Americans and Reproductive Tourism

By Sara Cherian-Thomas, J.D., LL.M. candidate

A recent article in the New York Times stated that an increased number of Americans are going overseas to receive infertility treatments because they can’t afford them at home.¹ The article tells the story of a forty-nine year old woman who longed for children, but at her age, her best hope lay in fertility clinics and an egg donor, a quest she soon found could easily cost up to $72,000 for repeated tries.² The price was too much, as she and her husband lived on a salary of $55,000 per year.³ However, the couple cut their costs to $18,000, including enough fertilized eggs for repeated efforts, by using an egg donor from Romania and having the eggs fertilized in Bucharest and shipped back to the United States.⁴ For the couple it was worth it, with the embryos developing after implantation into two beautiful twin boys.⁵ The average cost of a single in vitro effort in the United States is $12,400, and insurance usually does not cover the procedure.⁶ Since the average success rate for In Vitro Fertilization (IVF) is approximately 30 percent per cycle, couples often have to undergo the procedure many times to increase their chances of a successful pregnancy. As a result, for many American couples desperate to have a child, “cutting costs by booking a flight and spending a week or more abroad for treatments seems like an easy step in the desperate quest for a baby.”⁷

Unlike Americans who mostly go abroad for fertility treatment because of cost concerns, Canadians and Western European tend go on “fertility tours” because of increased regulations in their own countries which limit their reproductive options. For example, in Canada, the Assisted Human Reproductive Act passed in 2004 banned the sale of eggs.⁸ As such, the law limited those seeking to become pregnant to use eggs from a friend or family member or from a small pool of unpaid donors.⁹ Since waiting periods of several years are not uncommon in Canada, some of these women travel to the United States where there is an abundance of egg donors who set their own fees as well as a plethora of IVF clinics in many states.¹⁰

In contrast to Canada and many Western European countries, the United States is virtually regulation-free when it comes to Assisted Reproductive Technologies (ART) and it has even been called the “Reproductive Wild West.”¹¹ The few regulations that do

² Id.
³ Id.
⁴ Id.
⁵ Id.
⁷ Lee, supra note 1.
⁹ Id.
¹⁰ Id.
¹¹ See id.
exist have taken a relatively piecemeal approach: The federal government’s role is mostly limited to data collection for the Center for Disease Control (CDC).\footnote{See Centers for Disease Control and Prevention, Assisted Reproductive Technology: Home, available at \url{http://www.cdc.gov/reproductivehealth/ART/index.htm} (last visited Nov. 14, 2006).} The American Society for Reproductive Medicine (ASRM) and the Society for Assisted Reproductive Technologies (SART), are medical societies that can refuse to endorse fertility clinics that don’t adhere to widely accepted practice guidelines; however, they do not have any enforcement power.\footnote{See Society for Assisted Reproductive Technology, \url{http://www.sart.org} and The American Society for Reproductive Medicine, \url{http://www.asrm.org}.} And although individual states may regulate clinics, there is no uniformity of regulation at the state level.\footnote{See Lars Noah, Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation, 55 FLA. L. REV. 603, 615-16 (2003).} Notwithstanding the lack of regulation, the United States boasts excellent technology and wide availability of fertility treatment centers.\footnote{See Centers for Disease Control and Prevention, 2003 Assisted Reproductive Technology (ART) Report: Home, available at \url{http://www.cdc.gov/ART/ART2003/index.htm} (last visited Nov. 14, 2006).} The best treatment in the world is located right here at home.

