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Embryos on Ice – An Assisted Path to Parenthood and What You Need to Know

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Basic Elements of an Embryo Donation agreement

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INTRODUCTION

Approximately thirty percent (30%) of assisted reproductive technology (“ART”) cycles result in excess or cryopreserved (frozen) embryos.¹ What happens to these embryos when an individual or couple has completed their family building efforts?² Several dispositional options exist. Parties can choose to donate their excess embryos to medical research (including, stem cell research), discard them (typically by thawing the embryos), cryopreserve the embryos indefinitely, transfer the embryos to the intended parent at a time when the intended parent is unlikely to conceive (sometimes referred to as a compassionate transfer), or donate the embryos to other individuals or couples for reproductive use (“embryo donation”).

Embryo donation is a growing trend in the field of collaborative reproduction. As the American Society of Reproductive Medicine (“ASRM”) noted in its 2013 ethics opinion “Defining Embryo Donation: a committee opinion”:

The use of donated embryos can provide patients a way to conceive that may be less complex and less expensive than gamete donation. It also can provide the donating patients with a sense of fulfillment as their donation helps other patients build a family.³

Once the decision is made to donate embryos, the next step is determining how and where to donate. Many different types of embryo donation arrangements (referred to as an “EDA”) are possible. An EDA may be anonymous, where the parties do not know each other’s identities, and are matched through their physician or an embryo bank. Or an EDA may be known, where the donors and the recipients knew each other prior to the donation (they may be friends or family members), or are matched by a third party entity (a physician/fertility clinic, embryo bank or the internet) and exchange identities. Regardless of the type of EDA, it is imperative that all parties participating in the EDA have considered the medical, psychological

¹ Dr. Craig Sweet, Embryo Donation International, “Embryo Creation vs. Embryo Donation: Reviewing the Issues, Historical Perspectives and Offering Potential Solutions” Spring, 2015

² In 2011 over 612,000 embryos were cryopreserved in the United States.

<https://www.nightlight.org/spotlight/embryo-adoption-census-report-registration/>

³ Ethics Committee of the American Society for Reproductive Medicine: Defining Embryo Donation: a committee opinion. Fertil Steril 2013;99: 1846-1847.

and legal aspects and risks of embryo donation. Each party should have the opportunity to meet with a physician to discuss medical risks, a mental health professional to consider the potential psychological consequences of creating a child with donated embryos, and an independent attorney to consider the legal ramifications of embryo donation. Perhaps even more than other types of third party reproductive arrangements, the medical and psychological effects of embryo donation may have a greater impact on the resulting children -- as the children will be full genetic 'siblings'.

It is also important to consider the makeup of the embryos. Are they genetically related to one or both of the original intended parents (now the donors), or was a gamete donor (egg or sperm) used to create the embryo(s)? If a gamete donor was involved, did the gamete donor impose any limitations on the use of excess embryos? In other words, do the embryo donors have the right to donate these embryos to a third party? A gamete donor may donate his/her gametes pursuant to an agreement where the gamete recipient agrees not to donate excess embryos on to third parties for reproductive purposes. Before engaging in any EDA, make sure you determine the genetic makeup of the embryos and, if a gamete donor has been used, review any legal agreements or consent forms to ensure the original gamete donor has not imposed any limitation on the donation of embryos to third parties for reproductive purposes.

THE EMBRYO DONATION AGREEMENT

A legal contract between the embryo donor(s) ("donors") and recipient(s) ("recipients") is a necessity for any EDA, whether the parties know each other's identities or not. The purpose of the legal agreement is to set forth the parties' expectations and intentions before, during and after the embryo donation arrangement.

TERMINOLOGY

The importance of terminology cannot be overstated for all third party reproductive arrangements. Every agreement should accurately define the role of each party, the fertility clinic and the genetic make-up of the embryos. For example, the agreement and the fertility clinic's informed consent forms should always reference the recipients as the intended parents of any resulting child.

It is very important to distinguish between the term "embryo adoption" and "embryo donation". Although the process of donating embryos is often referred to as "embryo adoption", there are significant differences in the law between adopting a child and the donation of an embryo. Adoption occurs through a judicial order creating a parent-child relationship, and is only applicable to a child who has already been born. There is extensive governmental involvement in adoption

proceedings. Adoptions typically require home visits, court involvement, guardian ad litem appointed for the child, extensive legal fees and judicial review.

