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IDENTIFYING SPERM AND EGG DONORS: OPENING PANDORA'S BOX

Mary Kate Kearney*

INTRODUCTION

Children are the genetic product of their biological parents. Most people take for granted knowledge of their biological origins. Part of their identity is based on an awareness of who their biological parents are: their parents' names, ethnic and religious origins, medical and social history, and ancestral history. This is often not true for two groups: adoptees and offspring of egg or sperm donors. Adoptees usually do not know either of their birth parents; donor children typically do not know one of them.

The anonymity of the adoption and donation process has been challenged, but current laws have protected confidentiality in both processes to varying degrees. Adoption and donation implicate various parties' interests, and those parties have different reasons for either wanting or not wanting the process to remain anonymous. The competing sets of interests in adoption and donation raise challenging and complicated questions about how to balance matters of privacy against a right to information about such a basic matter—the identity of a person's biological parent(s).

This Article examines those interests in answering the question of whether sperm or egg donees have a right to know their donor's identity. Part I of the Article examines the right to know the identity of a biological parent(s) in the adoption context. It considers the interests of the involved parties and concludes that the status quo of keeping adoption records closed, absent some compelling reason, should be preserved. The purpose of this Article's adoption section is to compare and contrast adoption to gamete donation, since both adoption and gamete donation involve similar interested parties.

Part II examines the interests of the relevant parties in sperm and egg donation cases. It compares their interests to those of the parties in adoption, finding some useful similarities but also some striking differences. The result of the analysis, however, is that the identity of sperm and egg donors should remain anonymous.

Part III discusses contractual issues that sperm and egg donation raises. The parameters of the contract between a donor and a clinic are usually well-defined and guarantee anonymity. This section considers but ultimately rejects the offspring's argument that he or she is a third party beneficiary to the contract.

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Part IV explores the various public policy arguments against the release of identifying information about the donors. It determines that compelling administrability, fairness, and social policy considerations weigh in favor of keeping the records closed. The Article concludes by explaining why the balance of interests weighs in favor of maintaining anonymity for sperm and egg donors.

I. ADOPTION

The stakeholders' interests in the adoption process both resemble and are distinguishable from those involved in the gamete donation process. It is useful first to examine those interests separately and then to compare them.

Adoption was not always a closed process.¹ Until 1930, adoption records were open and available to any participant in the process.² That changed, however, initially out of a general desire "to protect the parties from public scrutiny."³ Over time, the reasons expanded to protect the parties' individual, specific interests.⁴ Arguably, four sets of interests are implicated in the adoption process: those of the biological parent(s), adoptive parents, the adoptee, and the state.⁵ Each stakeholder's interests will be considered separately.

A. Birth Parents

Sometimes both parents are involved in the adoption decision.⁶ Often, however, the birth mother alone chooses to place her child for adoption.⁷ A common reason for doing so is that she is not married to the child's father.⁸ In the mid-twentieth century, the stigma associated with being an unwed mother made it

¹ See Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 368 (2001) ("[A]doption procedures initially established by state statutes provided neither for confidentiality with respect to the public nor for secrecy among the parties[.]").

² See Rosemary Cabellero, *Open Records Adoption: Finding the Missing Piece*, 30 S. ILL. U. L.J. 291, 291 (2006).

³ Samuels, *supra* note 1, at 368. See also Cabellero, *supra* note 2, at 292 ("Closed adoption grew out of our society's stigma on unwed mothers, infertile couples, and illegitimate children.").

⁴ See Cabellero, *supra* note 2, at 292.

⁵ *Id.* at 297.

⁶ *Contra*. Melissa Arndt, Comment, *Severed Roots: The Sealed Adoption Records Controversy*, 6 N. ILL. U. L. REV. 103, 110 (1986) ("In the adoption setting, biological 'parents' often consist solely of a young woman, pregnant and unmarried.").

⁷ *Id.*

⁸ See Wayne Deloney, *Unsealing Adoption Records: The Right to Privacy Versus the Right of Adult Adoptees to Find Their Birthparents*, 7 WHITTIER J. CHILD & FAM. ADVOC. 117, 119–20 (2007) ("[S]tates . . . enacted laws sealing adoption records The reason was to protect the child from being stigmatized as being illegitimate and to . . . give the biological mother a chance to continue on with life without the public ever becoming aware of the illegitimate child.").

difficult for a woman to raise a child on her own.⁹ Moreover, if the birth mother was still a teenager, her parents most likely gave input on the decision and regarded adoption as a viable alternative.¹⁰

The perceived need for privacy was the foundation of the closed adoption model. After a birth, the mother placed her child for adoption, and it was assumed that she would want to make a “fresh start.”¹¹ She wanted to put the birth and its circumstances behind her and proceed with her life.¹² Arguably, a future spouse and children might never know of the existence of this child.¹³ Her ability to move on would be impeded if she could be contacted at any time by her biological child. If the birth father was involved in the adoption decision, it was thought that he would want a similar fresh start.¹⁴ The closed nature of the adoption process would promote its finality and allow both birth parents to put the issue behind them.¹⁵

Some birth parents have argued that their privacy interests are constitutionally protected.¹⁶ In *Doe v. Sundquist*, birth parents challenged the constitutionality of a Tennessee law that allowed adoptees to open their sealed adoption records when they turned twenty-one.¹⁷ The birth parents argued that unsealing the records violated their right to privacy under the state constitution, “specifically, [violating] familial and procreational privacy and the non-disclosure of personal information.”¹⁸ The parents maintained that the disclosure of such information was disruptive to their lives and could interfere with their ability to raise a family.¹⁹

The Supreme Court of Tennessee rejected the birth parents’ arguments for several reasons. First, the court noted that the disclosure legislation was in the “best interest of both adopted persons and the public.”²⁰ Second, it explained that the legislation adequately protected the privacy interests of birth parents because it limited the release of their names to the adoptee or his or her legal representative.²¹ Third, the birth parent could have a “contact veto” registered to reduce the risk of

⁹ See *id.*; see also Cabellero, *supra* note 2, at 292 (one of the primary reasons that adoption records are sealed is because of the stigma associated with out-of-wedlock births).

