Anonymity, no more?

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Introduction:

In January 18, 2011, Washington State Rep. Jamie Pedersen, introduced House Bill 1267, also known as the "Clarifying and Expanding the Rights and Obligations of State Registered Domestic Partners and Other Couples Related to Parentage Bill".¹ This bill became effective in Washington state on July 22, 2011.

This act has many objectives, but the one that is pertinent to the practice of assisted reproductive medicine is that it expands the legal rights of children born as a result of assisted reproduction upon reaching the age of eighteen.² With this act, Washington State became the first state in the United States to strip gamete donation of its anonymity.³

The Uniformed Parentage Act (UPA) was originally drafted in 1973 and amended in 2002. In its model form, the UPA covers issues such as voluntary acknowledgement of paternity, genetic testing to determine paternity, and paternity proceedings.⁴ The UPA also allows for the inspection of paternity records after obtaining a court order demonstrating good cause.⁵

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¹ WA LEGIS 283 (Westlaw 2011).
⁴ Id in 2.

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SECTION 633. HEARINGS; INSPECTION OF RECORDS.

(a) On request of a party and for good cause shown, the court may close a proceeding under this [article].

(b) A final order in a proceeding under this [article] is available for public inspection.

Other papers and records are available only with the consent of the parties or on order of the court for good cause.

House Bill 1267 added a new section to chapter 26.26 of the Revised Code of Washington, (RCW) which is based on the UPA. The new section read as follows:

(1) A person who donates gametes to a fertility clinic in Washington to be used in assisted reproduction shall provide, at a minimum, his or her identifying information and medical history to the fertility clinic. The fertility clinic shall keep the identifying information and medical history of its donors and shall disclose the information as provided under subsection (2) of this section.

(2)(a) A child conceived through assisted reproduction who is at least eighteen years old shall be provided, upon his or her request, access to identifying information of the donor who provided gametes for the assisted reproduction that resulted in the birth of the child, unless the donor has signed an affidavit of nondisclosure with the fertility clinic that provided the gamete for assisted reproduction.

(b) Regardless of whether the donor signed an affidavit of nondisclosure, a child conceived through assisted reproduction who is at least eighteen years old shall be provided, upon his or her request, access to the non-identifying medical history of the donor who provided gametes for the assisted reproduction that resulted in the birth of the child.

With this new addition to the RCW, a person of eighteen years old or older has the right to seek and receive non-identifying medical history of the donor who contributed to his existence by providing non-identifying medical history. What does non-identifying medical history mean? The bill does not define this term but does define the term identifying information on Section 1(26)(a)(b):
"Identifying information" includes, but is not limited to, the following information of the gamete donor:

a. The first and last name of the person; and

(b) The age of the person at the time of the donation.

The American Society for Reproductive Medicine, (ASRM), a professional organization that fertility clinic physicians voluntarily join, addresses various aspects of the gamete donation process through its guidelines. ASRM has developed various levels of information sharing. Non-identifying information is defined by ASRM as the donor’s provision of medical or biographical information, such as a statement or letter to be given to recipient couples. This practice is available in most clinics or gamete donation programs. Other levels of information sharing include non-identifying contact for medical updates, donor’s willingness to be contacted with anonymity maintained by the program to provide medical updates, and further information if requested by parents seeking to learn more about the child’s health condition. Non-identifying personal contact is when the donor is willing to have contact without identifying information provided when child reaches a certain age and both agree to the disclose. The last level includes identifying information when the donor is willing to have identifying information shared with the offspring when a child reaches the age of maturity and both, donor and offspring, agree to disclosure.

House Bill 1267 addresses the fourth level of information sharing identifying information but gives an opt-out to the gamete donor, by stating that the identifying information...
information of the donor can be given upon offspring request, unless the donor has signed an affidavit of nondisclosure with the fertility clinic that provided the gamete for assisted reproduction. Is this opt-out provision fair to the donor? What about the offspring? Does Washington House Bill 1267 truly strip anonymity of the gamete donation process? What does this mean for the rest of the states and the gamete donations programs?