For the most part, gamete donation arrangements, including egg donation, sperm donation and embryo donation do not require judicial involvement, governmental interference, home visits, guardian ad litem, etc. Although after the child is born the parties may seek a determination of parental rights in court, this cannot happen until the child has been born. If we refer to an embryo donation as an 'adoption' we are implying the necessity of increased governmental and judicial involvement. Moreover, because adoption laws only apply to living persons, the term "embryo adoption" suggests that an embryo has the same status as a human being – a concept rejected by most state law.⁴

The question of when life begins has been and continues to be a heavily debated issue in the United States. Some believe life begins at the moment an egg and sperm are combined in a petri dish, while others believe life does not begin until a child is born (and yet others believe it begins somewhere in between). ASRM first articulated its position regarding the status of an embryo in 1986 as follows:

The (pre)embryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, it is not yet established as developmentally individual, and it may never realize its biologic potential.

Regardless of one's belief about the status of an embryo, if the goal is to promote the ability to donate excess embryos on to other individuals and/or couples for reproductive purposes, this goal will be best achieved by designating the transfer of embryos as an embryo donation, thus avoiding a more time-consuming and expensive process necessary for adoption.

CONTRACTUAL TERMS

EDA agreements should address everything the attorneys believe may be relevant to the parties' intent. It is important to memorialize how the EDA will work before the transfer, during the transfer and after the transfer has occurred (looking into the future).

Purpose/Facts: The agreement should contain a section defining each party and explaining the reason for the EDA and any other facts deemed pertinent to the

8. ⁴ Louisiana is an exception. *See*, La. Rev. Stat. Ann. §§ 9:130–131 (defining an embryo as having personhood status).

agreement (name of fertility clinic, genetic make-up of gametes, how many embryos are being transferred, where the embryos are stored, etc.). It is important to be very specific about how control of the embryos will transfer from donors to intended parents. Often the transfer is not physical (i.e., the embryos remain in the same clinic), but ownership transfers upon the signing of the agreement. Sometimes a batch of embryos (from one donor) are donated to two sets of intended parents at one time, so it is important to designate which embryos will be transferred to which party (and separate agreements should exist between the donors and each recipient).

Representations and Evaluations: Each party should provide representations about his/her health status, and confirm that all of the information provided to the physician, mental health professional, other party or any other professional involved in the EDA is true and correct to the best of the party's knowledge. If the embryos were created by donated gametes, the agreement should reflect that the gamete donor was medically screened by a physician prior to the creation of the embryos and consented to the donation of embryos to third parties for reproductive purposes. Each party should undergo a medical and mental health evaluation/consultation to ensure that the party is an appropriate participant to the EDA and understands the medical and mental health risks.

State Law: The agreement should reference any state law that may be applicable. Although the majority of states do not have legislation addressing embryo donation, several states do, and if you are applying the law of one of these states you should reference the applicable statute or case law in the agreement and make sure you are in compliance with state law.⁵ Make sure you are working with an attorney licensed in the state whose law will apply to the agreement.

Intent of Parties: The agreement should unequivocally set forth the parties' intent that the recipients shall be the legal parent(s) of the child and donors shall have no rights or obligations to any child conceived. If there is law in your particular state, make sure you are following the requirements of your state statute or case law.

It is crucial that the recipient's obligation to the embryos/resulting child is irrevocable once the embryos are transferred. Because most states do not have laws addressing embryo donation, the only 'proof' a party may have to show his/her intent (should a conflict occur in the future) may be the embryo donation

⁵ See, e.g., Fla. Stat. Ann. Sec. 742.11 -742.17; Ga. Code Ann. §§ 19-8-40 to -43; N.D. Cent. Code sec. 14-18-01 – 14-18-07; Okla. Stat. Ann. Title 10, sec. 556; Tex. Fam. Code Section 160.702; Va. Code Ann. Sec. 20-156 – 20-165; Wash. Rev. Code RCW 26.26; Tenn. Code Ann. § 36-2-401; Wyo. Stat. § 14-2-902 (2015); 13 Del.Code. §8-101. (**Note:** Laws in this area are continuously changing. Make sure you consult with an attorney specializing in embryo donation in the appropriate state).

agreement. It is not uncommon for donors to request that unused embryos ‘revert’ back to the donors after the recipients have completed building their family, or that the donors be given control to the embryos in the event recipients die or divorce. Drafting an agreement with these requests is tricky. If the donors retain control over the embryos a court may find that the relinquishment of rights was not unequivocal and refuse to enforce the agreement. It is important to advise your clients of these risks and discuss alternative options to attempt to satisfy the parties’ desires while maintaining the integrity of the agreement.⁶

Legal Representation: Each party should have independent legal representation to explain the laws regarding embryo donation, the legal risks involved, and review and negotiate the embryo donation agreement. Often the recipients will pay the donors’ legal fees, which may be fine, so long as the donors acknowledge the conflict (i.e., that due to such payment it could appear that the donors’ attorney has some allegiance to the recipients), and agree to waive and never raise it in the future in an attempt to invalidate the agreement. The lawyer should also explain the difference between a birth certificate and a court order, and explain how to obtain a parentage order or adoption after the birth of the child.