While it is cheaper, there are also risks in going overseas for fertility treatments. First, there are concerns about the regulation of overseas clinics, the standards for egg donors and the difficulties in comparing pregnancy success rates here and abroad. Second, there is often little follow-up care as the patient is usually treated for a few days, and then goes on vacation for the portion of the trip or returns home.\footnote{See CBC News Online, Medical Tourism: Need Surgery, will Travel, June 18, 2004, available at \url{http://www.cbc.ca/news/background/healthcare/medicaltourism.html} (last visited Nov. 14, 2006).} This leaves any complications or side effects as the responsibility of the medical system in the patient’s home country.\footnote{Id.} Third, most countries that offer reproductive tourism have weak malpractice laws, so the patient has little recourse to courts or medical boards if something goes wrong.\footnote{See e.g., Bashir Mamdani, Medical Malpractice, 12 INDIAN J. MED. (2004), available at \url{http://www.ijme.in/122ss057.html} (discussing limitations of medical malpractice laws in India); see also, e.g., Medical Tourism, available at \url{http://www.overlawyered.com/2006/09/medical_tourism.html} (last visited Nov. 14, 2006).} Finally, there may be complications for both the mother and the fetuses if multiple gestation results from the transfer of pre-embryos during IVF,\footnote{Carson Strong, Too Many Twins, Triplets, Quadruplets and so on: A Call for New Priorities, 31 J.L. MED. & ETHICS 272, 273-275 (2003). (SART and ASRM have jointly issued guidelines on the number of embryos that should be transferred in the United States).} as many countries do not have any laws or professional guidelines limiting the number of embryos that should be transferred.

While going overseas for fertility treatments may not be ideal, it is often the only option for American couples if they want to get pregnant. Many infertile people in America discover that their insurance plans do not cover infertility treatments and look into treatments abroad as a last chance effort in having a child. However, more than half of insurance companies in the United States deny coverage for infertility treatments citing...
Historically, insurance companies said that infertility was not an illness and the procedures not treatments and are experimental. However, both the ASRM and the American College of Obstetricians disagree and recognize infertility as a medical condition. It should be up to medical professionals and not insurance companies to decide this question.  In *Witcraft v. Sundstrand Health and Disability Group Benefit Plan*, the Iowa Supreme Court held that infertility was an illness. Commentators have expanded this by stating that “the malfunction of the reproductive organs should not be treated any differently than the malfunction of any other organ.”

**So far, fourteen states have passed legislation requiring insurers to cover infertility treatments.** Each state law is different and can be divided into two groups: those that mandate to cover and those that mandate to offer. Eleven states have mandates that coverage be provided; however, these mandates vary. Some of them mandate that coverage be provided only by certain forms of health insurance such as HMOs, and many direct that certain medical conditions be met before coverage is provided. Texas, California and Connecticut, on the other hand, have mandates to offer. This means that state laws mandate that companies offer coverage at an additional cost, but the laws do not require the companies automatically to provide coverage as a standard part of their plans. The remaining thirty-six states do not have laws that require the provision or offer of infertility coverage. As such, if there were two employees working for the same company in two different states, one might have coverage and the other might not.

In 2001, two federal bills were introduced that, if enacted, would have mandated insurance coverage for infertility treatments to protect the rights of infertile couples: The Fair Access to Infertility Treatment and Hope Act of 2001 (“Faith”) and the Family Building Act of 2001. However, these bills were not passed, for the most part because of strong insurance company lobbying efforts. This leaves infertile couples seeking affordable treatment with few real alternatives but to look outside of the United States.

---


21 See id. at 198.

22 Id.


25 Id. at 200


27 Id. The eleven states that have a mandate to cover are Arkansas, Hawaii, Illinois, Maryland, Massachusetts, Montana, New Jersey, New York, Ohio, Rhode Island and West Virginia.


29 Id.

30 Id.

31 Id.


33 *Family Building Act of 2001*, H.R. 389, 107th Cong. (2001). This legislation would have required all health plans that provide pregnancy related benefits to provide coverage for infertility treatments.
The high costs of treatment and lack of insurance coverage leaves the average couple with an illusory choice of obtaining treatment at home and opens them up to the risks of undergoing treatments abroad. Federal legislation mandating insurance company for infertility treatments is needed to protect the rights of these desperate infertile couples in America who do not have access to affordable infertility treatments here at home.

November 2006