My statements herein relate to my opinions formed as a result of representing Danielle Teuscher and ZF, Ms. Teuscher's donor conceived child. The lawsuit is Teuscher v. CCB-NWC, LLC, d/b/a NW Cryobank and it is pending in the Federal Court of the Eastern District of Washington. I will refer to Judge Thomas O. Rice's decision dated January 31, 2020 (the "Decision") which is related to NW Cryobank's request to dismiss 3 claims brought by Plaintiff Danielle Teuscher, these claims were: Intentional Infliction of Emotional Distress, Declaratory Judgment that NW Cryobank's customer agreement was unconscionable, and NW Cryobank's breach of the Washington's Consumer Protection Act. The Court was constrained to use a particular legal standard in deciding NW Cryobank's motion to dismiss these claims therefore, his decision has limited legal impact.

The gametes that were confiscated in this case were donor sperm and my legal opinions are limited to this type of gamete. It is also my opinion that state law prevails in most of the matters involving privacy, donor confidentiality/anonymity and contract and property claims against cryobanks.

1. **Can parents of donor-conceived children freely test their childrens' DNA without fear of being sued by the cryobank they used to purchase donor sperm? What about adults who were conceived using donor sperm?**

Assuming that other courts and laws would opine as did Judge Rice in the Eastern District of Washington and pursuant to Washington law, yes, parents of donor-conceived children are able to test their donor conceived child's DNA without fear of getting sued by their cryobank. Most certainly, this case does not reflect on the legal rights of adult donor conceived offspring to do anything, let alone test their own DNA. The Court stated at the Decision, page 16, "Importantly, Plaintiff could still perform DNA testing to discover genetically relevant medical information without seeking information on genetic *ancestry* or other information that would destroy the donor's anonymity. It is the procurement of ancestry information, not genetic medical testing, that gave rise to the breach of contract claim."

Future decisions in pending cases and in cases yet to be filed will undoubtedly develop the states' laws with regard to the ability and one could go so far as to say, rights of parents of donor conceived children, to seek out ancestry information from their donor.

2. Can cryobanks withhold donor sperm purchased for future use by intended parents in the event that these individuals connect with genetic relatives of donor-conceived children found via DNA testing companies such as 23andMe?

I believe that cryobanks can claim that their customers have materially breached their agreement with it and may withhold donor sperm from their customers if these customers connect with genetic relatives of their sperm donor. However, and specific to Ms. Teuscher's intentional infliction of emotional distress claim, the Court noted that NW Cryobank's actions were a "close call", meaning that Ms. Teuscher's claim was in a grey area of the law. Note as the complaint references, NW Cryobank made no attempts to communicate with Ms. Teuscher prior to sending its Cease and Desist Letter claiming that it was entitled to $20,000, taking away her gametes, charging her for its attorneys' fees and restricting her ability to further test or examine her daughter's DNA.

3. Are gametes - cryopreserved sperm - considered a client of a cryobank's personal property?

Yes and since "Personal property" is capable of being owned by someone, there are rights associated with someone owning this personal property. Even though an intended parent may choose to cryopreserve her purchased gametes with a cryobank, the gametes are her own personal property. As stated in the Decision at page 6, "As for the withholding of the gametes, it is important to note that there appears to be no reason to treat the gametes at issue as anything but personal property." The Court rejected NW Cryobank arguments that the gametes were incapable of being owned by a cryobank's customer.

In future cases, I would expect a further development of this personal property right and the expectations that a customer has surrounding her property so as to prevent cryobanks from seizing personal property. In the Decision at page 7, J. Rice further discussed Ms. Teuscher's personal property ownership rights, "While Defendant may not ultimately have the right to withhold the property, Defendant did nothing more than assert a colorable contractual remedy to not perform (i.e.: deliver the gametes) in response to discovering what it perceived was a material breach." Notably though, the Court assumed that NW Cryobank was able to withhold gametes and this was a "colorable contractual remedy" even though it was not a remedy that was drafted by NW Cryobank in its own contracts. The Court cited no law for its reasoning regarding this plausible or "colorable" contractual remedy.

4. Where does this case leave parents who have the same contracts as Ms. Teuscher and have connected or want to connect with donor's relatives?

Unfortunately, since the Teuscher case did not have the opportunity to appeal the ruling of the Court that dismissed the claim which sought to invalidate the part of NW Cryobank's customer agreement containing the liquidated damages provisions. Liquidated damages are contract provisions and a way for a business to assess damages against a customer if that customer breaches their agreement; it is used in contracts where damages are unknown and difficult to ascertain. In my opinion Judge Rice incorrectly made an assumption in his Decision that the liquidated damages provision was reasonable because it was protecting a donor's rights of anonymity.

Judge Rice accepted NW Cryobank's argument that their business model is to GUARANTEE ANONYMITY and recognized that the donor's "rights" to anonymity are memorialized and reflected by the customer's agreement with Cryobank. The Court further reasoned that the language of the agreement balances the privacy interests of the donor with that of the customer's rights. In my opinion, the Court's analysis lacked any reasoning or logic about the donor conceived person's rights to know their background and their biological fathers.

It is my opinion that the Court did not address the reality of the Teuscher case: Ms. Teuscher's purchase of an Open ID donor. This is another reason that the Decision should be given limited legal effect. In any event, if parents contact their donor conceived child's relatives, be forewarned that you could receive a Cease and Desist letter trying to enforce the liquidating damages provision of their contracts. However, bear in mind that receiving a Cease and Desist letter is not the same as getting sued; if parents do receive a Cease and Desist Letter they should immediately contact a lawyer.

Since the Court dismissed three of Ms. Teuscher's claims there is no definitive decision whether an appellate court would have upheld Judge Rice's decision. Again, the Decision has limited legal effect due to the procedural stage of this case. In my estimation, this is an important distinction to note for future cases and for scholars studying this area.

Judge Rice did cite case law that provided an exception (if other qualifications are present) of sorts to parties being bound by their contracts. (Decision, pages 11-12) The exception is that when an unrepresented party makes an unconscionable bargain. It is my opinion that, by definition, cryobanks take advantage of their customers because the customers are working

within a stressed and short time frame to conceive babies, are unrepresented by counsel and asked to sign an on-line agreement that they usually do not read. My unsolicited advice: have your lawyer try to change the language of your contracts before you sign these agreements!

5. If a family wants their donor-conceived child to be able to contact their donor upon reaching adulthood, can they rely on a cryobank's Open ID or Open Donor classifications?

In the Teuscher case NW Cryobank changed the donor's classification after the sperm was purchased and failed to notify the customer. What recourse would families have if a cryobank revokes a donor's Open status? It is my opinion that the Decision stands for the fact that if a cryobank engages in a regularized course of conduct that is unfair and injurious to the public, that conduct can be penalized under Washington's Consumer Protection Statute. (See Decision, page 9). Additionally, and interesting to keep in mind, NW Cryobank admitted that due to a clerical or website error the donor's true wishes for communication were not relayed via its website. (Answer of NW Cryobank, paragraph 26.) My take away: In my opinion, if parents, donor conceived offspring, organizations and any others who have legal standing commence lawsuits when cryobanks alter the communication status of donors and fail to inform the parents and donor conceived offspring, there could still be legal redress if the conduct is part of their regularized course of conduct and injurious to the community.

Written by Jill H. Teitel, Esq. attorney for Danielle Teuscher and Z.F. - for Wendy Kramer's use on the DSR