Disposition of Embryos: The parties should consider and memorialize what will happen to any excess embryos that are not used by the recipients. Will the excess embryos be thawed and discarded in a medically appropriate manner, or will they be donated to medical research? Perhaps excess embryos will be donated to another set of intended parent/recipients. If the embryos will be donated to subsequent recipients the agreement might require the initial recipients to enter into an embryo donation agreement with the subsequent recipients (perhaps requiring an exchange of identifying information with the original donors, or, if anonymous, an exchange of birthdates)⁷. The parties should consider and set forth in the agreement what will happen to the excess embryos should one or both of the recipients die, or should they separate or divorce.

Future Contact: The type of contact (if any) the parties intend to have after the EDA should be articulated in the agreement. Some agreements require notice of pregnancy and/or notice of birth. Are the parties planning to disclose the EDA to their children? If the parties decide they are not going to disclose to their children do they have a means to contact each other in the future in the event of a medical necessity? What if one family intends to disclose but another family does not? It is important to remember that the children created by these embryos are not parties to the agreement, and, accordingly, are not bound by any term of the contract,

⁶ One possible alternative is to state in the agreement that the recipients are not prohibited from donating excess embryos back to the donors upon their divorce, death, or when they have completed building their family.

⁷ Because any children born from the EDA will be genetically related all parties using the embryos should have some method of contacting each other in the future in the event it is medically or psychologically necessary.

including confidentiality provisions. One question to consider and discuss with your client(s) is whether the child has a right to know that there may be other children living with another family fully genetically related to him/her?⁸ At a minimum, the agreement should set forth how and when such information can be disclosed. An absolute bar prohibiting intended parents or donors from telling their children about the EDA, or that they may have genetically related ‘siblings’ should be avoided. No matter how strongly a client might feel when entering into the EDA, feelings change, situations change, and a parent should never be forced to lie to his/her child because the parent is fearful of breaching a contractual term.

Confidentiality: The agreement should address each party’s right to privacy and set forth any boundaries or limitations with respect to disclosing the EDA to third parties. Although many agreements prohibit disclosure in a public format (i.e., social media networks, news media, Facebook), it is important to carve out an exception to allow parties to communicate with friends, relatives, clergy, medical/mental health professionals and other support networks if they desire. A party should be able to talk to whomever he/she wants about his/her participation in an EDA, so long as he/she does not disclose the other party’s identity absent his/her consent.

Assumption of Risk: Every reproductive arrangement includes risks to each party involved. Risks may be immediate or they may occur in the future. Certain risks are foreseeable or known, while others may not be contemplated at the time of entering into the arrangement. Because EDAs consist of relatively new medical technology with scant legal precedent, the importance of making an informed decision of whether or not to enter an EDA is extremely important. Accordingly, a party’s assumption of risk should always be based on an informed decision. Each party should acknowledge that he/she had the opportunity to consult with independent medical, psychological and legal professionals with expertise in an EDA, and have had all of his/her questions answered to his/her satisfaction. Only after this acknowledgement should each party agree to ‘assume’ the risks, and release every other party from any physical, emotional, psychological or legal harm that may directly or indirectly result from the EDA.

Consider including in the agreement known risks. For example, the agreement should contain language recognizing that embryo donation is a relatively new medical technology, and the laws are continually evolving and changing. One potential ‘known’ risk is that the laws may change, and as such no warranties or promises can be made as to the ultimate cost, liability or obligation of any party which may be affected by future legislation, court decisions or any other judicial process.

⁸ It is important to remember that lawyers are not mental health professionals, and although often faced with psychological issues during representation, the lawyer’s job is to provide legal advice. It may be that the best advice a lawyer can give is a referral to a mental health professional.

The parties may also want to acknowledge that there is no guarantee the EDA will be successful. The agreement may specify for example, that: (a) not all attempts at embryo transfer result in a pregnancy; and (b) there is no guarantee that a pregnancy which does result will go full term, or produce a healthy child.

