

Supplementary information to the donation and surrogacy guidelines

Purpose of this information

1. This information is intended to ensure that:
 - fertility services providers understand why ACART has revised the guidelines for donations and surrogacy the way it has
 - that all parties know how the consent process works
 - ECART understand why ACART has revised the guidelines for donations and surrogacy the way it has so that they can apply the guidelines as ACART intends.

Social convenience — purpose of this provision

2. The guidelines contain a provision that “the intending parents are not using the procedures for social or financial convenience or gain.” The purposes of this provision are to minimise risks to the offspring and any other parties, and to protect the dignity of future generations.
3. Surrogacy and donor conception have general risks to offspring in addition to biological (pregnancy) risks of surrogacy to the birth mother. Some examples are: avoidable poor health (e.g. due to choosing a donor with a significant inheritable disease); citizenship risks; having no genetic link to parents when that would have been a possibility; disputes arising in surrogacy cases that affect the child, or intending parents refusing to adopt the child. These risks should be mitigated by precluding the use of a procedure to allow the intending parents to prioritise some financial purpose or social purpose over the wellbeing of the offspring.
4. Generally, the use of ART has costs to society and small risks to offspring, so its use needs to be justified. Justifications are: its use mitigates a medical need, or a need associated with relationship-status (including sexuality). However, when using surrogacy and donor conception, our ethical framework must also consider the motivation of parents to have children if, for example, they are placing all the risks of pregnancy onto others without justification, or not considering interests of offspring.
5. Financial gain can include deciding to use a donated embryo rather than using more expensive IVF, without considering the impacts on children of taking away the opportunity for them to be genetically related to their parents if it had been possible.
6. On the other hand, ART may be the best or only option for some people, and they may have carefully considered potential impacts on children and how to mitigate them. If the

latter is the case, evidence should be provided to ECART about this, and how it overrides the apparent social or financial convenience.

7. Social gain could mean avoiding pregnancy for social or career reasons, or using surrogates to have children for intending parents far beyond normal reproductive lifespan. (While care must be taken to avoid age discrimination, the interests of the child in having parents able to care for them is a consideration.)
8. This provision in the guidelines is intended to balance the risks of rescinding the biological link policy, against the need of some people to use a wider range of donation and surrogacy options to form families.

Donations of gametes and embryos, and consenting

9. The removal of the mandatory biological link means gametes and embryos can be donated and used in a greater range of situations than before. For example, single people who are infertile will be able to have surrogates gestate babies for them to which they have no genetic connection (ie both gametes will be donated), as will couples in which both partners are infertile.
10. All gamete donors will need to be aware of the range of potential donation scenarios and what rights they will have over their donated gametes, or embryos created from those gametes. Similarly, embryo donors will need to be aware of the various donation possibilities, and what authority they will have (or not have) in the different scenarios.
11. People might have embryos created for themselves and decide to donate any unused embryos — and the recipients of those donated embryos might then choose to donate embryos too if they have any surplus, if either of them had not had children from the embryos. (ACART has kept the policy of limiting full-genetic siblings to only two families).
12. An attached table sets out all of the possible embryo donation scenarios, showing who is involved and who must consent in which situation (as explained below).

Counselling will need to cover numerous scenarios and factors

13. It is important that counsellors explain to gamete and embryo donors that donation, re-donation and on-donation are all possible and that the gamete and/or embryo donors should specify conditions about the use of their donation when they donate, if they have any. For example, gamete donors could specify that any embryos created using their gametes are not to be re-donated or on-donated.

Gamete donors must consider possible embryo donations and can place conditions

14. Some submitters to ACART’s consultations asked whether gamete donors would need to have consented to the donation of embryos created from the gametes they provided. Some gamete donors might like to know who could use the embryos created from their gametes, and might be concerned that people who are unknown to them might be given surplus embryos by the intending parents.
15. Embryo donation (or re-donation or on-donation) is possible in many situations. ACART stresses the importance of counsellors being clear that embryos could be donated (and possibly re-donated or on-donated) and that the gamete donors will have no further say in those donations other than by conditions they might apply when they originally donate their gametes.
16. Gamete donors can place conditions on how their gametes can be used up until an embryo is formed (or their gametes are used for insemination). Once gametes have been used to create an embryo the gamete donors do not have any further say. However, if gamete donors had consented before these guidelines were in use, and a new donation is planned that they had never thought of, they must be asked if they consent to the now planned use. This is the “retrospective rule” (explained below in paragraph 25). Otherwise, and generally, it is important that gamete donors specify any conditions **before** they make their donation.

