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# Verdict

January 24, 2012

Joanna L. Grossman

## Men Who Give It Away: The Potential Perils of Free and Non-Anonymous Sperm Donation



A recent episode of 20/20, entitled **“The New Sex,”** (<http://abc.go.com/watch/2020/SH559026/VD55163327/2020-113-madonna-and-new-sex>) focused on the supposedly emerging practice of free and non-anonymous sperm donation. The show opens with a portrayal of a married couple, Beth and Richard, who desired to conceive a child together, but could not, because Richard’s vasectomy could not be reversed. After spending fourteen thousand dollars on fertility treatments, all of which are unsuccessful, the couple turns to the Internet’s **Free Sperm Donor Registry** (<http://knowndonorregistry.com/>) to locate a donor who will provide sperm at no cost and without the cloak of anonymity. The rest of the episode, described below, follows the couple as they choose a donor and perform an insemination in a hotel room. It also follows a man who has given away so much sperm that the government has ordered him to cease “manufacture” of it, and a third man who gives away sperm through “natural insemination,” by having sex with women who want to become pregnant.

The 20/20 episode had no obvious point, other than to shock or titillate the audience. (The same could be said for the brief and thinly reported story that followed on “sugar babies,” college-age girls who are financially supported by older men in exchange for “companionship.”) The episode contained no information about how common these unconventional sperm donations are, how safe or unsafe they might be, how the parties deal with one another after the birth of a child, or what legal consequences might arise from this unconventional form of sperm donation. Yet, in-person sperm donation—especially if the “donation” occurs through sexual intercourse—raises complicated questions about the legal rights and obligations of the sperm donor.

In this column, I will explore the different arrangements the 20/20 episode profiled, and analyze the ways in which parentage law might facilitate or obstruct the intent of the various parties. The bottom line is that this type of sperm donation falls outside many of the conventional rules governing assisted reproduction. Thus, the women who use the free sperm from a known donor may end up with co-parents they do not want, and the sperm donors may end up with responsibilities they didn’t foresee. At best, they are all in legal limbo.

### Beth and Richard’s Story: The How, Where and Why of Free Sperm Donation

In addition to the registry that Beth and Richard utilized (which is now called The Known Donor Registry), there

are several other websites that seek to pair up free sperm donors with women seeking sperm. On The Known Donor Registry, the woman creates a profile in which she shares her personal traits and indicates the type of arrangement she seeks. There are pull-down menus so she can choose what gametes she wants (sperm, eggs, embryos); what method she prefers (artificial insemination, natural insemination, shipped on dry ice, or cryobank deposit); the degree of contact with the donor (contact after 18, limited contact, frequent contact, or “uncle or friend role”). Potential donors create a similar profile, which indicates what gametes they are offering, what method they prefer for sharing them, and how much contact, if any, they would seek with any resulting child.

On the 20/20 episode, working through this registry, Beth and Richard select a donor, an introverted computer geek named Drew, who is described by 20/20 as an “extreme altruist.” Despite modest means, Drew donates thousands of dollars to charity, and once donated a kidney to save a child he didn’t know. He also regularly donates sperm, at no cost, to women who are desperate to conceive children.

Beth, Richard, and Drew meet in person for a brief (and awkward) interview in a hotel room, which has been scheduled to coincide with Beth’s peak ovulation period. After a brief chat, the parties decide to proceed with the donation and insemination. The couple leaves Drew alone, with, in the reporter’s words, “a cup and his imagination.” The camera fades out as he unwraps a plastic cup found by the bathroom sink and focuses in again when Beth receives a one-word text message from Drew: “Done.” Beth and Richard then return to the room for the insemination. Beth is shown drawing sperm from the cup into a plastic syringe, and then lying under a sheet with her hips propped up on pillows to “maximize” the chance of conception.

(A Newsweek reporter interviewed for the 20/20 segment offers this juicy tidbit: Bathrooms at Starbucks are a popular choice for both donation and insemination in these unconventional arrangements. As this information is revealed, the show shamelessly relies on a video of a Starbucks coffee cup filling with foamed milk.)

### **Men Offering Sperm: A One-Man Sperm Bank**

The same 20/20 episode also profiles a man who, like Drew, gives away his sperm for free—but apparently more prolifically. Trent Arsenault claims to have made 300 sperm donations, to 50 different recipients, resulting in the birth of at least 14 children. He posts pictures of his offspring on his Facebook page, and has recently met one of them.