¹⁰ See, e.g., Raye Hudson Rosen, *Adolescent Pregnancy Decision-Making: Are Parents Important?*, 57 *ADOLESCENCE* 43, 43 (1980) (in a Michigan study, more than half of adolescents involved their mothers in pregnancy resolution decision-making).

¹¹ Cabellero, *supra* note 2, at 297.

¹² See *id.*

¹³ See Arndt, *supra* note 6, at 110–11 (“Once many years have passed, it is possible that [the biological mother] has begun a new family and a new life, and she may have kept her earlier pregnancy a secret from those with whom she now lives.”).

¹⁴ Cabellero, *supra* note 2, at 297 & 307.

¹⁵ *Id.*

¹⁶ *Doe v. Sundquist*, 2 S.W.3d 919, 920–21 (Tenn. 1999).

¹⁷ *Id.*

¹⁸ *Id.* at 921–22.

¹⁹ *Id.* at 926.

²⁰ *Id.*

²¹ *Id.*

disruption to his or her life.²² Finally, the court noted that the adoptee could not unseal the records until reaching the age of twenty-one.²³ The length of time between the adoption and the unsealing of the records likely would serve to minimize the disruption to the birth parents' lives.²⁴ For these reasons, the court concluded that the statute did not violate the birth parents' privacy interests.²⁵

Additionally, courts have been unwilling to ascribe a constitutionally protected right to privacy for birth mothers who would seek to keep adoption records closed.²⁶ In *Does v. State*, the Oregon Court of Appeals determined that because a birth mother had a choice to place a child for adoption, but not a fundamental right to do so, she did not have a corresponding right to keep that information confidential.²⁷

These more recent decisions stand in contrast to an earlier case decided by the Supreme Court of Illinois. *In re Roger B.* involved an adult adoptee unsuccessfully petitioned to open his sealed birth and adoption records.²⁸ In balancing his interests against those of the other interested parties, the court asserted the need for confidentiality in the adoption process.²⁹ The court stated:

Confidentiality is needed to protect the right to privacy of the natural parent. The natural parents, having determined it is in the best interest of themselves and the child, have placed the child for adoption. This process is done not merely with the expectation of anonymity, but also with the statutory assurance that his or her identity as the child's parent will be shielded from public disclosure. Quite conceivably, the natural parents have established a new family unit with the expectation of confidentiality concerning the adoption that occurred several years earlier.³⁰

²² *Id.* Tennessee law provides for a "contact veto registry," by which "[a] parent, sibling, spouse, lineal ancestor, or lineal descendant of an adopted person" can register their name with the contact veto registry either to give consent to be contacted or to file a "contact veto" which prevents the adoptee from contacting them. TENN. CODE ANN. §§ 36-1-128(a) - (b)(1) (West 2011).

²³ *Sundquist*, 2 S.W.3d at 926.

²⁴ *See id.*

²⁵ *Id.* at 926.

²⁶ *Does 1, 2, 3, 4, 5, 6, & 7 v. State*, 993 P.2d 822, 836 (Or. Ct. App. 1999).

²⁷ *Id.* ("Although adoption is an option that generally is available to women faced with the dilemma of an unwanted pregnancy, we conclude that it is not a fundamental right. Because a birth mother has no fundamental right to have her child adopted, she also can have no correlative fundamental right to have her child adopted under circumstances that guarantee that her identity will not be revealed to the child").

²⁸ *In re Roger B.*, 418 N.E.2d 751, 752 (Ill. 1981).

²⁹ *Id.* at 754.

³⁰ *Id.*; *see also id.* (quoting *In re Maples*, 563 S.W.2d 760, 763 (Mo. 1978)) (The Missouri Supreme Court stated: "[T]he state at the behest of those concerned undertook through the adoption process to sever the parental relationship, award custody and establish a new relationship of parent and child. Much of the information coming into the court's

The court also noted that there was no statute of limitations on a birth parent's expectation of privacy.³¹ It did not end after twenty-one years, and the birth parent should have a continuing privacy expectation.³² Therefore, the court concluded that the birth parents' combined interests in anonymity and finality, coupled with the interests of the other involved parties, outweighed the adoptee's desire to know who those birth parents were.³³

B. Adoptive Parents

Like birth parents, adoptive parents assert privacy interests that mitigate against opening adoption records.³⁴ Their privacy interests, however, are usually to protect against the unwanted intrusion by birth parents into the newly constituted adoptive family unit.³⁵ Adoptive parents who are seeking to build the parent-child relationship may not welcome a birth parent's involvement in the child's life, at least while the child is still a minor.³⁶ They may feel that the child's relationship with the birth parent will interfere with building and maintaining their own relationship with the child.³⁷

records during that process is for good reason treated as a confidence, offering a fresh start to the parties so that natural parents making this agonizing decision are assured the parent-child relationship will be completely severed, both legally and socially and may put behind the mistakes and misfortunes precipitating this fateful act. They are assisted in this traumatic experience by the knowledge that the records may be compromised only on order of the court and that neither the child nor the adoptive parents may question why they consented to the adoption or circumstances of the abandonment or neglect. If it were otherwise, the adopted child might reenter their lives with disastrous results. There must be finality for the natural parents and a new beginning; if there is a right of privacy not to be lightly infringed, it would seem to be theirs.).

³¹ See *id.* at 754 (“These [privacy] interests do not cease when the adoptee reaches adulthood.”).

³² *Id.*

³³ *Id.* at 755–56.

³⁴ See Deloney, *supra* note 8, at 136 (one reason for sealing adoption records is to keep the adoptive parents' identity confidential).

³⁵ *Id.* (“Unwanted intrusions from birth parents into the lives of adoptive parents and their adopted children are prevented with sealed adoption records. Adoptive parents should not have to deal with unwanted intrusions by biological parents and some fear that opening adoption records would lead to the loss of their adopted child to the biological parent of the child”).

³⁶ See Caroline B. Fleming, Note, *The Open-Records Debate: Balancing the Interests of Birth Parents and Adult Adoptees*, 11 WM. & MARY J. WOMEN & L. 461, 468–69 (2005).

³⁷ *Id.* (“[S]ome have argued that birth parents, if allowed access to the adoption records of the children they surrendered, would unreasonably interfere with the lives the adoptive parents are trying to build with their children.”).