Authority over embryos usually rests with the original intending parents

17. Recipients of donated embryos must be aware that the authority over those embryos rests with the original intending parents. This is the case now and will be under the new guidelines.
18. The original intending parents might choose to re-donate the embryos to another recipient (providing the two-family limit would not be breached). The recipients of the donated embryos do not have the authority to stop such a re-donation except for in cases where they have had children from embryos that would be full siblings to the children that would be born from the re-donation — this is described further now.

Authority over embryos: in one scenario it rests with recipients

19. In most cases, the authority to decide what happens to an embryo rests with the person/couple who had the embryos created for their own use. However, in the particular scenario set out below, the authority over embryos rests with the recipients of the donated embryos.
20. Specifically, if the original intending parents:
 - i. did not have a child that would be a genetic sibling to a child born from the donated embryo **and**

- ii. did not have any gametes in the embryos, **and**
- iii. the recipients did have a child that would be so related, **then**
- iv. the authority to consent to the embryo donation rests with these recipients.

Joint agreement needed if recipients had a child and the embryo donors had gametes in the embryos

21. If the recipients of donated embryos have had a child and the embryo donors (who did not have a child) had gametes in the embryos to be donated, then both parties would need to agree to a donation as both parties would have an interest in the consequences of the donation.

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The original intending parents might later have a child

22. It is also possible that original intending parents will:
- a. not have children initially and
 - b. donate surplus embryos to recipients and
 - c. subsequently have a child that would be a full genetic sibling to any child born of the already donated embryos.
23. If this were to happen, and the recipients have had a child, then no further donations could be made by either party as the two-family limit for full siblings would have been reached.

The retrospective rule

24. As is the case now, gamete donors will be able to change or withdraw their consent up to the point the gametes are used to create an embryo.
25. Because of the new donation scenarios that have arisen by rescinding the mandatory biological link, ACART has introduced a provision to cover the potential retrospective effects of the new guidelines. Specifically, when a person or persons had donated gametes or embryos before these new guidelines were issued, and a procedure is now intended that had not been possible under the previous guidelines, the gamete donors must give new consent.
26. This requirement for a new consent applies even when embryos have been created from the donated gametes under the previous guidelines because the gamete donors might not have considered or consented to the use of the embryo that is now intended.

Embryo donors will have no legal rights over the offspring

27. It is particularly important that clinics/counsellors advise embryo donors that they will have no legal rights over the resulting children. The birth mother (and any partner) or the adopting parent(s) in surrogacy cases will be the legal parents of the child and have sole parental rights.

Surrogacy

All parties must consider how their residency will affect relationships in the future

28. With the removal of the mandatory biological link it is now possible for intending parents to have a child, with no genetic link to them, gestated by a surrogate. Although this enables more people to have children and more women to act as surrogates it also raises certain risks.
29. Consequently, ACART has introduced the provision that all parties to the surrogacy must have considered the future residency of those parties. This requirement will ensure the parties will have plans in place to protect the well-being of the offspring and the adult parties. The provision will give ECART the scope to consider whether the residency plans will make such protections available.
30. ACART acknowledges that in surrogacy arrangements involving other countries it could be more difficult to safeguard the wellbeing of all the parties. Consequently, it is important that ECART elicit as much information as needed to ensure the residency plans are sufficient to ensure the child will not be stateless, and the parties can maintain contact with one another.
31. There is a mandatory requirement in the guidelines that all parties to a surrogacy must obtain legal advice — ACART anticipates that the legal advice should include information about the rights (or absence of such rights) of the child to be a New Zealand citizen depending on the citizenship of the surrogate (birth mother).
32. Oranga Tamariki has information on its website setting out the matters the Minister of Immigration may consider when deciding whether to grant citizenship to an individual.
<https://www.orangatamariki.govt.nz/assets/Uploads/Documents/information-sheet-international-surrogacy.pdf>

Family gamete donations

33. In the case of gamete donations between certain family members there can be a greater potential for one party to exert an undue influence over another. Also, depending on who is donating what to whom there can be a greater risk of intergenerational complexity than would occur with gametes from a non-family member.
34. ACART therefore strengthened the provision for undue influence stating that ECART must check specifically for evidence that such influence might have occurred. Similarly, ECART must assess cases involving family gamete donations for intergenerational complexity that could be problematic for the parties involved.
35. ACART has also made a provision that clinics can seek an ethical review from ECART if they have a case for which they believe additional expert consideration would be beneficial.

