

ASSEMBLY THIRD READING
AB 556 (Maienschein)
As Introduced February 11, 2021
Majority vote

SUMMARY:

Permits a private cause of action for damages against a person who misuses sperm, ova, or embryos, as specified.

Major Provisions

- 1) Authorizes a private cause of action for damages against a person who criminally misuses sperm, ova, or embryos, as specified.
- 2) Provides that a prevailing plaintiff who suffers harm as a result of the criminal misuse of sperm, ova, or embryos may be awarded actual damages, or statutory damages of not less than \$50,000, whichever is greater.

COMMENTS:

Nature and Extent of Fertility Fraud in Assisted Reproduction. "Assisted reproduction" refers to a variety of techniques and technologies available to individuals or couples who, for any number of reasons, cannot reproduce through sexual intercourse. Federal law defines "assisted reproduction" as any technology that involves the handling of sperm, oocytes (human eggs or ova), and embryos for the purposes of facilitating reproduction. (24 United States Code Section 263(a)(7).) Although assisted reproduction may take a variety of forms, most involve in vitro fertilization or artificial insemination (artificially combining sperm and ova), whether outside or inside of a woman's body, in order to produce a fertilized egg that can divide and develop into an embryo. California's Uniform Parentage Law (Family Code Section 7540 *et seq.*) establishes rules for determining legal parentage in cases of assisted reproduction. Health & Safety Code Section 1644 *et seq.* requires "sperm banks" or "gamete banks" to collect and maintain information about donors, and establishes means by which children conceived by artificial reproduction may obtain health information about (and in some cases the identity of) donors. This bill, however, addresses the "misuse" of sperm, ova, and embryos – or more precisely, the use of sperm, ova, or embryos in a manner inconsistent with the intent of the donor or recipient.

Readily available and popular DNA-Kits (23andMe, Ancestry.com, etc.) have recently resulted in children conceived by assisted production learning that the person they thought was their parent (usually the father) was not their parent, or discovering the existence of siblings, about whom they had no prior knowledge. Among the more unusual (and troubling) discoveries involve children who learn that they were conceived by the sperm of the doctor who provided the assisted reproduction treatment. According to a story in *Voice of San Diego*, at least two women in the San Diego area discovered, after DNA testing, that they had been conceived by the doctors who had provided assisted reproduction treatment to their mothers. (It was not the same doctor.) In both cases, the doctor had informed the mothers that they would receive sperm from an "anonymous" donor; instead, the doctor used his own sperm. A complaint filed last September in a federal district court in Northern California alleges that a doctor "inserted his own sperm into [the plaintiff] without her consent and against her wishes." The complaint further alleges that the doctor promised the plaintiff and her husband that the sperm would come from an anonymous medical student who physically resembled her husband and who would never learn the plaintiff's

identity. However, the doctor used his own sperm in the artificial insemination process. Not only did this breach the promise that the donor would not know the identity of the plaintiff, but also that the donor would resemble the husband of the plaintiff (because the doctor did not remotely resemble the husband in terms of height, hair color, eye color, or complexion). (See "Complaint," *Richards v Kiken*, United States District Court, Northern District of California, filed September 16, 2020.)

According to a report in the *Washington Post*, attorneys who practice in the area of fertility fraud suspect that such deceptive practices may be more common than we assume. Because twenty or thirty years ago "sperm banks were less common and frozen sperm less reliable," some doctors were tempted to use their own sperm, assuming that they were fulfilling their promise to use an "anonymous" donor. (Rachel Weiner, "Woman sues after learning 'anonymous' doctor was her own fertility doctor," *Washington Post*, November 19, 2020.) As easily available DNA testing has brought more of these stories to light, two organizations now maintain websites that track known cases of fraud, collect the stories from the people affected, and advocate for legislative change. (See Donor Deceived website at <http://donordeceived.org>. The organization "Right to Know" provides a link to its website through its Facebook page at <https://www.facebook.com/RighttoKnowUS/>)

