

Legal and Ethical Issues in Embryo Mix-Ups  
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Most disputes regarding ART occur when the parties who knowingly entered into the process change their mind, because the intending couple no longer wants to stay together, one party no longer wants to proceed with ART using gametes that are already frozen, or the gestational mother finds that she is unwilling to give up the child. In those cases, both courts and legislative drafters have used a variety of approaches to resolve these disputes, mostly focusing on contract, intent, or genetic connection. Each of these leads on occasion to problematic outcomes.

The common denominator in ART mix-ups is that gametes end up in the wrong place – a person or couple who is trying to have a child either finds that their child has gametes from person(s) they had not intended or they discover that their gametes were used to create embryo(s) that someone else gestated without their consent. In other words, mix-ups inevitably involve people who did not intend to be involved with each other in the short and certainly not the long term. And yet courts at times have chosen to give parental rights to individuals whose gametes were inadvertently used, introducing complete social strangers into the family.

To avoid that anomaly, Professor Bender appropriately argues in my view for establishing priority of parentage on the basis of the labor contribution to the child's existence. Thus, gestation receives the highest weight given its profound impact on the woman and her body; ovum donation would be next given the significant and at times hazardous nature of that process; followed by sperm donation.

[According to Bender,] the parental priority list in cases of ART mix-up mistakes proceeds as follows:

- a. gestational mother (and her chosen co-parent, if there is one)
- b. genetic mother (and her chosen co-parent, if there is one)
- c. genetic father (and his chosen co-parent, if there is one)
- d. intended parent (and chosen co-parent) with no genetic or gestational connections to the child
- e. adoption by stranger uninvolved in the ART process that created the child.

Creating visitation rights outside this hierarchy is to be avoided since the unwitting gamete source (donor is not the right word here) was previously a social stranger to the ultimate family unit. Divided families are difficult enough when the parties previously were in a relationship.

At present, obtaining a confidential family medical and genetic history from the unwitting gamete donor (as well as from the gestational mother if she chooses not to keep the child) for the benefit of the child is desirable. This will become less important as our ability to assess genetic variation directly advances. In the event that the gestator is not the ultimate custodian, her gestational history may still be relevant.

## References

Robert B. v. Susan B., 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003) Bs' embryos accidentally given to Susan Buchweitz who had sought to be single parent; sperm donor given split custody

Perry-Rogers v. Fasano, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000) Donna Fasano accidentally given one of Rogerses' embryos; Rogerses sued for custody of black twin

A v. B., [2003] EWHC 259 (QB) woman's egg was fertilized by sperm of black man; woman's husband required to adopt the children

Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1 (2003)

Marjorie M. Shultz, *Taking Account of ARTs in Determining Parenthood: A Troubling Dispute in California*, 19 WASHINGTON UNIVERSITY JOURNAL L. & POLICY 77 (2005)