



BY ELIZABETH SWIRE FALKER

# TOP TEN DRAFTING TIPS FOR EGG DONATION AGREEMENTS

**T**he relatively low cost and ease of access to egg donation make it likely that your first exposure to third-party-assisted reproductive law may involve donated eggs, rather than a gestational carrier arrangement.

However, both types of agreements address similar issues. During your initial consult with your client, keep in mind that he or she is probably so focused on wanting to become a parent that little thought has been given to the details involved in egg donation and the reasons for preparing an Egg Donation Agreement (EDA).

The client may have contacted you because the egg donation agency indicated the need for a “contract” or because the fertility clinic requested confirmation of “legal clearance” for the egg donation cycle to begin. In fact, it is likely that your client has contacted you, not out of a desire to protect his or her legal interests, but rather because someone told the

client to call you. With little understanding of the importance of these agreements, your client may well underestimate the EDA’s value in protecting everyone involved, especially with regard to issues surrounding parental rights.

Although egg donation arrangements may seem straightforward, in reality third-party parenting arrangements tend to present complicated factual scenarios in a seemingly unending number of combinations and permutations. This precludes the use of standard form agreements, or worse yet, adaptation of a document your clients found on the Internet and which bears no logical or factual relationship to your client’s situation.

The good news is that there are specific legal concepts that each EDA must address, despite varying fact patterns.

The bottom line for your client—and what should be foremost in your mind as you advise your client and/or begin drafting your agreement—is that your client’s goal is to become a parent or to help someone else become a parent. The entire purpose of the EDA is to ensure that the recipient(s) of the donated eggs have full parental rights to any resulting baby and custody, control, and ownership of any cryopreserved preembryos, and that the egg donor relinquishes or otherwise has no parental rights or responsibilities with respect to the child or preembryos created from her donation. You want to ensure that when the recipient or intended parents leave the hospital with their baby, they are protected and their right to be deemed a legal family is protected from as many different vantage points as possible.

## Your hypothetical client

Let's consider what terms and conditions may be important to hypothetical clients as they embark upon their egg donation arrangement with the goal of becoming parents. Although the discussion that follows focuses on the representation of the recipient or intended parents, the concepts apply equally to the representation of an egg donor. Throughout this discussion, the terms "embryo" and "preembryo" are used interchangeably as are

the terms "frozen" and "cryopreserved." The top ten issues are presented sequentially, rather than in order of legal importance.

Nancy and Daniel come to your office for a consult. They were referred by a friend who previously used your firm in connection with another matter. Due to her age, Nancy can no longer use her own eggs to conceive a child with Daniel. Their physician at an infertility clinic (IVF physician) has recommended

that they use donor eggs, fertilize them with Daniel's sperm, and transfer any resulting preembryos to Nancy's uterus. This will enable them to have a baby, which is genetically related to Daniel and gestated and delivered by Nancy. With the help of an egg donation agency, Nancy and Daniel have identified an anonymous egg donor. Before they can begin their medical treatments, the IVF physician wants them to enter into an EDA with their donor.

## That said, following are the "top ten" issues that should be addressed when drafting Nancy and Daniel's anonymous EDA.



**1 The Parties.** Define (even if anonymously) the parties to the agreement, including the medical providers. If the egg donor is married, consider whether her husband should be a signatory to the agreement insofar as he potentially could be deemed the legal father of any child conceived during their marriage. Clarify that the donor is entering into the donation with the knowledge, agreement, and support of her spouse.

**2 Intent.** Clearly establish each party's intent that any child(ren) conceived from the egg donation shall be the legitimate child(ren) of Nancy and Daniel's marriage, that Nancy and Daniel's names are to be placed on the child(ren)'s birth certificate(s), and that the child(ren) shall inherit from Nancy and Daniel's estate.

**3 Informed Consent.** Establish that Nancy, Daniel, and their donor have obtained psychological, medical, and legal advice and that the parties are entering into the EDA knowingly, voluntarily, and with full informed consent.