Existing Law and Criminal Remedies. Existing law makes it a crime to misuse sperm, ova, or embryos in any manner inconsistent with the intent of the donor or recipient. Specifically, Penal Code Section 367g makes it a felony to "knowingly use" sperm, ova, or embryos in assisted reproduction technology, for any purpose other than that indicated by the donor's signature on a written consent form. While this language protects the donor, another provision makes it a felony to "knowingly implant" sperm, ova, or embryos in a "recipient . . . without the signed written consent of the sperm, ova, or embryo provider and recipient." In short, whether a person commits this crime depends largely upon the representations that the person makes to the donor or recipient. A doctor quoted in the *Washington Post* story, cited above, claimed that he did not violate the law because his identity as the donor was "anonymous" to the patient. However, in the California cases, it appears that the doctors also represented to the patients that their identity would also be anonymous to the donor, and in this sense the doctors clearly violated the California law. While the criminal law punishes the perpetrator, it does not compensate the victim for any psychological, emotional, or financial harm they may have suffered. This bill, therefore, would allow any person harmed by a violation of this law to bring a civil action against the perpetrator. A successful plaintiff would be entitled to recover actual damages, or \$50,000, whichever is greater.

Existing Civil Remedies: Even without this bill, a person subjected to fertility fraud committed by a doctor providing assisted reproduction services would have a number of statutory and common law remedies. For example, Business & Professions Code Sections 17500 and 17200 prohibit "false advertising" and unlawful, unfair, and fraudulent business practices. Because assisted reproduction is a "service" within the meaning of those statutes, the consumer purchasing those services could bring an action alleging false and deceptive advertising and unfair or fraudulent business practices. In addition, a person could allege several common law causes of action lying in tort and contract, including battery, breach of contract, unjust enrichment, intentional or constructive fraud, breach of the implied covenant of fair dealing, breach of fiduciary duty, intentional or negligent infliction of emotional distress, or medical malpractice. Indeed, the complaint filed in the federal district court of Northern California listed twenty-two causes of action. (See "Complaint," *supra*.) However, a cause of action under this

bill would have certain advantages for a person harmed. First, a person could bring an action under this bill even if the facts did not meet all of the elements of the other causes of action. Moreover, because the damages caused by fertility fraud are not easily quantified, this bill has the advantage of allowing the plaintiff to recover actual damages, or statutory damages of \$50,000, whichever is greater.

Finally, most of the other statutory and common law causes of action referenced above would only be available to the woman, or perhaps the couple, who purchased the services or signed the agreement with the doctor or fertility clinic. The children conceived by the misuse, on the other hand, would not have "privity" (a legally recognized relationship such as that of blood, lease, or service) with the doctor or fertility clinic. Under this bill, however, any "person" who is "harmed" by a violation of Penal Code Section 367(g) has the authority to bring a cause of action for damages. If the child could show "harm," then the child would be entitled to statutory damages.

According to the Author:

Making the decision to have a child through Assisted Reproductive techniques is monumental to a couple, and having to experience [fraudulent misuse of sperm, ova, or embryos] can be a massive violation of the personal, fiduciary, and ethical realms. While this is an illegal practice in California, there is a glaring deficiency that the legislature can address. . . AB 556 would amend the California civil code and allow for victims of fertility fraud to seek actual damages or damages of \$50,000, whichever is greater.

Arguments in Support:

The Consumer Attorneys of California (CAOC) support AB 556 because it would address the "systemic problems emerging within the largely unregulated IVF fertility clinic industry." CAOC cites, for example, an NBC News investigation which found that there's no single governmental entity overseeing the fertility industry which, according to CAOC, makes the industry "ripe for fraud and abuse." CAOC sees AB 556 as "an important first step towards building accountability in the fertility industry." However, CAOC also suggests that the bill could be expanded to address the many other problems that emerge in this unregulated industry.

Arguments in Opposition:

No opposition on file.

FISCAL COMMENTS:

None

VOTES:**ASM JUDICIARY: 10-1-0**

YES: Stone, Gallagher, Chau, Chiu, Davies, Lorena Gonzalez, Holden, Kalra, Maienschein, Reyes

NO: Kiley

UPDATED:

VERSION: February 11, 2021

CONSULTANT: Thomas Clark / JUD. / (916) 319-2334

FN: 0000138