Adoptive parents also may have expected confidentiality from the process.³⁸ The original adoption agreement may have been based on the nondisclosure of information about the birth parents, which might have been an important consideration to the adoptive parents.³⁹ A shift from nondisclosure to disclosure would fundamentally alter the nature of the agreement and correspondingly undermine adoptive parents' confidence in the process.

Furthermore, the adoptive parents, as the child's legal guardians and emotional caretakers, may not believe that it is in the child's best interests to know the identity of her birth parents.⁴⁰ For a variety of reasons, including but not limited to the circumstances surrounding conception and the personality and behavior of the birth parents, the adoptive parents may want to limit the child's access to information about the birth parents. As the legal guardians, the adoptive parents have a decision-making responsibility for the child until he or she becomes an adult. Until that point, they should be able to "make the call" about who is part of the child's life.

Arguably, the adoptive parents' privacy interests diminish when the child becomes an adult.⁴¹ By then, they have had ample opportunity to develop their own relationship with the adoptee.⁴² In addition, the adoptee now is an adult who has the legal right to make decisions on her own about contact with her birth parents.⁴³ In fact, many adoptive parents strongly support giving the adult adoptee access to her adoption records and may have already provided the adoptee with that information.⁴⁴

³⁸ Cabellero, *supra* note 2, at 299 ("[A]doptive parents believe that confidentiality was promised to them from the beginning.").

³⁹ See Jennifer R. Racine, *A Fundamental Rights Debate: Should Wisconsin Allow Adoptees Unconditional Access to Adoption Records and Original Birth Certificates?*, 2002 WIS. L. REV. 1435, 1452 (2002) (the assurance of confidentiality may have been a significant factor in the adoptive parents' decision to adopt).

⁴⁰ See *id.* at 1452 ("[I]t is in the child's best interest to maintain sealed records until the child reaches the age of majority[.]").

⁴¹ See Arndt, *supra* note 6, at 114 ("During their child's youth, the adoptive parents are properly given the right to determine how much information about the child's adoption and birth parents the child should receive. They determine what is in the child's best interest. The argument of the adoptee is that once the adoptee reaches adulthood, his parents no longer have the right to protect him from his own past; neither do they have the right to keep from his information fundamentally his in order to protect their own position in his life.") (internal footnotes omitted).

⁴² See Cabellero, *supra* note 2, at 299-300. (by the time the adoptee becomes an adult, the threat that he or she "will want to leave their adoptive parents and return to their birth parents" has greatly diminished).

⁴³ See Arndt, *supra* note 6, at 114.

⁴⁴ See Brett S. Silverman, *The Winds of Change in Adoption Laws Should Adoptees Have Access to Adoption Records?*, 39 FAM. & CONCILIATION CTS. REV. 85, 96 (2001) ("It has been found that a majority of adoptive parents are very secure in their relationships with the adoptee and that they feel the adoptee should be able to seek their roots upon reaching the age of maturity.").

C. *The State*

The state has several interests in the adoption process.⁴⁵ First and foremost, the state has a strong *parens patriae* interest in securing the best interests of the adopted child.⁴⁶ This means placing the child in a stable, nurturing environment.⁴⁷ A second and related goal is ensuring finality and permanency with adoptions.⁴⁸ A protracted process, or one which fails, would undermine public confidence in adoptions. Third, the state has an interest in protecting the confidentiality of adoptions if that was part of the original agreement.⁴⁹ Finally, since adoption laws are legislatively created, the state has an interest in ensuring that they are carried out as written.⁵⁰ If the laws require sealed records, then the records should be kept closed.

D. *The Adoptee*

Arguably, the person with the greatest stake in the process is the adoptee. Adoptees often drive the process to unseal adoption records. They base their claim on an overwhelming interest in learning their identity. They have asserted that this interest should be legally protected for various reasons.

First, adoptees have maintained that they have a strong need to know who they are.⁵¹ They argue that it is essential to their psychological well-being to learn their origins in order to have a complete picture of themselves.⁵² They maintain that this desire represents more than mere idle curiosity; it is imperative to their mental health.⁵³ Without this information, they do not know who they truly are and as a result their self-esteem suffers.⁵⁴

Second, and often in combination with seeking their general identity, some adoptees need to know who their birth parents are for medical reasons.⁵⁵ The need may be immediate, as in the case of the adoptee needing a bone marrow transplant,

⁴⁵ Cabellero, *supra* note 2, at 300.

⁴⁶ *Id.* at 301 (*parens patriae* means “the state is endowed with the duty and authority to act as ‘parent’ to a child in its custody.”).

⁴⁷ *Id.*

⁴⁸ See Arndt, *supra* note 6, at 114 (the state has an interest in making sure its families are protected, and it has been asserted that if the adoptee has access to his or her birth records then the adoptive family unit will be harmed).

⁴⁹ Cabellero, *supra* note 2, at 300.

⁵⁰ *Id.* at 300–01.

⁵¹ See Deloney, *supra* note 8, at 133 (“To have a healthy sense of self-esteem and to have complete identity formation, a person must be able to know of his or her origins.”).

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See *id.* (“Adoptees have been found to have lower self-esteem related to identity problems because of their inability to know of their biological origins.”).

⁵⁵ *Id.* at 133–34; Fleming, *supra* note 36, at 470–71.

or it may be less urgent but equally important, such as a genetic predisposition to alcoholism or some other particular condition.

Some states have addressed one or both of these issues with “good cause” provisions.⁵⁶ These provisions allow an adoptee to have his adoption records unsealed if he can show “good cause” for doing so.⁵⁷ Because the standard is determined by a judge in an individual case, it fluctuates and is inconsistent.⁵⁸ Some courts require an urgent medical reason while others will accept psychological need, at least in certain situations.⁵⁹

Some adoptees have argued that these interests are constitutionally protected.⁶⁰ They argue that the right to privacy includes a right to know one’s identity and that the closed records laws are a violation of equal protection.⁶¹ However, courts have not found that the right to privacy includes the unsealing of their adoption records, nor have they struck down closed records laws under equal protection challenges.⁶²

In *In re Roger B.*, the Illinois Supreme Court rejected an adult adoptee’s arguments that his sealed birth and adoption records should be opened.⁶³ The court acknowledged that the information sought by the adoptee was “important to one’s

⁵⁶ See Cabellero, *supra* note 2, at 304 (“In states that retain closed records, adoptees can only gain access to their original birth certificates through the courts. To get the court to issue an order, adoptees have to show good cause why they need access to their own birth certificates.”).