When asked by 20/20 whether he does this out of some narcissistic impulse to see himself recreated over and over again, Trent says no. He says that he views making these donations “like community service or volunteering at church;” this is “just another way to help the community.” He takes his volunteerism seriously—even inventing a homemade fertility smoothie, chock-full of vitamins and antioxidants, to make sure his recipients get his “best product.” Trent also regularly has his sperm count tested and brags that his levels are almost four times that of an average man.

In addition to following and interviewing Trent, 20/20 also follows and interviews Christa, a lesbian woman who is picking up a sperm donation from Trent. She explains that she has tried conventional fertility treatments, but has no more money to spend and, in any event, she believes that fresh, rather than frozen, sperm “offers her a better shot at her dream.”

Christa texts Trent when she is near his house so that she can get the sperm at its freshest. “Time is of the essence,” Trent explains. Trent hands over a plastic cup on the front porch, and he and Christa exchange a quick hug. Her partner then performs the insemination in their car, which is now parked in front of Trent’s house. Then Christa lies down in the backseat while her partner drives them home. Christa had earlier become pregnant twice with Trent’s sperm, but miscarried both times. She vows to try again, however. She says that she trusts Trent, in part because he posted his medical history and STD test results on the Internet. (He also, it turns out, has posted graphic pictures of himself on the Internet.)

### **Sperm Donation Like Trent’s May Be Governed By—and Might Violate—FDA Regulations**

Although recipients like Christa may appreciate the free service that Trent provides, the Food and Drug

Administration (FDA) apparently does not. It issued a **[“cease manufacture” order](http://www.fda.gov/biologicsbloodvaccines/safetyavailability/tissuesafety/ucm232852.htm)** (<http://www.fda.gov/biologicsbloodvaccines/safetyavailability/tissuesafety/ucm232852.htm>) to Trent, ordering him to stop distributing his sperm.

In the FDA’s view, Trent is violating federal guidelines that are designed to regulate the donation of human cells and tissue. The guidelines for sperm banks are designed to ensure adequate screening of donors, appropriate cryopreservation, and sufficient record-keeping. It may well be that Trent’s volunteerism is governed by—but not in compliance with—these regulations. Trent does not, for example, freeze and quarantine his sperm for six months, as the guidelines require.

### **Men Offering “Natural Insemination”: It’s So Modern, It’s Retro**

The 20/20 episode concludes with a profile of people who make use not only of free sperm, but also of “natural insemination,” rather than artificial insemination. In these cases, the man “donates” his sperm by having sex, free of charge, with women who want to become pregnant. One man who has engaged in “natural insemination” with many different women describes this practice as “win-win”—the women get the chance to have a baby, and he gets a chance to have sex without consequences. But because he is married and his wife does not know of his “altruistic” hobby, 20/20 blacked out his face and altered his voice during the interview.

To be clear, “natural insemination,” despite its veil of reproductive-technology terminology, is just sex. (Some of the registries include “partial natural insemination” as an option for the delivery method. That seems to be defined as intercourse that begins just before ejaculation, in order to minimize the amount of physical contact.)

The “natural insemination” arrangement—whether full or “partial”—raises perhaps the most interesting legal parentage questions of any insemination method, since it doesn’t square at all with the conventional understanding of sperm donation.

### **Are Free, Non-Anonymous Sperm Donors Legally Fathers of All Resulting Children?**

Recall the 20/20 story about Beth. 20/20’s episode depicted Beth’s situation as follows: Beth’s husband, Richard, inseminates his wife with donor-Drew’s sperm. Beth and Richard are shown lying next to each other in the hotel bed, as Beth waits for the sperm to (hopefully) do its work. Beth tells the reporter that it is important that Richard be there so he “can say he was there at conception. He will be the father of the baby.” But, is Beth right? Or is Drew, instead, the father of the child if Beth conceives with his sperm?

And what about Trent, or the married man whose face 20/20 blocked out? Is each of them the father of any child who is produced through his donation (in Trent’s case) or “natural insemination” (in the married man’s case)?

Parentage law tells us who is, and who is not, a legal parent. A legal parent is someone who, by virtue of a recognized tie to the child, is endowed with constitutionally protected rights and subjected to potentially onerous obligations. A legal parent can sue for custody or visitation, but also is obligated to support the child.

Women typically become legal mothers by giving birth to a child. (Complications can arise, however, when a woman gives birth to a child that was conceived with someone else’s egg or that was commissioned through a surrogacy arrangement.) Men become legal fathers in a variety of ways. A genetic tie is generally not sufficient, on its own, to make the biological father the legal father. He must also be married to the mother, have acted as a father, or have had his paternity acknowledged or adjudicated.

Most states have a special set of rules that govern the issue of parentage when children are conceived using assisted reproduction. These laws appeared for the first time in the 1970s, when artificial insemination with donor sperm became more common and more accepted.