For the offspring of donor-conceived children, this bill, although a small step, finally deals with an issue that needed to be addressed a long time ago. First, the donor’s identifying information will not be destroyed, even if the donor wishes to remain anonymous. Second, many donor-conceived children finally will have much wanted information about their donor, like his or her medical history, that can be very helpful, perhaps even lifesaving. However, this bill does not guarantee that the gamete donor will stay in contact with the clinic and continue to provide medical information. Still, for some donor-conceived children, non-identifying medical information is not enough, so if the donor decides not to disclose his or her identifying information, the offspring may never learn about his or her heritage, or may never be able to establish a relationship with his or her donor.8

For the donor, this bill gives the opportunity to choose to remain unknown to his genetic offspring, but this does not mean that the donor will remain anonymous. At least medical non-identifying information and the donor’s name and age will be kept and identified. It is pretty clear that the donor is not going to be just a number anymore. With information being released the donors expectation of privacy may be

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8 D.R. Beeson, et al. Offspring Searching For Their Sperm Donors: How Family Type Shapes The Process Vol.0, No.0 HUMAN REPRODUCTION, pp. 1–10, (2011). It is important to mention that this survey was based on a random sample.
diminish. In the article *Regulating Sperm Donation: Why Requiring Exposed Donation Is Not The Answer*, one of the author’s concerns about exposing the donors identity is that if the donor is no longer permitted to withhold their identity, a court may choose to draw the privacy line even further away from a donors complete medical information, allowing disclosure of his or her private identifying information, if a court, for example, finds that a child’s best interests should override the donor’s expectation of privacy. This is the kind of concern a donor should take into consideration before he or she donates his sperm or her egg.

For Washington State gamete donation programs and/or fertility clinics, this law imposes a huge burden because the identifying information of the donor must be kept by the fertility clinic. The law does not establish how long the information shall be kept; it can only be assumed that is more than eighteen years. Also, the law does not address the issue of who pays for the maintenance of the records containing donor’s information.

In addition, House Bill 1267 "calls for a reexamination of the consent process and new attention to the landscape of ethical responsibilities as well as the rights of involved parties to one another" (donor, the intended parent and the offspring).

Fertility programs should develop an informed consent process that focuses on the gamete donor, including but not limited to having the donor complete a mental health evaluation; have them understand that his or her donation might affect their own or future family, that there is a possibility of future contact if he or she decide to

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9 Id in 5.
disclose his or her identifying information. Even if the law does not address the possibility of the donor withdrawing his or her signed affidavit of nondisclosure, the donor should be made aware that he might want to disclose his identity if the donor conceived child decides to seek it. Last but not least, the clinic should encourage the donor seek to legal advice so she or he can understand the legal implication of the gamete donation.

**What does this mean for the rest of the states?**

Washington State is attempting to regulate an area of the assisted reproductive technology that has been kept unregulated for more than thirty years. Many states may follow Washington State initiative, either by enacting laws that require disclosure of the gamete donor’s information or by instructing their courts to review the issue case by case.¹²

**Conclusion:**

Supporters of anonymity belief that government intervention in gamete donations, specially banning anonymity will greatly impact gamete donor creating a scarcity of gametes. These supporters recall United Kingdom Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations that came in effect on April 1, 2004.¹³ Under this law, donors conceived children can receive identifying information of their gamete donor when they turn eighteen.¹⁴ By banning

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¹¹ Id.
¹⁴ Id
anonymity, the number of gamete donations decreased.\textsuperscript{15} In the United Kingdom, the number of donations fell in the months after above mentioned law was passed; however, in 2007 figures from the Human Fertilisation Embryology Authority show that the number of men registering as sperm donors rose by 6\% in the year following the law removing donor anonymity. The latest figures from the Human Fertilisation Embryology Act (HFEA) show that registration is up both in UK sperm donors and in the total number of donors available (which includes imported sperm).\textsuperscript{16} The same can not be said for egg donations, but concerns other than disclosure of identifying information may influence the decision of donor’s candidates.

For some, governmental regulation is an unwanted intrusion in the decision of how a family should be build that will have regretful outcomes like gamete shortage. For others governmental regulation is necessary in order to address ethical concerns in ART like the possibility of inter-marrying of unknown half-siblings, donor responsibility, interests and rights. The Washington state initiative can be the testing ground that will finally prove what school of thought will prevail.

\textsuperscript{15} HUMAN FERTILISATION EMBRYOLOGY AUTHORITY, \textit{Number of sperm donors up following anonymity law changes.} (2007) available at \url{http://www.hfea.gov.uk/465.html}.

\textsuperscript{16} Id.

"In the 12 months to 31 March 2006 - the year following the law change – there were 265 new sperm donors registered with the HFEA (of which 208 were based in the UK.). New registrations in the 12 months to 31 March 2005 were 250 (of which 197 were based in the UK.). In September 2005 the HFEA issued a report ‘Who are the Donors?’ as part of its review of the sperm, egg and embryo donation system which showed that modern sperm donors are typically family men in their 30s, rather than the old-fashioned stereotype of a medical student in their teens or early 20s."