⁵⁷ *Id.*

⁵⁸ Fleming, *supra* note 36, at 472–73 (“[b]ecause the good cause standard is not determined by statute but is interpreted judicially on a case-by-case basis, adoptees have no clear guidelines to follow when filing petitions or arguing their case before a judge. Moreover, in determining what facts constitute good cause, courts have drawn widely divergent lines, offering adoptees no consistent judicial guidance on the issue.”).

⁵⁹ Silverman, *supra* note 44, at 87–88 (“[t]he easiest way to satisfy the burden is by showing that medical or psychiatric needs exist and that the information is unattainable elsewhere. On occasion, courts have released information to those who have offered proof of a psychological disorder that developed out of an identity crisis. Mere curiosity will not satisfy a court to release the information.”). See, e.g., *In re Dixon*, 323 N.W.2d 549, 552 (Mich. Ct. App. 1982) (sufficient medical conditions have led to the unlocking of adoption records by constituting good cause, and on occasion there have been sufficient psychological reasons to open records); *In re Assalone*, 512 A.2d 1383, 1386 (R.I. 1986) (to prove good cause sufficient to unseal adoption records, a “severe psychological need to know” must exist which is so strong that it trumps the birth parents’ rights regarding privacy); *In re Maples*, 563 S.W.2d 760, 766 (Mo. 1978) (holding “a thinly supported claim of a ‘psychological need to know’” is not enough for a finding of good cause).

⁶⁰ See Fleming, *supra* note 36, at 470–71.

⁶¹ *Id.* (arguments in support of open records “center around equal protection as well as the right of all adults to access information about their pasts[, and they] also cite the right to privacy, reasoning that the privacy right extends to an awareness of personal biological history.”). See, e.g., *In re Roger B.*, 418 N.E.2d 751, 753 (Ill. 1981) (arguing that the right to know is a fundamental right).

⁶² See Cabellero, *supra* note 2, at 303. See also *In re Roger B.*, 418 N.E.2d at 754.

⁶³ *In re Roger B.*, 418 N.E.2d at 757.

identity” but declined to locate it within the “zone of privacy implicitly protected within the Bill of Rights.”⁶⁴ It therefore concluded that the adoptee did not have a fundamental right to have his adoption records unsealed.⁶⁵

Furthermore, adoptees have not been successful in asserting a violation of equal protection.⁶⁶ They maintain that their interest in knowing who their birth parents are is something that others take for granted.⁶⁷ Because non-adoptees know who their birth parents are, adoptees should have access to the same information.⁶⁸ To treat them differently is unfair. Since courts, however, have not found that adoptees are subject to a suspect classification, they have evaluated the equal protection challenge to access restrictions under a rational basis standard and struck it down.⁶⁹

Even in the wake of the “sexual revolution” of the 1960s and 1970s, which broadened “societal definitions of the acceptable family[,]” the open records movement did not begin to earn much approval until the end of the twentieth century.⁷⁰ Subsequent to the sexual revolution, state legislatures continued to disallow adoptees’ access to sealed adoption records and original birth certificates despite the fact that the “stigma of illegitimacy” began to decrease and as more and more women “discovered birth control and single parenting.”⁷¹ Currently, various state laws controlling access to adoption records span from prohibiting access to the records without a compelling and explicit demonstration of “good cause,” to granting the adult adoptee unrestricted access to their adoption records.⁷² However, today, the majority of states continue to have a closed system when it comes to access to adoption records.⁷³

II. GAMETE DONATION

Today, couples who are trying to build a family, but encounter problems with infertility, have options other than just adoption and can use assisted reproductive

⁶⁴ *Id.* at 754.

⁶⁵ *Id.*

⁶⁶ Cabellero, *supra* note 2, at 303.

⁶⁷ *See id.* (“Adoptees argue that closed records laws deny them equal protection because they are not allowed access to their original birth certificates, while those not adopted can obtain this information by simply asking.”).

⁶⁸ *See id.*

⁶⁹ *Id.*; Arndt, *supra* note 6, at 110 (“The rational basis standard carries a strong presumption in favor of the validity of the legislation, one that the adoptees are not likely to overcome.”).

⁷⁰ Fleming, *supra* note 36, at 462.

⁷¹ *Id.* at 466.

⁷² *Id.* at 471.

⁷³ Susan Whittaker Hughes, Note, *The Only Americans Legally Prohibited from Knowing Who Their Birth Parents Are: A Rejection of Privacy Rights as a Bar to Adult Adoptees’ Access to Original Birth and Adoption Records*, 55 CLEV. ST. L. REV. 429, 438 (2007).

technology.⁷⁴ Assisted reproductive technologies also give non-traditional families, such as homosexual couples and single individuals, a way to have children.⁷⁵ These technologies include donor insemination (DI) and in-vitro fertilization (IVF), which most of the time require the use of donated ova (eggs) or sperm.⁷⁶ In contrast to adoption, a state-run process, assisted reproductive procedures are typically a private matter and “primarily take place within the context of the doctor-patient relationship.”⁷⁷ This Article only discusses anonymous gamete donation; it does not pertain to donation where the intended parents know the gamete donor.

A. Donors

Donors can be separated into two groups: sperm donors and egg donors. Egg donation has only existed for about twenty-five years, making this process a more recent phenomenon than sperm donation.⁷⁸ Egg donation is a difficult process, and requires the donor, who must be healthy and preferably in her twenties to mid-thirties, to complete comprehensive medical screenings and questionnaires.⁷⁹ The procedures are quite involved and time-consuming, where one donation cycle can take as long as six weeks.⁸⁰

The procedure involves taking medication to stop the ovaries’ normal functioning, followed by hormone injections, which stimulate the ovaries to produce a greater number of eggs than a normal cycle. During the administration of medication, the donor must have regular blood tests and ultrasound examinations to allow doctors to monitor the number of ovulated eggs and determine how the donor is responding to the hormones. Once the eggs are harvested, they are removed from the donor’s ovaries through a minor surgical procedure called transvaginal ovarian aspiration, which ordinarily last approximately thirty minutes.⁸¹

⁷⁴ See Elizabeth Siberry Chestney, Note, *The Right to Know One’s Genetic Origin: Can, Should, or Must a State that Extends this Right to Adoptees Extend an Analogous Right to Children Conceived with Donor Gametes?*, 80 TEX. L. REV. 365, 365–66 (2001).

