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May 4, 2012

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

RE: House Bill 101

Dear Governor O'Malley:

We have reviewed and hereby approve House Bill 101, "Health - General - Posthumous Use of Donor Sperm and Eggs," for constitutionality and legal sufficiency. In reviewing the bill, we concluded that the third reader as printed does not properly reflect the amendments to the bill. As printed the bill has one effect that is arguably not reflected in the title. We recommend that the mistake be corrected in the next corrective bill.

House Bill 101, as introduced, simply provided:

A PERSON MAY NOT USE SPERM OR EGGS FROM A KNOWN DONOR AFTER THE DONOR'S DEATH FOR THE PURPOSE OF REPRODUCTION, UNLESS THE DONOR PREVIOUSLY GAVE CONSENT FOR THE POSTHUMOUS USE OF SPERM OR EGGS.

It also established the requirements for consent for the posthumous use and set criminal penalties. These changes were adequately described in the original title.

Amendments by the Health and Government Operations Committee added provisions relating to inheritance by posthumously conceived children. The Committee

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amendments also added language defining the scope of the criminal provisions, and amended the penalty provision to require that a violation be knowing. These changes are also adequately described in the title.

Two additional floor amendments were adopted. The first, by Delegate Valentino-Smith, amended the criminal prohibition as follows:

A PERSON MAY NOT USE SPERM OR EGGS FROM A KNOWN DONOR AFTER THE DONOR'S DEATH FOR THE PURPOSE OF REPRODUCTION, UNLESS ~~THE~~ : (1) THE DONOR PREVIOUSLY GAVE CONSENT FOR THE POSTHUMOUS USE OF SPERM OR EGGS; AND (2) THE DONOR AND THE INDIVIDUAL WHO INTENDS TO BECOME A PARENT THROUGH THE USE OF THE SPERM OR EGGS DO NOT RECEIVE ANY REMUNERATION FOR THE DONATION OR USE OF THE SPERM OR EGGS.

Under this amendment, the criminal prohibition still applied only to posthumous use of sperm and eggs. This change as well was included in the existing title of the bill.

The second floor amendment, by Delegate Waldstreicher, made changes to the title, including striking the word "certain" in one place, the words "after the donor's death," and the word "except." The Waldstreicher amendment also made changes incorporating the requirement of knowledge into the description of the offense, and removing it from the penalty provision. Finally, the amendment limited the application of the requirements for a valid consent to consents given after the effective date of the bill, and eliminated the requirement that the consent be acknowledged by the donor before a notary public. The Waldstreicher amendment was drafted without reference to the Valentino-Smith amendment and no change in it should have changed the language actually added by that amendment.

The third reader version of the bill, however, combines the changes to the portion of the bill affected by both floor amendments as follows:

A PERSON MAY NOT USE SPERM OR EGGS FROM A KNOWN DONOR ~~AFTER THE DONOR'S DEATH~~ FOR THE PURPOSE OF ASSISTED REPRODUCTION, ~~UNLESS THE DONOR PREVIOUSLY GAVE IF:~~

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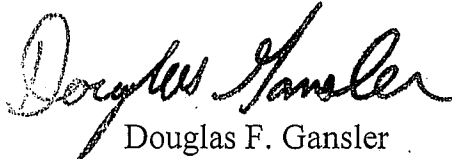
(1) THE PERSON KNOWS THAT THE KNOWN DONOR DIED AND DID NOT GIVE CONSENT FOR THE POSTHUMOUS USE OF THE SPERM OR EGGS; OR

(2) THE DONOR OR THE INDIVIDUAL WHO INTENDS TO BECOME A PARENT THROUGH THE USE OF THE SPERM OR EGGS RECEIVES ANY REMUNERATION FOR THE DONATION OR USE OF THE SPERM OR EGGS.

As noted above, there is no source in any amendment for the change of the conjunction between paragraphs (1) and (2) from "and" to "or." With this change, a person may violate the section either by using the sperm or eggs of a person they know died without giving consent, or by using sperm or eggs if either the donor or the potential parent received remuneration, without regard to whether the donor has died. This application of the criminal provision to the use of the sperm and eggs of living donors would be reflected in the title only by the words "under certain circumstances," which had been in the title from the beginning.

Because nothing in the amendments, nor in the title, gives any indication of intent to make this change and apply the criminal provision outside the context of posthumous use of sperm and eggs, it is our view that the "or" between paragraphs (1) and (2) of Health - General Article, § 20-111(b) was wrong on the third-reader and should be changed to "and" as it appeared in the amendment in next year's corrective bill.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable John P. McDonough
Joseph Bryce
Karl Aro

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May 8, 2012

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

RE: House Bill 101

Dear Governor O'Malley:

In our earlier letter concerning this bill, we noted that, in the course of putting the amendments to this bill together for third reader, the word "or" was substituted for the word "and," expanding the application of the bill to situations involving the use of sperm or eggs from still living donors. On further consideration, it appears that changing the "or" back to "and" does not solve the problem. As a result, we now recommend a different corrective solution.

As noted in the earlier letter, the Valentino-Smith amendment provided:

A PERSON MAY NOT USE SPERM OR EGGS FROM A KNOWN DONOR AFTER THE DONOR'S DEATH FOR THE PURPOSE OF REPRODUCTION, UNLESS ~~THE~~ : (1) THE DONOR PREVIOUSLY GAVE CONSENT FOR THE POSTHUMOUS USE OF SPERM OR EGGS; AND (2) THE DONOR AND THE INDIVIDUAL WHO INTENDS TO BECOME A PARENT THROUGH THE USE OF THE SPERM OR EGGS DO NOT RECEIVE ANY REMUNERATION FOR THE DONATION OR USE OF THE SPERM OR EGGS.

The Honorable Martin O'Malley

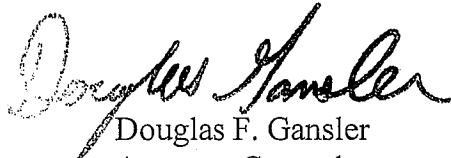
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The lead-in language "unless," combined with the "and," meant that both conditions had to be present for the use of sperm and eggs after the death of the donor to be permissible.

When this language was combined with the Waldstreicher amendment, however, the word "unless" was deleted, and replaced with "if," and the two provisions were converted to the negative. Thus, to retain both requirements it is necessary to use "or" not "and." The problem arises because the combined amendments do not restrict the application of the prohibition on remuneration to situations where the donor is deceased at the time of the use, though that was clearly the legislative intention. It is our view that this problem can be corrected by adding the words "after the donor's death" back in to the lead in language in next year's corrective bill.

Very truly yours,



Douglas F. Gansler
Attorney General

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cc: The Honorable John P. McDonough
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