Under the Uniform Parentage Act (UPA) of 1973, an anonymous sperm donor was not deemed to be the “legal father” of any resulting children as long as the insemination was performed by a licensed physician and the woman was married. (Whether or not the sperm donor was paid for his services was not a factor.) The woman’s husband, in turn, was presumed to be the legal father of the child, and that presumption could only be rebutted in

exceptional circumstances. Many states either adopted the UPA expressly, or adopted their own statutes with similar provisions.

### **What Parentage Would Look Like, in the Cases I've Described, Under the Original Uniform Parentage Act**

Under the original, 1973 version of the UPA that I just described, Beth's husband would not be the legal father of any child resulting from a conception with Drew's sperm, because the insemination was not handled by a physician. Whether Drew would have been the legal father of Beth's child would depend on whether and when Drew admitted paternity (or had paternity adjudicated) or held himself out as a father.

Likewise, any child born to Christa, the woman who was inseminated by her partner, in the car, with Trent's sperm, would not be governed by the assisted reproduction provisions of the UPA because she was neither married nor relying on the services of a licensed physician.

Like Drew, under the original UPA, Trent might or might not, have been established as a legal father depending on the actions he took following birth.

(In fact, neither Beth nor Christa became pregnant through the particular inseminations depicted on 20/20.)

### **What Parentage Would Look Like, in the Cases I've Described, Under the Revised Uniform Parentage Act**

In 2002, the UPA was substantially revised. Among other changes, the UPA dropped the requirements that the insemination must be performed by a licensed physician, and that the woman must be married.

The revised UPA's provision on assisted reproduction applies to any conception that relies on donor sperm, whether the identity of the donor is known or unknown, and whether the donor was paid or unpaid. The revised statute clearly provides that a sperm donor is not the legal father of any resulting child. As the comment to the applicable provision explains, "The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation."

Under this type of statute, Drew and Trent would thus be off the hook for any child-support responsibilities (and barred from invoking any parental rights of custody or visitation). But would these children have legal fathers?

In the case of Beth, her husband Richard would be the legal father if he consented in writing to the insemination.

And Christa's female partner might be recognized as a second legal parent, depending on the law's treatment of lesbian co-parents (about which I've written in a [prior column \(http://verdict.justia.com/2011/08/23/do-lesbian-co-parents-have-rights\)](http://verdict.justia.com/2011/08/23/do-lesbian-co-parents-have-rights)).

### **In States That Follow the Original, 1973 UPA, or Have Their Own Laws Relating to Sperm Donation, the Parties to a Donation May Still Face Legal Risks**

Only nine states, however, have adopted the 2002 version of the UPA. Some still follow the 1973 version, which eliminates the parentage of donors only for married women who are inseminated by doctors.

Other states have their own provisions, which may or may not produce the parentage result desired by the women who avail themselves of sperm donation. There have been cases going both ways—finding that a known sperm donor was indeed a legal father, and finding the opposite. The degree of involvement between donor and child often plays a role. And contracts designed to regulate these arrangements, and the parentage that flows from them, have been only inconsistently enforced. Unless the women who use donated sperm, and their donors, are fully-versed in the law of the relevant jurisdiction, they are wading into the waters of sperm donation at some risk.

### **The Legal Dangers of "Natural Insemination" by a Sperm Donor**

Perhaps the most momentous risk is faced by the unidentified married man who participates in “natural insemination” with many women. The statutes providing for the non-parentage of sperm donors define donors to be men who provide sperm for “assisted reproduction,” which is in turn defined as a “method of causing pregnancy other than sexual intercourse.” This is so, according to the 2002 UPA, “irrespective of the alleged intent of the parties.”

Under these statutes, then, getting a woman pregnant by having sex with her (including in the case of “partial natural insemination”) is not assisted reproduction at all. It’s no different from a one-night stand from which a pregnancy results. Thus, whether or not the pregnancy was intended or desired, and whether the sperm “donor” intended to be a father or not, he may find that he is one. Children that result from a sexual union are governed by the conventional rules of parentage. The unwed father (here, the sperm “donor”) may be a legal father for purposes of child support—especially based on the genetic tie alone, if paternity can be established. And he may be able to insist on playing a part in the children’s lives, even though the women who turned to him for sperm want nothing of the sort.

It may be true, as Elizabeth Vargas marvels at the beginning of the 20/20 piece story, that you can find absolutely everything on the Internet. But fresh sperm may not be the only thing you need to conceive a child who will have the parents (and only the parents) that you intend it to have. Given the structure of parentage law, a doctor and a lawyer may play important roles as well.



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