors would favor their claim over the claim of the donor/genetic mother as the closest counterpart to the relationship of parent and child.

However, this is only one consideration by the court. It is important to keep in mind that IVF through egg donation

46. 232 Cal. App. 3d at 1239.

47. The court in *Matthew B.*, quoting *Denning v. Taber*, states that, "courts will not intercede where the parties have fully performed under the illegal contract. This rule 'is intended to preserve the dignity of the law by refusing to determine controversies dependent upon the construction of illegal contracts.' " *Id.* at 1256.

48. *See supra* note 39.

49. California Civil Code Section 226(a) sets forth a number of factors for the court to consider in determining the child's best interests. It directs that consideration of the best interests shall include: an assessment of the child's age, the extent of bonding with the prospective adoptive parent or parents, the extent of bonding or the potential to bond with the natural parent or parents, and the ability of the natural parent or parents to provide adequate and proper care and guidance to the child. 232 Cal. App. 3d at 1263.

involves three people, while surrogacy involves only two. Consequently, the outcome of the "pure surrogacy" cases is persuasive but not controlling. Thus, a court faced with an IVF egg donation custody battle would have to look beyond surrogacy case law and focus on decisions involving other reproductive techniques for further guidance.

IV. ARTIFICIAL INSEMINATION CASES

In 1986, the California Court of Appeals decided *Jhordan C. v. Mary K.*[50] This case involved a child conceived by artificial insemination with semen donated personally to Mary from Jhordan.[51] The court held that where the parties have failed to take advantage of the statutory basis for preclusion of paternity,[52] the donor of semen can be determined to be the father of the child in a paternity action.[53] The court awarded sole legal and physical custody to the mother, but granted the male donor substantial visitation rights.

In its conclusion, the court stressed that public policy in the area of non-traditional notions of family structure is best determined by the legislative branch.[54] Yet the court seems to be affecting public policy by ignoring the "best interests of the offspring" argument[55] that protects the social and financial well-being of the child produced. The court's failure to address this issue may lie in the fact that Mary was to raise the child jointly with her same-sex partner Victoria. By ignoring the "best interests of the offspring" argument, the court avoids a discussion of non-traditional family structures for the sole purpose of keeping a male figure in the child's life. As a result, the court's reasoning should be used very cautiously and

50. 179 Cal. App. 3d 386 (1986).

51. *Id.* at 389.

52. This statutory preclusion is found in California Civil Code Section 7005, that provides in pertinent part, "[i]f, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by another man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived....The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of the child thereby conceived." CAL. CIV. CODE 7005 (West 1988).

53. 179 Cal. App. 3d at 389.

54. The court states that this decision does not express any, "judicial preference toward traditional notions of family structure or toward providing a father where a single woman has chosen to bear a child." *Id.* at 397.

55. There was nothing in the record of this case showing that Mary was unfit to raise the child herself, as the agreement between Jhordan and herself called for.

may not be a good basis for determining the outcome of the IVF hypothetical.

Nonetheless, both the recipient couple and the donor in our hypothetical IVF lawsuit can use *Jhordan* to further their positions. The egg donor can point toward the court's unwillingness to uphold the contract, and place the child with its biological mother. The donor may even be able to borrow from the language of California Civil Code Section 7005[56] in an attempt to exclude the recipient husband as a sperm donor.

On the other hand, the recipient couple has two compelling arguments to support its position. First, the couple can argue that the court's unwillingness to uphold the contract was based on the need to keep a male figure present in the child's life. In so doing, the recipient couple focuses the court on the best interests of the child. Second, the couple can also point to California Civil Code Section 7005 and argue that, although its language expressly deals with artificial insemination rights, it should analogously apply to egg donation cases in order to keep up with new reproductive techniques. They can point out that section 7005 was designed to take away the legal parental rights of the donor,[57] and that this should apply equally to female donors as well as male donors. Using the artificial insemination cases cautiously in deciding our IVF hypothetical, a California court would probably find for the recipient couple because of the similarity between an egg donor and a sperm donor. Because of this similarity, the argument to terminate the donor's parental rights under section 7005 seems to be the strongest argument.

V. GESTATIONAL SURROGACY CASES

Gestational surrogacy differs from "pure surrogacy" in that the surrogate is not the biological mother of the child. A woman who cannot carry a child to term will contract with a surrogate for gestational services. This differs from IVF egg donation in that the gestational surrogate is the one who has the fertilized embryo implanted into her uterine cavity and she carries the child through the gestational process.