Financial Commitments: Unlike sperm and egg donation, where the gamete provider may be compensated for his/her time and inconvenience or pain and suffering, there can be no compensation to an embryo donor, as the donor is not being 'inconvenienced' or experiencing any pain or suffering. Although no embryo donation contract should provide any compensatory relief to the embryo donors,⁹ the donors' expenses may be reimbursed. It is fairly typical for the recipients to pay for the donors' legal fees.¹⁰ In addition, once the agreement is executed, the cost of transfer and/or storage of the excess embryos will typically become the sole obligation of the recipients, who may also pay for any additional medical or mental health testing of any party. Some agreements will offer the donors or their children additional mental health counseling after a child is born via the EDA. If offered, it is a good idea to set forth the parties' expectations with respect to reimbursement, and place caps on the amount of reimbursement that will be allowed as well as time limits for when recipient's reimbursement will cease.¹¹

Estate Planning: What happens to excess embryos when a party dies? If the parties have expressed their intention in an estate plan, the estate-planning document will dictate the disposition of the embryos. Because most estate planning laws were passed prior to the advancement of medical technology allowing for gamete and embryo donation, should a party die intestate (without a will), the disposition of excess embryos (and inheritance rights of resulting children) may occur in ways not contemplated or desired by the parties. For example, a recent Texas court determined that a 2 year old would inherit 11 cryopreserved embryos when his parents died intestate.¹²

⁹ Federal law prohibits the sale of organs. *See*, US Federal Organ Transplant Act of 1986. In addition, the American Society of Reproductive Medicine's (ASRM) guidelines for embryo donation states that, "the selling of embryos, per se, is ethically unacceptable." *See*, Practice Committee for ASRM SART, 2006 Guidelines for gamete and embryo donation, *Fertil Steril* 2006;86(Suppl 4):S38-50.

¹⁰ If the recipients are paying the donors' legal fees, a conflict waiver should be included stating that the donors acknowledge their attorney is independent and only representing the donors (despite the fact the recipients are paying the legal fees).

¹¹ For example, a contract may include the following language:

Recipients agree to pay for the cost of Donor's mental health evaluation and agree to pay up to an additional Five Hundred Dollars (\$500.00) for any further mental health consultation sought by donors and/or their children throughout this arrangement for up to sixty (60) days after the birth of any Child conceived using the Embryos.

¹² *See*, Report and Recommendations of Master in Chancery, In the Estate of Yenenesh Abayneh Desta, Deceased, No, PR 12-2856-1. Probate Court No. 1 Dallas County, Texas

The importance of estate planning documents cannot be underestimated. The parties should require that estate planning documents be in effect by a certain time in the pregnancy (or, even better, at the time the embryos are created and/or transferred). The recipients should name a guardian for the child, attempt to provide financial support for the child, and indicate what will happen to any excess embryos consistent with the terms of the agreement. Both donors and recipients should set forth their agreements regarding future contact and the exchange of information in their estate planning documents. The donors and the recipients should also provide direction (which may be different for each of them) as to how and when to tell the child about the EDA and who they would like to provide this information to the child.

Other Miscellaneous Provisions : In addition to the suggested contractual provisions set forth above, most agreements addressing third party reproductive arrangements will also include the following provisions:

- Choice of Law Provision/Venue: providing which state law should govern the agreement in the event of a dispute as well as agreeing to submit to the jurisdiction of a particular state.
- Attorneys' Fees Provision: allowing the prevailing party to recover attorneys' fees in any suit or appellate proceeding.
- Informed Decision: having each party acknowledge that he/she is over the age of 21 and believes he/she understands the agreement and its legal effect.
- Resolution of Disputes: requiring the parties to seek mental health counseling or mediation prior to initiating a lawsuit.
- Enforceability, Severability and Survival: expressing the parties' intent that should a court strike down a provision of the agreement as unenforceable, the remainder of the agreement should stand.
- Notice: setting forth notice requirements.
- Other Agreements: noting that other agreements may exist between the parties (i.e., the informed consent forms), but

(Two year old inherits 11 embryos to be held in trust until he is 18; parents were murdered and died intestate and without dispositional direction left to the fertility clinic).

that the embryo donation agreement should control the rights and obligations between the parties should there be any inconsistency between any other agreement and the embryo donation agreement.

- Entire Agreement/Modification: a section stating that the embryo donation agreement is the entire agreement between the parties related to the EDA, and supersedes all prior writings or understandings between the parties, and that any modifications to the agreement must be in writing and signed by all living parties.
- Execution/Counterparts: explaining how the agreement will be signed, and whether it can be signed in counterparts and/or by facsimile or electronic transmission.
- Parties to the agreement: recognizing that any child that may result from the agreement is not a party to the agreement and may not be bound by the terms of the agreement.

In short, the necessity of a well drafted comprehensive embryo donation agreement is a crucial step for any person participating in an embryo donation arrangement.