Who consents to donation of gametes and embryos and in what circumstances

Embryos

- Embryos will have been created for the original intending parents.
- In theory, re-donations and on-donations can keep being made. In practice, this is unlikely to happen often and might never happen at all.
- In cases of re-donation or on-donation the “first” recipients can be referred to as the “prior” recipients.
- Original intending parents consent to initial and any **re**-donation of embryos. Recipients consent to **on**-donations.
- Re-donations are allowed in all but “scenario 1” in the tables below, assuming other conditions are met (such as conditions placed by the gamete donors and that full genetic sibling children can only be born in a maximum of two families). On-donations are allowed in only one scenario (scenario C.3).
- The ability to donate / re-donate / on-donate embryos is based on some combination of:
 - a. who the embryos were created for
 - b. whose gametes were used
 - c. the two-family limit for full-genetic siblings not being breached
 - d. whose family any existing full-genetic siblings are in
 - e. whose family the new full-genetic sibling would be raised in.
- Having a surrogate gestate a child does not change who has the authority over a donation (unless the surrogate keeps the baby, in which case the relevant family is the surrogate’s family).

Gametes

- Gamete donors consent to a use when they donate their gametes or up until such time as an embryo is created.
- Once an embryo has been created the gamete donors do not have a say in the use of the embryo — they need to know this before-hand and place any conditions accordingly before the embryo is created. So, in the scenarios below, the gamete donors will have consented to a use (and possible other uses: namely other donations) and do not need to be approached again to consent to the embryo donations that are being considered (unless the retrospective rule applies).

A. The original intending parents use both of their own gametes

Scenario 1	Scenario 2	Scenario 3	Scenario 4
Original IPs have a child.	Original IPs have a child. Consent	Original IPs do not have a child. Consent	Original IPs do not have a child. Consent
First* recipients have a child.	First recipients do not have a child.	First recipients have a child. Consent	First recipients do not have a child.
Subsequent recipient not allowed.**	Subsequent recipient allowed.	Subsequent recipient allowed.	Subsequent recipient allowed.

**Because of the two-family limit.

- In scenario 3, **both** the original IPs and the recipients who have had a child using the embryos must consent to any subsequent donation. This is because the original IPs have a genetic interest, and had the embryos created for themselves, and the recipient family will have a full genetic sibling if the embryo is donated and results in a living child.

B. The original intending parents use one of their own gametes and one from a donor

Scenario 1	Scenario 2	Scenario 3	Scenario 4
Original IPs have a child.	Original IPs have a child. Consent	Original IPs do not have a child. Consent	Original IPs do not have a child. Consent
First* recipients have a child.	First recipients do not have a child.	First recipients have a child. Consent	First recipients do not have a child.
Subsequent recipient not allowed.	Subsequent recipient allowed.	Subsequent recipient allowed.	Subsequent recipient allowed.

- In scenario 3, **both** the original IPs and the recipients who have had a child using the embryos must consent to any subsequent donation. This is because the original IPs have a (partial) genetic interest, and had the embryos created for themselves, and the recipient family will have a full genetic sibling if the embryo is donated and results in a living child.

C. The original intending parents use two donated gametes

Scenario 1	Scenario 2	Scenario 3	Scenario 4
Original IP(s) have a child.	Original IPs have a child. Consent	Original IPs do not have a child.	Original IPs do not have a child. Consent
First recipient(s) have a child.	First recipients do not have a child.	First recipients have a child. Consent <i>This is the "on-donation"</i>	First recipients do not have a child.
Subsequent recipient not allowed.	Subsequent recipient allowed.	Subsequent recipient allowed.	Subsequent recipient allowed.

- In scenario 3 the recipients can **on-donate** surplus embryos because they have had a child that would be born from the embryos that are to be donated and because the original intending parents did not have a child, nor do the original intending parents have gametes in the embryos. This means the original intending parents are considered to have less of a connection to the embryos. Since the original intending parents have not had a child using the embryos, there is no full-genetic sibling connection either.
- These provisions for consent do not prevent original intending parents from placing conditions on their original embryo donation. For example, if they wish they may consent to embryo donation subject to them not being on-donated.