The California Court of Appeals recently decided *Anna J. v. Mark C.*,[58] a case that could affect the continuation of

56. *See supra* note 52.
57. 91 Daily Journal D.A.R. at 12436.
58. *Id.* at 12433.

noncoital reproductive agreements. Mark and his wife Crispina contracted to have a biological child delivered to them by Anna, who would receive $10,000 for carrying the child to term.[59] When the child was born, Anna, like Mary Beth Whitehead in *Baby M.*, decided that she could not give the child to Mark and Crispina.[60] The trial court found in favor of Mark and Crispina, ruling that they were the "genetic, biological and natural" father and mother. It also ruled that the contract was legal and enforceable against Anna's claims.[61]

Because the trial court found the contract valid, it would appear that the Court of Appeals would uphold this decision on a contractual basis. But the court went one step further, holding that, "[I]f a blood test shows a woman is not the natural mother of the child, the case must be decided accordingly;"[62] granting no parental rights to the surrogate. The court felt that the genetic ties between the donor and the offspring were the deciding factor. In so doing, the court did not accept the gestational mother's claim of maternity under California Civil Code Section 7003.[63] The court found the statute silent on whether a birth mother is automatically the "natural mother," particularly when her maternity is ruled out by blood tests.[64] While holding that genetics controls, the court's analysis tracks the reasoning of the artificial insemination cases.

The court stated that sperm donors, even though genetically tied to the child, would have no rights to custody.[65] If the court wanted to protect the interests of Mark and Crispina so as not to, "deprive them of the traditional parental relationship which they might otherwise enjoy,"[66] it could have simply upheld the trial court's ruling on a contractual basis.

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59. *Id.* at 12434.

60. *Id.*

61. *Id.*

62. *Id.* at 12433.

63. California Civil Code Section 7003 provides in pertinent part, "[t]he parent and child relationship may be established as follows: (1) Between a child and the natural mother it may be established by proof of her having given birth to the child." *Id.* at 12435.

64. *Id.* at 12436.

65. The court, addressing California Civil Code Section 7005 states, "[s]ection 7005 seeks not to punish sperm donors, but to protect both sperm donors and married couples who employ artificial insemination. If being a sperm donor carried with it the responsibilities of parenthood, the pool of volunteers would be small indeed. And by the same token, if employing artificial insemination brought with it potential claims from sperm donors, few couples would use the procedure." *Id.*

66. *Id.* at 12437.

How would this same court decide our hypothetical case involving an egg donor and the recipient couple? If *Anna J.* is read literally, the egg donor/genetic mother of the offspring, would at the very least obtain partial custody.

The recipient couple can argue in support of the court's position that genetics should only control in gestational surrogacy cases. First, the holding should not apply to IVF through egg donation for the same reasons the court concluded it should not apply to cases of sperm donation.[67] If the court supports promoting and protecting the rights of couples using forms of reproduction involving sperm donors, the same protection should apply to the rights of couples contracting with egg donors. Second, the contract in *Anna J.* was upheld, thus the court must enforce the contract in an egg donation scenario as well in order to give the parties what they freely bargained for. Third, public policy should favor the recipient couple in order to protect the best interests of the child.

Based on the holding in *Anna J.* that genetics controls parental rights, a California court deciding the hypothetical IVF egg donation case would probably have to grant joint custody to the donor and the husband whose semen was used in creating the child. This decision however, would ignore considerations of the contract and the best interests of the child.

VI. THE BEST INTERESTS OF THE OFFSPRING

When parenthood is separated along genetic, gestational, and social lines, the arguments seem to address the adults involved and what rights they have. This focus ignores what should be the strongest interest served, namely, the protection of the child. At the heart of the "best interests of the offspring" argument is stability and continuity for the child.[68] The fear seems to be that children will be confused by the delination of genetic, gestational and rearing parents. With IVF egg donation, the child will have a genetic link with the rearing father and a biological link with the donor/genetic mother. But it is the recipient/gestational mother who has the strongest link. The recipient female, while pregnant, shares most of her major bodily functions with the child. For some time after birth, the child retains and uses the woman's life-preserving

67. *See supra* note 65.