⁷⁵ See Julie L. Sauer, Comment, *Competing Interests and Gamete Donation: The Case for Anonymity*, 39 SETON HALL L. REV. 919, 925 (2009) (“Today, donor eggs and donor sperm are also used when a person wishes to conceive a child as a single parent, or when a gay or lesbian couple decides to conceive a child through the use of donor eggs or sperm.”).

⁷⁶ Chestney, *supra* note 74, at 366.

⁷⁷ *Id.*

⁷⁸ See Sauer, *supra* note 74, at 925 (“The first successful delivery of a child created through the use of a donor egg occurred in 1984.”).

⁷⁹ *Id.* at 926.

⁸⁰ *Id.*

⁸¹ *Id.* at 926–27.

Once the eggs are harvested from the donor, she loses all control of the eggs, including the right to find out if a child resulted from her donated eggs.⁸² The retrieved eggs are fertilized with sperm, and if an embryo or embryos are formed, implanted in another woman who will hopefully become pregnant.⁸³ After the whole process is complete, the donor is typically paid approximately \$5,000 to \$8,000 for her participation.⁸⁴

Sperm donation is an easier process than egg donation. The majority of sperm donation agencies mandate that the sperm donors are in the age range of twenty-one to forty.⁸⁵ Similar to the egg donation process, sperm donors are required to undergo multiple testing and screening procedures and provide comprehensive medical information before being allowed to donate.⁸⁶ Furthermore, the sperm donor is required to provide the sperm donation agency with a sample of his sperm, “which is frozen and thawed to allow for post-freezing/thawing semen parameters.”⁸⁷ The donor provides his semen specimen by way of self-masturbation, and he typically is compensated approximately “\$100 to \$350 per vial [and usually] two to three vials [are] needed per cycle.”⁸⁸ Similar to the egg donation process, after the sperm are donated, an anonymous donor loses all control of his specimen and does not have the right to find out if a child resulted from his donated sperm.⁸⁹

Sperm donation is the older of the two procedures since it has been around for over fifty years.⁹⁰ Most sperm donors choose to be anonymous and contract for that anonymity with a sperm bank, hospital or program.⁹¹ Typically, one man’s sperm can be used to fertilize eggs for many different women.⁹²

Some obvious differences exist between sperm and egg donation. First, egg donation requires more of the donor both physically and in terms of a time commitment.⁹³ Although both sperm and egg donors usually have physical and psychological pre-screening, sperm donation involves no physical risk while egg

⁸² *Id.* at 927.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 928.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 928–29.

⁸⁹ *Id.* at 929.

⁹⁰ *See id.* at 928 (“[S]perm donation has been practiced since 1945.”).

⁹¹ *Id.* at 929.

⁹² *See* Chestney, *supra* note 73, at 382 (stating that sperm donors are able to “father” many children). *See also* ETHICS COMM. OF THE AM. SOC’Y FOR REPROD. MED., *Interests, Obligations, and Rights of the Donor in Gamete Donation*, 91 FERTILITY & STERILITY 22, 22(2009), available at http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/interests_obligations_rights_of_donor.pdf (because of the ease associated with sperm donation, more offspring may result from sperm donation than egg donation).

⁹³ *See generally* Sauer, *supra* note 74, at 926–29 (discussing the differences in sperm and egg donation).

donation imposes a physical burden on the donor.⁹⁴ In addition, the actual sperm donation takes very little time while an egg donation cycle can take up to six weeks.⁹⁵ Furthermore, the ease of the sperm donation process and the amount of sperm produced make it likely that a sperm donor will produce more children than an egg donor.⁹⁶

A comparison of sperm and egg donors to birth parents in adoption yields interesting similarities and differences. The most obvious similarity is the biological connection the parties have to the child or children. The birth parents and donors have an undeniable genetic connection to the child. The circumstances that led to the child's birth, however, are sharply distinguishable in the two situations. In adoption, the birth parents were the ones who initiated the process. They created the situation, intentionally or unintentionally, through their pregnancy. The related decision to place the child for adoption had to occur before the other parties could get involved. In contrast, in donation situations, the donors get involved after someone else has chosen them to help procreate a child. The recipient or intended parents made the initial choice to try to have a child, and the donor comes into the process later to help facilitate that choice. In that respect, the analogy between the interests of the birth parent and the donor does not hold up.

This difference in status between birth parents and donors also may help to explain other significant distinctions in their interests. Birth parents place their children for adoption for a host of reasons. One common factor is the desire for the child to have a "better life" which the birth parent feels she is unable to provide.⁹⁷ While donors may be motivated somewhat by altruism, they often donate eggs or sperm because of the financial compensation.⁹⁸ More selfish considerations replace altruistic ones.

The privacy interests between birth parents and donors have the same foundation, but donors might have a more transient interest. A similarity can be drawn between birth parents and donors in that both parties have an expectation of privacy. However, donors have a heightened expectation of privacy from the onset of the gamete donation process that their anonymity will be preserved and all matters regarding their donation will remain confidential.⁹⁹ In most cases, the sperm or egg donor became a gamete donor in exchange for monetary payment.¹⁰⁰ In the donor's decision to donate, they did not choose to become a parent.¹⁰¹ Their

⁹⁴ See ETHICS COMM. OF THE AM. SOC'Y FOR REPROD. MED., *supra* note 92, at 22.

⁹⁵ See generally Sauer, *supra* note 74, at 926–29 (discussing the differences in sperm and egg donation).

⁹⁶ See ETHICS COMM. OF THE AM. SOC'Y FOR REPROD. MED., *supra* note 92, at 22.

⁹⁷ Sheryl Buske, *Dubious Conceptions: The Politics of Teenage Pregnancy*, 51 DEPAUL L. REV. 963, 976 (2002) (reviewing KRISTIN LUKER, *DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY* (1996)) (“[T]he traditional reasons for putting a child up for adoption are grounded in the belief that the child will have a better life.”).

