Addressing the particular recordkeeping needs of infertile orthodox Jewish couples considering the use of donated eggs

Richard V. Grazi · Joel B. Wolowelsky

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Abstract Infertility counseling is a specialized field that will continue to grow in coming years as the impact of infertility and its treatment is documented more and more in terms of emotional, physical, social and life consequences. Counselors should anticipate issues that may arise in the future and assist couples in their efforts to address them. We report here on recordkeeping issues of possible future concern that should be addressed when Orthodox Jewish couples make use of donor eggs. Good medical practice values the importance of understanding the patient's individual concerns and values, including the complex psychological, sociological and cultural context in which they experience their infertility. Good counseling anticipates and addresses future problems about which patients might not currently be aware.

Keywords Orthodox Judaism · Halakha · Cultural literacy · Ovum donation · Maternal identity

Introduction

Infertility counseling is a specialized field that will continue to grow in the coming years as the impact of infertility and its treatment is documented more and more in terms of

emotional, physical, social and life consequences [1]. Such counseling properly includes anticipating problems that might come up after many years and helping the couple work through how they might deal with them. We report here on a recordkeeping issue of possible future concern that should be addressed before Orthodox Jewish couples make use of donor eggs. In the United States, medical education has increasingly emphasized the importance of understanding the patient's individual concerns and values, including the complex psychological, sociological and cultural factors that they involve. Good counseling includes anticipating issues that might not yet be obvious to the couple at this stage in their lives.

Orthodox Jews are committed to Halakha, the traditional corpus of Jewish law and ethics. The basic sources for the investigation of halakhic positions on any ethical or legal issue are the Jewish Bible (known to Christians as the Old Testament) and the Mishna and Talmud. Although there are universally accepted codifications of Halakha (such as Maimonides' Mishneh Torah or the later Shulhan Arukh), the various rabbinic authorities and courts have no formal hierarchical structure. As a consequence, halakhic rulings on contemporary issues cannot be promulgated by any central authority. Instead, positions on present-day matters are typically developed by the circulation of responsa (rabbinic rulings) to questions posed to the various rabbinic authorities. Collegial review and community acceptance eventually allow for specific opinions to emerge as dominant. Yet, even when one view surfaces as authoritative, individual rabbis or layman will often defer to their local authority, whose position is considered decisive.

Filial relationships in an orthodox Jewish family

American law allows courts to sever filial relationships and assign them to others. Halakha allows no such possibility. Filial relationships are established at birth and are not tied to

Capsule Physicians helping infertile Orthodox Jewish couples requesting donor eggs should be aware of possible special recordkeeping needs.

R. V. Grazi
Division of Reproductive Endocrinology and Infertility, Maimonides
Medical Center, Brooklyn, NY 11219, USA

J. B. Wolowelsky
Department of Jewish Philosophy, Yeshivah of Flatbush, Brooklyn,
NY 11230, USA

R. V. Grazi (✉)
GENESIS Fertility & Reproductive Medicine, 1355-84th Street,
Brooklyn, NY 11228, USA
e-mail: rgrazi@genesisfertility.com

who functions as the social parent. What secular law calls adoption is viewed as foster parenting in Jewish law. (While this is true in regard to the filial relationship, there are halakhic accommodations to ensure a stable family relationship, such as allowing close contact between parents and children of opposite gender even though they are technically not related halakhically.)

The only act that severs filial relationships is religious conversion, which is viewed as creating a new personality. Thus, from the perspective of the fundamentals of Halakha, a brother and sister who convert to Judaism may marry each other as their conversion has severed all halakhic relationships with their biological relatives. However, such marriages are prohibited rabbinically because sensitivity to the odious nature of sibling incest makes them grossly inappropriate regardless of the subtleties of Jewish law.

Jewish identity is likewise established at birth. A child born to a Jewish mother is fully Jewish regardless of the religious identity of the biological father. (If he is not Jewish, the child has no halakhic filial relationship to him.) A child born to a non-Jewish mother acquires Jewish identity only by a halakhic conversion performed by a properly constituted rabbinic court. If the biological father is Jewish, the child has no halakhic filial relationship to him even after the conversion.

When the gestational and genetic mothers are not the same person, establishing which one is the halakhic mother is of major concern to the Orthodox Jewish family. If one is Jewish and the other is not, the Jewish identity of the child is in doubt. If both are Jewish, the question arises as to which relatives may be married without fear of halakhic incest.

These issues become crucial when and if the child desires to marry in an Orthodox ceremony. Even couples who are far from any commitment to personal Orthodox practice might want their child to be able to marry freely within the total Jewish community. Moreover, in Israel, Orthodox rabbis control all State marriages between Jews.

Establishing maternal identity

Halakhists generally look to precedent in addressing contemporary issues but, as Bick [2] points out, there is no clear source in rabbinic literature that suggests that a woman has eggs. Bleich [3] [4] reviews the early rabbinic discussions, noting the various conflicting opinions and concluding that the dominant position is that the gestational mother is the halakhic mother. More recently, other senior religious authorities [5] opined that it is the genetic mother who is the halakhic mother.