68. In Re Marriage of Carney, 24 Cal. 3d. 725, 730-31 (1979).

tissue, cells, blood, nutrients, and anti-bodies.[69] Only the lack of a genetic tie between the gestational, rearing mother and the offspring distinguishes noncoital reproduction with donor eggs from children who are coitally conceived.[70]

Where then, is the child better situated to live? Is it with it's biological mother? Or is it with it's genetic father and gestational mother? The answer is difficult because custody of a child born by way of IVF egg donation has yet to be litigated. In looking at the surrogacy and gestational surrogacy cases for guidance, it seems clear that the "best interests of the offspring" argument is simply a judicial tool without clear parameters, which finds a way to give custody to the married couple. Whether or not this enhances stability for the child is arguable, but granting sole custody to the recipient couple would protect reproductive choice and keep these children out of ugly court battles-a factor that should be given great consideration.

In determining the "best interests of the offspring," a court must make an, "assessment of the emotional bonds between parent and child, upon an inquiry into the heart of the parent-child relationship the ethical, emotional, and intellectual guidance the parent gives to the child throughout his formative years, and often beyond."[71] In our IVF egg donation hypothetical, the donor can only argue that she is the genetic mother and is bonded with the child biologically. Conversely, the recipient couple can point to many factors to establish their emotional bond with the offspring. First, and most importantly is that the recipient/gestational mother has carried the child to term and has bonded emotionally and physically with the child for that nine-month period. Second, the male is the genetic father, and together with the gestational mother the recipient couple may begin to raise the child, while the donor may not have even seen the child prior to the lawsuit. If a meaningful and healthy attachment had formed, then disrupting this bond may cause the child to, "become fragmented, depressed, and insecure in his attachments...."[72] If stability,

69. 91 Daily Journal D.A.R. at 12436.

70. Robertson, *Ethical and Legal Issues in Human Egg Donation*, 52 Fert. and Steril. 353, 355 (Sept. 1989).

71. In *Matthew B.*, the court found both parties capable of providing for Matthew's health, safety, and welfare, and no difference in terms of the opportunities for education. The court then stated that they must inquire into the parties' bonding to Matthew and their fitness as parents. 232 Cal. App. 3d at 1264.

72. *Id.* at 1265.

continuity, and a loving relationship are the most important criteria for determining the "best interests of the child,"[73] the court would grant custody to the recipient couple in order to protect these interests.

V. WHAT TOMORROW MAY LOOK LIKE FOR THE EGG DONATION RECIPIENT COUPLE

A couple employing IVF by way of egg donation in order to conceive a child they could not otherwise conceive, may face a situation they never dreamed of: the egg donor comes back into their lives after the birth of the child and sues for custody. As stated earlier, there has yet to be a case litigated involving IVF egg donation, therefore, the recipient couple must look to other areas of the law to support their claim and retain custody of the child.

A. CONSTITUTIONAL CONSIDERATIONS

One place for the recipient couple to start is by showing they have a constitutionally protected right of access to the reproductive technique of IVF by egg donation, and therefore, interference with this access would be a constitutional violation. Although nowhere in the United States Constitution are individuals expressly granted the right of privacy,[74] there are implied protections regarding the right to procreate,[75] the right to privacy within marriage, and the right of access to contraceptives.

The United States Supreme Court recognized the right to procreate in *Skinner v. Oklahoma*.[76] The majority noted, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[77] In the years since *Skinner*, the Court has expanded its assertion of the constitutional status of the right to procreate, finding it

73. *Id.* at 1264; [quoting *Burchard v. Garay*, 42 Cal. 3d 531, 542 (1986)].

74. 410 U.S. at 152.

75. Otherwise known as the right to bear or beget children.

76. 316 U.S. 535 (1942). In *Skinner* the Court held unconstitutional a statute that permitted the sterilization of criminals who were three times convicted of certain crimes. *Id.* at 538.

77. *Id.* at 541.

protected by both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[78]

The right to privacy within marriage was recognized by the Supreme Court in *Griswold v. Connecticut*.[79] In *Griswold*, the Court struck down a statute that prohibited the use of contraceptives because it violated the right of marital privacy.[80] This right to privacy was then expanded to include unmarried persons.[81]

Following this line of cases, an infertile couple can assert that to prohibit their access to IVF through egg donation by taking away the resulting child is to interfere with the right to privacy within marriage. If the recipient couple has an infertility problem, the decision to resort to IVF is essentially a decision to "bear or beget a child."[82] Prohibiting the use of IVF effectively denies an infertile couple the right to procreate. It is not a question of "how," but "whether" to bear a child if such means is the only way to conceive a child.

