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ASSISTED REPRODUCTIVE TECHNOLOGIES

Should We Be Advising ART Clients To Beware Of Home DNA Tests?

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With the holidays coming up, the search for the perfect gift is, for many of us, well underway. If your social media feed is anything like mine, the companies making home DNA kits are aggressively marketing that this is THE gift. For everyone. But these tests have shown to have very real legal consequences. As lawyers, especially those advising clients on assisted reproductive technology-related issues, should we be advising clients to beware?

Home DNA kits are becoming a popular gift. What does this mean for ART clients?

Credit: Manuel Tauber-Romieri via GettyImages

The DNA Kit-Inspired Legal Quagmire.

We've seen at least one case where a woman believed that having her daughter take a DNA test to learn more about her ancestry would be a fun and innocent activity. So rather than one more teddy bear, she got her young daughter a 23andMe DNA kit. Not only would the daughter probably have preferred a more kid-friendly gift, but it gets worse: the mother found herself embroiled in a legal mess.

In the case, which involves a woman named Danielle Teuscher, Teuscher and her spouse struggled with infertility, and turned to a sperm donor to help conceive their daughter. Tesucher and her spouse chose an "open" donor, meaning that the donor indicated that he was open to contact with the child, but only once the child turned 18 years old. When the 23andMe kit results came back showing a close relative to Teuscher's daughter--she presumed it was the child's grandmother, i.e. the mother of the sperm donor--Teuscher struggled with whether to reach out. On the advice of other families with donor-conceived children, she sent a short message to the woman, indicating the existence of her daughter, and that they were open to contact.

After a short, confused message back from the woman, followed by an apology from Teuscher, the contact was over. But the drama had just begun. A few weeks later, Teuscher received a cease and desist letter from the sperm bank. The letter notified Teuscher that she was in "flagrant violation" of the agreement that she had signed with them. Pursuant to the liquidated damages clause of the contract barring Teuscher from seeking out the donor, the sperm bank said that it was entitled to at least $20,000 in damages from her. The clinic's position was that merely having her daughter take a DNA test at all was one violation of the agreement. The message to the donor's relative was a second breach.

The clinic also told Teuscher that she was losing access to five additional vials of the same donor's sperm that were still being held in storage by the sperm bank. That meant that Teuscher, if she

ever wanted more kids, would not be able to use the same sperm donor. The sperm bank did not offer Teuscher any refund for cutting off her access to these vials. (Indeed, the sperm bank miscounted the vials, and initially told her it was only 4 vials. Whoops!)

Since then, Teuscher has now brought a lawsuit against the sperm bank, arguing that the sperm bank had no legal right to repossess the vials of sperm, and that the terms of the contract were against public policy. The lawsuit is pending.

What's a Lawyer To Do?

So what does this mean for our clients? First, especially until the case is resolved, parents of donor-conceived children should be aware of the case, especially where the agreement between the parents and the donor includes terms regarding anonymity or other terms restricting contact. It may be worth a legal review of the contract between the intended parents and the donor as to whether the mere choice to have a donor-conceived child take a DNA test may be a breach of their agreement. And, of course, it would be good to know what the liability to the parents might be.

When You Can, Pre-Plan.

Backing up to what lawyers should do before a dispute arises, when you are drafting a contract with clients between intended parents and donors, due consideration should be given to the language of the terms, and how it would interact with the child taking a DNA test. I am skeptical that contracts ought to restrict people from learning information about themselves that could be medically valuable, and perhaps even life-saving. But if those provisions are key to one of the parties, lawyers should at least tailor restrictions as to contact and "seeking out" the donor, to be clear that merely taking a DNA test and receiving the information about oneself should not, without more, be a breach of contract. Whether the parents agree to restrain themselves from reaching out to their DNA relatives is another question, and worth addressing directly.

The Child Is Not A Party To The Contract.

I know you are already doing this, but it's always worth reminding clients -- especially donors -- that any child conceived from a donated embryo or donated gametes, is not a party to the contract. You know, because the child hasn't born yet. And with the increasing prevalence of DNA

kits, it's highly unlikely that any donor can stay anonymous for very long. So when the child grows up, expect whatever restrictions are placed in the contract to not only be inapplicable to the child's actions, but largely ineffectual.

So this holiday season, you can give your clients the gift of trying to avoid lawsuits resulting from their stocking stuffer DNA tests.

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