⁹⁸ Sauer, *supra* note 75, at 943.

⁹⁹ See *id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

choice to donate, while sometimes driven by “a genuine desire to help [an otherwise incapable] family conceive children, [while] others are motivated solely by the financial incentive [that accompanies the donation process].”¹⁰² In most cases of anonymous donation, the donor most likely signed a private contract with the gamete donation agency that guaranteed that their identity would be kept confidential.¹⁰³ Often, “the promise of confidentiality plays an essential role in the donor’s decision to donate gametes.”¹⁰⁴

B. Intended Parents

The intended parents have similar interests to those of adoptive parents yet also stand in sharp contrast to them. Like adoptive parents, the intended parents are the driving force in the process. The adoptive parents did not procreate the child, but they affirmatively are seeking to create a new family or add to their existing one with the adoption. Similarly, the intended parents are seeking to bring a child into their family. The result is that both have a cognizable interest in creating a strong family unit with the child. Both kinds of parents could maintain that they have a privacy right that includes preventing unwanted intrusions from the genetic parents—whether it is a birth father or mother or a sperm or egg donor.¹⁰⁵

In donation, however, the privacy interest arguably could extend beyond the privacy interests asserted by adoptive parents. The reason is the possible increased confidentiality surrounding donation that may not exist in adoption. In adoption, the child usually knows that he or she has been adopted, as do others. The privacy issue is not the fact of the adoption; instead, it is whether the adoptee and birth parents will know who the other is. In some donation cases, such as sperm donation for a single woman or egg donation for a homosexual couple, the fact of donation is also well-known. As with adoption, the issue is whether the child and/or intended parents will know who the donor is.

In other situations, however, the existence of a sperm or egg donor may be known only to the intended parents. They may have sought the services of either a sperm or egg donor because of infertility or other health issues that they may not

¹⁰² *Id.*

¹⁰³ *Id.* at 929, 938.

¹⁰⁴ *Id.* at 938.

¹⁰⁵ See Deloney, *supra* note 8, at 136 (a primary purpose for sealing adoption records is to keep the adoptive parents’ identity confidential, and to prevent the birth parents from making unwanted intrusions into the adoptive parents lives); Jennifer A. Baines, Note, *Gamete Donors and Mistaken Identities: The Importance of Genetic Awareness and Proposals Favoring Donor Identity Disclosure for Children Born from Gamete Donations in the United States*, 45 FAM. CT. REV. 116, 119 (2007) (one reason intended parents have for not disclosing information regarding their child’s genetic background has to do with their own privacy rights).

wish to disclose to anyone.¹⁰⁶ In those cases, the intended parents have to decide whether they will disclose that fact to any children born of that process.

[T]here are essentially two steps involved in the donor-conceived child's ability to discover the identity of his or her gamete donor. The first is telling the child the circumstances surrounding the child's conception. The second is in the child's ability to access information about the gamete donors, including donor-identifying information.¹⁰⁷

Thus, the decision of the intended parents is not what to disclose but whether to do so.¹⁰⁸

The other major distinguishing feature that often sets intended parents apart from adoptive parents is the existence of a biological connection between one of the intended parents and the child. Unlike a two-parent adoption, where neither adoptive parent typically is related to the child,¹⁰⁹ donation cases usually involve one intended parent who has a biological connection to a child plus either a sperm or egg donor.¹¹⁰ It could be a number of different scenarios. For example, the intended parents might be a homosexual couple who provide the sperm but seek an egg donor; it could be a single woman who provides the egg but wants a sperm donation; it could be a heterosexual couple who provide either the sperm or the egg but seek one or the other. Since half of the child's genetic material comes from the intended parent(s), they arguably are in a different position from the adoptive parents at least at the outset of the relationship. The intended parents' privacy interest could justifiably be stronger than the adoptive parents' privacy interest because of the biological connection that one intended parent has with the child from the very beginning of the child's conception.

C. Donor Offspring

As with the comparison of the other involved parties' interests, similarities and differences abound in a comparison of the adopted child to the donor child.

¹⁰⁶ See Sauer, *supra* note 75, at 922 (one in seven couples experience difficulty in trying to conceive children).

¹⁰⁷ Michelle Dennison, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation*, 21 J.L. & HEALTH 1, 3–4 (2008) (citations omitted).

¹⁰⁸ See *id.* at 4 (“[D]onor-conceived children must first be told *where* they came from before they can proceed to find out *who* they came from[.]”) (emphasis in original).

¹⁰⁹ This Article does not pertain to stepparent adoptions where one parent is biologically related to the child.

¹¹⁰ See Baines, *supra* note 105, at 117 (2007) (“Donor insemination is a process whereby a woman is inseminated with the sperm of a man who is not her husband or partner, and the resulting child is genetically related to the mother but not to the father who raises the child. . . . Egg donation is similar to donor insemination in that the child is genetically related to only one parent. However, in this case, it is the mother with whom the child lacks a genetic link.”).

The most obvious difference, of course, is that the donor child is probably biologically related to one intended parent while the adopted child is not.¹¹¹

Beyond that, the two groups have similar questions about their origin. Like adoptees, donor children want to know the identity of both their genetic parents for psychological and medical reasons. There is some evidence that many donor children may experience severe, negative psychological consequences from the withholding of information about their origin.¹¹² For example, a recently released study¹¹³ of adults conceived through sperm donation suggests that these individuals “struggle with serious losses from being purposefully denied knowledge of, or a relationship with, their sperm donor biological fathers.”¹¹⁴ The study discusses how these young adults suffer from higher rates of depression and related disorders than their counterparts raised by biological parents.¹¹⁵ The study concludes that donor children want to know both the fact that they were conceived through sperm donation and identifying information about their donor.¹¹⁶

The similar “who I am” questions asked by adopted and donor children may reflect a sense of loss that both feel. That loss is likely the product of the absence of information about one or both biological parents and the corresponding lack of relationship with that person or persons. Although both may lack that relationship, the circumstances surrounding that relationship differ significantly between adopted child and donor child. The adopted child arguably might suffer a greater sense of loss because one or both biological parents made a conscious choice to place him for adoption and not to raise him, and as such the child might be

¹¹¹ Chestney, *supra* note 74, at 375 (“The main difference in the relationships the adoptee, as opposed to the donor offspring, has with each of her ‘parents’ is that the adoptee usually has no genetic relationship to either parent, where as the donor offspring is usually related to one custodial parent.”).