B. Case Law Considerations

The second line of argument for the recipient couple is based on the cases involving surrogacy, artificial insemination, and gestational surrogacy. Although the facts and decisions analyzed in Sections III-V of this article are distinguishable from each other, one thing remains clear: the courts' willingness to grant custody of the child to the recipient couple. This

78. One example is *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974). The Supreme Court voided a school district rule that required pregnant teachers to take maternity leave during the last five months of pregnancy, holding that such a rule, "can constitute a heavy burden on the exercise of personal choice in matters of marriage and family life protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 639.

79. 381 U.S. 479 (1965).

80. The Court, in rendering its decision, reasoned, "[t]he present case, then, concerns a relationship lying within the zone of privacy created by several constitutional guarantees. And concerns law which, in forbidding the use of contraceptives rather than regulating their manufacture and sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship....The very idea is repulsive to the notions of privacy surrounding the marriage relationship." *Id.* at 485-86.

81. Eisenstadt v. Baird, 405 U.S. 438 (1972). The Court concluded that, "[i]f the right of privacy means anything it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453.

82. *Id.*

is shown in the cases of *Matter of Baby M.*,[83] *Adoption of Matthew B.*,[84] *Anna J. v. Mark C.*,[85] and *Jhordan C. v. Mary K.*[86]

It seems the courts hold tantamount protecting the best interests of the child. These interests are best served by the recipient couple; who has planned for the raising of the child from the beginning; who has undergone the nine months of pregnancy together; and who has "bonded" with the child. The courts find these considerations should not be overridden by the fact that the donor has a genetic tie with the child. Further, the California courts are seemingly willing to uphold these arrangements as a valid contract.[87]

C. LEGISLATIVE CONSIDERATIONS

In the context of IVF egg donation, California Civil Code Section 7003[88] should be read in conjunction with Section 7005[89] in order to establish the parent and child relationship with respect to the natural mother. The fact that Section 7005 expressly relinquishes the parental rights of a sperm donor should be a major factor in the court's determination of whether or not to relinquish the parental rights of an egg donor. If a sperm donor has no legal right or obligation to an offspring produced by his donated sperm, there is no logical reason that the same should not hold true for an egg donor. It seems absurd that there would be legislation protecting a couple using artificial insemination against a claim by the donor while not having any such legislation protecting a couple using IVF egg donation from a claim by an egg donor. The California legislature may avoid custody battles in this area by following the lead of other states.[90] But until then, a court should read California Civil Code Sections 7003 and 7005

83. 537 A.2d at 1227.
84. 232 Cal. App. 3d at 1239.
85. 91 Daily Journal D.A.R. at 12433.
86. 179 Cal. App. 3d at 386.
87. *See* Matthew B. and Anna J. *supra* notes 11, 13.
88. 91 Daily Journal D.A.R. at 12435.
89. CAL. CIV. CODE SECTION 7005 (West 1988). *See supra* note 52.
90. One state that has passed legislation dealing explicitly with egg/oocyte donation is Oklahoma. Oklahoma Statute Section 554 states, "[a]ny child or children born as a result of a heterologous oocyte donation shall be considered for all intent and purposes, the same as a naturally conceived legitimate child of the husband and wife which consent to and receive an oocyte pursuant to the use of the technique of heterologous oocyte donation." Oklahoma Statute Section 555 states, "[a] n oocyte donor shall have no right, obligation or interest with respect to a child born as a result of a heterologous oocyte donation from such donor." 10 Okl. St. 554, 555 (1990).

together, in order to see the compelling interests of the recipient couple that must be served.

VI. CONCLUSION

While there is no modern treatment for infertility, a couple wanting to have a child has many choices. One of those choices, IVF through egg donation, allows the husband to be genetically related to the child, and the wife to experience gestation and the birth of the resulting child. Is the potential disappointment experienced by the donor a sufficient basis for courts to override allocation of rearing rights and duties in the offspring? To do so would shift the emphasis to the welfare of the donor, away from the welfare of the offspring or the recipient couple. At the present and in the absence of legislative guidance, the court fortunately seems unwilling to make that shift.