Because the issue is not settled in the halakhic community, the general practice is to require that the child undergo a religious conversion when the genetic and gestational mother are not both Jewish. While this guarantees universal

acceptance of the Jewish identity of the child, it is not without its own problems. Orthodox religious courts will generally not convert a child unless there is substantive halakhic observance in the household. Also, a woman convert may not marry a *kohen* (a descendent of Aaron the High Priest). Moreover, all converts lose their halakhic filial relationships upon conversion, so if the father is a *kohen* his son might not be considered one—a fact that will become obvious when both father and son attend synagogue together. A couple requiring egg donation might want to avoid all these problems by obtaining eggs from a Jewish donor.

Orthodox Judaism is not the only religious legal system that has not reached a definitive judgment on this question. For example, Abdulaziz Sachedina, Professor of Religious Studies at the University of Virginia, advises (email to JBW, April 25, 2013) that there is a dispute among Islamic jurists on the issue. The majority of the Sunni jurists consider the genetic mother to be biological mother while the gestational mother is simply the social mother. A minority among Sunni jurists and some among the Shiite jurists regard the gestational mother to be biological mother. There are others among Shiites and Sunnis who contend that if the surrogate mother is a second wife, whether permanent or temporary (only in *Shiism*), then both are to be regarded as genetic mothers, in which case the laws of consanguinity apply.

The responsibility of the physician for accurate recordkeeping

In the case of donor eggs, it is therefore important for the physician to be able to provide some documentation that the donor is Jewish, if indeed she is. This is especially important when anonymity has been guaranteed and the child will not have access to his or her genetic history at an appropriate time, as may be provided by secular law in some jurisdictions. It is to be generally expected that the donor will not be located at some future date when the child will want to marry. Of course, great sensitivity is required in explaining to the prospective donor why such documentation is important to the infertile couple.

It would not be sufficient to simply report that the donor considered herself to be Jewish. In the United States, a significant number of people who consider themselves to be Jewish are not recognized as such by Orthodox authorities. This is because they were converted or were the children of people converted by non-Orthodox rabbinic courts, or because they relied on the non-Orthodox principle of patrilineal descent, which gives Jewish status to children of a Jewish man and a non-Jewish woman.

Ideally, the physician would have a standing relationship with an Orthodox court or rabbinical authority to whom the donor could be referred for an interview. (An example of an

established Orthodox rabbinical court –one with which we have no personal relationship– that performs these services with professionalism and sensitivity, and with the ability to cater to a secular clientele, is the Beth Din of America, affiliated with the Rabbinical Council of America, 305 Seventh Avenue, 12th Floor, New York, New York 10001, (212) 807–9042.). If no such relationship exists, the Orthodox rabbi of the couple might be appropriate. The rabbi would then provide a letter indicating that he found the donor to be Jewish, and include some identifying information such as the first name of the donor's mother and her date and place of birth. The purpose of this minimal identifying information is to allow the child to marry anyone whose grandmother had a different first name and date and place of birth.

Practically, not every physician can or wants to have such a relationship with a rabbinic group or individual – and many potential donors may be put off by the suggestion that they be vetted by an outside agency. The physicians should then record as fully as possible how they know that the donor is Jewish and give a copy of the record to the couple.

If the donor is a member of an Orthodox congregation and the donor allows the physician to discretely contact the rabbi, the physician can report that he or she has verified her status.

If the donor's parents were married in an Orthodox ceremony and can provide a copy of the religious marriage certificate, the physician can report that he or she has verified her status. If the parents were married in Israel, that would also establish that both parents were Jewish.

If the donor has no relationship to the Orthodox community, the physician can record that the donor declared that her mother, maternal grandmother, and great-grandmother were naturally born Jews who had not undergone any conversion.

The physician should also indicate that there was no monetary advantage to the donor for being Jewish, as for the same compensation she would have been accepted for general donation. In addition, some minimal identification information – such as the first name of donor's mother and the date and place of her birth – should be included.

It should be noted that recent advances in egg cryopreservation have led to the establishment of donor egg banks, which function much like sperm banks in that they make

frozen donor eggs commercially available. Although some banks may offer eggs from Jewish donors, those donors cannot be vetted in any of the ways outlined above. Therefore, the use of frozen eggs is generally not appropriate for Jewish couples who request a verifiably Jewish egg donor.

Particular needs

These specific records are not the only particular needs of Orthodox Jewish couples. As we reported elsewhere [6] [7] [8], these couples sometimes request rabbinic supervision of the laboratory procedures so that no religious doubt can be cast on the integrity of the process; or request sex selection through PGD; or request medical intervention to delay ovulation. All this adds pressure on the physician but relieves pressure on the couple, both of whom are undergoing tremendous stress. Addressing their particular needs is part of the total care good medicine demands.

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