¹¹² See ELIZABETH MARQUARDT, NORVAL D. GLENN & KAREN CLARK, INST. FOR AM. VALUES, MY DADDY’S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION 5–6 (2010), available at http://www.familyscholars.org/assets/Donor_FINAL.pdf.

¹¹³ *Id.* at 5 (“[The] study is the first effort to learn about the identity, kinship, wellbeing, and social justice experiences of young adults who were conceived through sperm donation. The survey research firm Abt SRBI of New York City fielded [the] survey through a web-based panel that includes more than a million households across the United States. Through this method [the authors] assembled a representative sample of 485 adults between the ages of 18 and 45 years only who said their mother used a sperm donor to conceive them. [The authors] also assembled comparison group of 562 young adults who were adopted as infants and 563 young adults who were raised by their biological parents.”).

¹¹⁴ Press Release, The Comm’n on Parenthood’s Future, Pathbreaking Study Finds Adults Conceived Through Sperm Donation Suffer Substantial Harm (May 31, 2010), available at http://www.familyscholars.org/assets/Donor_pressrelease.pdf.

¹¹⁵ Marquardt, *supra* note 112, at 5.

¹¹⁶ *Id.* at 11–12.

suffering from a sense of rejection. Of course, the birth parent made that painful choice in an effort to secure a better future for the child.¹¹⁷

In contrast, the donor child was created by intended parents who went to great lengths to have a child. In theory, this child should not suffer the same sense of loss because he or she was a very wanted child and was purposefully brought into the world. This, however, may not make a difference to the donor child who is focusing on the biological parent he does not know rather than the intended parents who he does know. From the donor child's perspective, a couple of factors are irrelevant in his or her eyes. First, it does not matter to the child that the donor came into the relationship because the intended parent(s) sought out the donor for his or her services. Second, it does not matter to the child that the donor most likely left the process of donation with the expectation of privacy and confidentiality. Also, arguably it is irrelevant that the egg or sperm donor came into the process after the intended parent(s) made the choice to have a child, or that he knows his intended parent(s). The child's focus is on the information he does not have rather than on who he does know. Arguably, the offspring's need to discover information stems from a sense of entitlement to that information which they lack, but which their peers with two biological parents so readily possess.

III. CONTRACTUAL ISSUES

The question of disclosing identifying information about an anonymous egg or sperm donor raises contractual issues. Typically, an anonymous donor has entered into a contractual agreement with a hospital, sperm bank or clinic which details the terms and conditions of donation.¹¹⁸ The purpose of that agreement is to arrange for the exchange of sperm or eggs in return for financial compensation.¹¹⁹ Most of the contractual provisions address the medical aspects of the procedure including the risks associated with it.¹²⁰ Furthermore, these contracts typically require donors to sign away any interest they might have in seeking information about the result of the donation.¹²¹

Under traditional contract principles, the donor and clinic have bargained for and exchanged consideration: the parties have traded money for sperm or eggs. One of the conditions of the agreement is anonymity.¹²² Because the donor has given up any expectation of getting information about the result of the donation process, he or she has a corresponding expectation that his or her own identity will not be disclosed. This expectation is reasonable in light of the contractual terms

¹¹⁷ See Buske, *supra* note 97, at 976.

¹¹⁸ See Chestney, *supra* note 74, at 383 ("The one potentially legally significant difference [between adoption and gamete donation] is that anonymity of donors is usually protected through private contract.").

¹¹⁹ See Sauer, *supra* note 75, at 943.

¹²⁰ *Id.* at 947.

¹²¹ *Id.*

¹²² *Id.* at 943 ("[D]onors who enter programs as anonymous donors have a reasonable expectation that their identity will not be made available to potential donor offspring.").

and should not be overturned without his knowledge or permission. Any disclosure of information therefore should not take place absent the donor's express consent because the donor has a reliance interest on the representations of confidentiality made in the original agreement.

The offspring of sperm or egg donation could argue that they are a third party beneficiary of the contract between donor and clinic. The issue is whether the offspring is an intended or incidental beneficiary.¹²³ According to the Restatement Second of Contracts, “[a] promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.”¹²⁴ Thus, in order for a third party to be able to recover from the promisor of a contract, she or he must be classified as an “intended beneficiary” not an “incidental beneficiary.” The Restatement Second of Contracts further explains that “a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties”¹²⁵ The Wisconsin Court of Appeals explained in *Goossen v. Estate of Standaert* that the exception to the general rule—that a contract can only be enforced by an individual who is a party to the contract—“is a contract specifically made for the benefit of a third party.”¹²⁶ The court further explained that in order to determine if a third-party is an intended beneficiary that “[t]he person claiming to be a third-party beneficiary of a contract must show that the contract was entered into by the parties to the contract directly and primarily for his benefit.”¹²⁷

Arguably, the offspring of gamete donors are not intended beneficiaries because neither party to the contract for gamete donation, the donor and the clinic, entered into contract for the direct and primary benefit of the offspring. Most likely the donor and the clinic signed the donation contract for self-serving reasons, the donor probably looking for the financial incentives that accompany donation and the clinic looking for donors to donate gametes so that they can run their business. Furthermore, even if either the donor or the clinic had altruistic motives for donating their gametes or helping individuals who cannot conceive naturally, those motives are to help benefit the *intended parent(s)* who are unable to conceive on their own, not to benefit an unborn child. Thus, the offspring of gamete donors are most likely incidental beneficiaries, which makes them incapable of suing under the contract made between the donor and the clinic.

If the offspring could successfully argue that he or she is an intended beneficiary, she or he would still have to show that her interests in knowing the donor's identity outweigh the donor's desire to maintain anonymity.¹²⁸ The best argument that the offspring could make would probably be that some urgent

¹²³ See RESTATEMENT (SECOND) OF CONTRACTS § 302(1) (1981).

¹²⁴ *Id.* § 304.

¹²⁵ *Id.* § 302(1) (emphasis added).

¹²⁶ *Goossen v. Estate of Standaert*, 525 N.W.2d 314, 319 (1994) (citation omitted).

¹²⁷ *Id.* (citation omitted).

¹²⁸ See *Dennison*, *supra* note 107, at 13–14.

medical reason requires her to know who the donor is.¹²⁹ For example, if the offspring needed a bone marrow transplant, she would be looking to her biological mother or father or their children for a match. This kind of reason is analogous to the good cause standard for opening adoption records and faces the same kinds of difficulties in interpretation.¹³⁰

In any event, the donor's expectation of anonymity is such a critical part of the original donation agreement that courts or the legislature would be unlikely to overturn it.¹³¹ The donor's ability to rely on assurances of confidentiality may have played an important part in their willingness to donate. If those assurances no longer exist, then past and present donors will be betrayed by this unforeseen change in the rules of the game. Future donors will be reluctant to participate in a process that is no longer transitory but is one which carries lifelong ramifications.

IV. RECOMMENDATIONS

The decision to release identifying information about a donor touches on many interests and raises multiple legal issues. The determination about whether the donor should be able to maintain anonymity shifts as we consider the various parties' perspectives. Things look different to the twenty-one year-old sperm donor than they do to his biological offspring twenty-one years later. Moreover, the seemingly obvious analogies to donation, particularly adoption, may ultimately reflect more similarities than differences.

Public policy considerations can be raised on both sides but ultimately militate against the release of identifying information. The first consideration is one of logistics. The information about egg and sperm donors is not kept in a central registry or data bank. It is maintained by the hospital or clinic where the donation took place.¹³² Each entity has its own records and method of recordkeeping. In egg donation situations, the records can go back twenty-five years. In sperm donation cases, they might be fifty-years-old. Most importantly, they were never created with the intent or expectation that they would be opened. Therefore, they have not been updated or maintained in ways that would lend themselves to release.¹³³ The burden on the hospital or clinic now to go back through them and prepare them for release would be heavy.¹³⁴

¹²⁹ See generally *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864 (Cal. Ct. App. 2000) (finding that parents and minor diagnosed with kidney disease allowed to depose sperm donor in action against sperm bank for failure to disclose donor's history of kidney disease).

¹³⁰ See Cabellero, *supra* note 2, at 304 (discussing the "good cause" standard).

¹³¹ Chestney, *supra* note 74, at 383 ("State infringement upon [anonymous donation] contracts with identity-disclosure requirements may be problematic.").

¹³² Sauer, *supra* note 75, at 950-51.

¹³³ See *id.*

¹³⁴ See *id.* at 951 ("If laws are enacted permitting or requiring disclosure of donor identity, states will most likely be required to take further action requiring donors to update key information.").

Second, the decision to open donation records would be inconsistent with the current practice in adoption situations. Although there might be a trend toward opening adoption records, the majority are still closed, in accordance with state law.¹³⁵ The move to open adoption records has been around far longer than in donation situations.¹³⁶ If courts and legislatures have been reluctant to open adoption records, then they probably will not want to open donation records. It would be unfair to adoptees if donees were accorded more rights and had greater access to information about their birth parents. The two groups are similarly situated and should receive similar treatment under the law.

Third, all of the parties currently have a reasonable expectation of anonymity in the donation process. Under current principles, the donor, the intended parents and the offspring do not expect to know the donor's identity. The donor has signed away his or her right to know about the result of the donation process.¹³⁷ The intended parents have certain information about the donor but are not entitled to know who he or she is. The offspring may know that they are the product of a sperm or egg donor but do not have any access to additional information about the donor's identity. This expectation of anonymity creates certainty because all of the parties understand the parameters of the relationships. They may not like those parameters, but the parameters are defined and settled.

Fourth, and as a result of those settled expectations, donors can feel confident in participating in the donation process. They know what to expect and where the lines of confidentiality are drawn. For example, a donor who has a deep desire to know the result of the donation process or have a relationship with offspring born of that donation may be well-advised not to become an anonymous donor. For the donor who has chosen anonymous donation with the expectation of confidentiality and for future donors, a subsequent decision to release identifying information would have a chilling effect on the decision to donate. If society recognizes assisted reproduction as socially valuable, then it should encourage egg and sperm donation. The best way to do this is to uphold the guarantee of anonymity.

This decision may disappoint the offspring who wants to know the identity of the sperm or egg donor. The balancing of interests in favor of anonymity does not mean that exceptions can never be made to release identifying information about the donor. Such information could be released under limited circumstances, perhaps to an adult offspring who has compelling reasons and whose donor may also be seeking comparable information. Mere curiosity would not suffice;¹³⁸ however, situations analogous to good cause in adoption might.¹³⁹

Nevertheless, the decision to release identifying information about gamete donors is not ripe for legislative enactment. Since opening adoption records is still a matter of unsettled law, with the majority of states still keeping records sealed, it

¹³⁵ Hughes, *supra* note 73, at 438.

¹³⁶ See, e.g., *In re Roger B.*, 418 N.E.2d 751 (Ill. 1981) (arguing for open adoption).

¹³⁷ Sauer, *supra* note 75, at 947–48.

¹³⁸ Silverman, *supra* note 44, at 88.

¹³⁹ See Cabellero, *supra* note 2, at 304 (discussing the “good cause” standard).

would be premature to require the disclosure of donor identity. As discussed above, the majority of states still keep closed adoption records. Since adoptees may arguably have a stronger interest in obtaining information from sealed records and the majority of states still maintain sealed records, it would be improper to disclose confidential information regarding gamete donors to their offspring who arguably have an inferior interest in such information. Furthermore, unlike adoption, which is a state-sponsored process, gamete donation is a private contractual matter. Therefore, it would be inappropriate for the state to intervene and regulate the private matter of disclosure. For these reasons, the identity of gamete donors should remain confidential.

CONCLUSION

The determination of whether to identify sperm and egg donors is not an easy decision. The involved parties all have compelling reasons for their positions, and it is not possible to accommodate all of their interests. Ultimately, the balance should be struck in favor of preserving the donor's anonymity under most circumstances. This decision protects the expectation of the original parties to the contract and respects the privacy rights of all involved. Although it does not meet all of the needs of the donor offspring, it currently is the best way to guarantee the continuation of the process that led to their creation: anonymous donation.