**4 Reliance.** Establish that the parties are relying on the veracity of the information they each have provided to each other in connection with their

decision to enter into the EDA and whether and to what extent any newly discovered information shall be shared between or among them.

**5 Choice of Law and Relinquishment of Rights.** Identify the law upon which the parties are relying in declaring that the egg donor shall have no parental rights or responsibilities, and identify the point in time at which the donor ceases to have custody, control, or decision-making authority with respect to the eggs and/or preembryos, including any cryopreserved preembryos. Depending on your jurisdiction, a state statute may explicitly provide that an egg donor has no parental rights.

**6 Disposition of Preembryos.** Establish the extent to which Nancy and Daniel have decision-making authority with respect to any preembryos (*e.g.*, for use with a gestational carrier or subsequent donation to third parties) and what can or cannot happen to any preembryos in the event that Nancy and Daniel divorce.

**7 Medical Process and Procedures.** Describe or discuss the egg donation process, including but not limited to the medical procedures

involved, the scope of the medical information pertaining to the egg donor that may be shared with Nancy and Daniel, and the donor's obligation to follow the IVF physician's instructions.

**8 Compensation.** Establish the amount of the donor's compensation for undergoing the medical processes necessary for her to donate eggs; when that compensation will be paid; who is responsible for paying it (Will the parties be using a third-party escrow manager?); and what other costs associated with the egg donation will be paid, when, and by whom (*i.e.*, medical as well as any travel or other out-of-pocket costs).

**9 Communication.** Determine under what circumstances the parties will communicate with each other after the donation is complete (*e.g.*, to convey newly learned medical information), by what means such contact will be initiated, and discuss issues surrounding the parties' desire and intent to remain anonymous. (What happens if there is an intentional or inadvertent disclosure of a party's identity?)

**10 Breach.** Determine what the con-

sequences will be if any party to the agreement breaches the agreement.

Of these top ten issues, one of the most commonly litigated is the disposition of cryopreserved embryos in the event of divorce. With 50 percent of all marriages ending in divorce, the odds are that Nancy and Daniel may one day be fighting over which one of them can use their frozen preembryos. The disposition of

(noting that absent such a document expressing intent, the court could not force one party to parent against his or her will and that such inquiry should focus on whether parties made an expression of mutual intent); see also *Davis v. Davis*, 842 S.W.2d 588, 589 (Tenn. 1992).

Thus, as you draft the EDA and/or confer with Nancy and Daniel, determine whether they signed a consent

using cryopreserved embryos over a competing claim from the other parent). Thus, any designation regarding the disposition of cryopreserved preembryos made prior to the time of divorce could be subject to challenge if either Nancy or Daniel has a change of mind about who should get custody or control of the cryopreserved preembryos at the time of their divorce. *Id.*, see also *Kass*, 696 N.E.2d 174; *Davis*, 842 S.W.2d 588.

Thus, it may be prudent to stipulate in the EDA that Nancy and Daniel can decide only how to dispose of their frozen embryos at the time of a divorce or, if necessary, pursuant to a court order. See also, *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998); *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); *In re Marriage of Dahl*, 194 P.3d 834 (Or. Ct. App. 2008); *In re Marriage of Litowitz*, 48 P.3d 261 (Wash. 2002).

## Compensation

Another issue to address is the donor's compensation and the distinction between the sale of genetic material (eggs) and the concept of donation. Although Nancy and Daniel may argue otherwise, they are not "buying" their donor's eggs. The donor is compensated, regardless of the quality or quantity of the eggs she produces or whether the eggs fertilize with Daniel's sperm or whether Nancy conceives a pregnancy. Once the egg donor has undergone all medical procedures and the eggs are surgically retrieved from her ovaries, she is entitled to compensation, regardless of how many eggs are retrieved or whether Nancy gets pregnant.

The donor is being compensated for her time, effort, and pain and suffering in undergoing medical procedures and inconveniences for Nancy and Daniel to have a chance to become parents. If the EDA does not state this—that the donor is not being paid for her eggs—the docu-



## If the EDA does not state this—that the donor is not being paid for her eggs—the document potentially is subject to challenge on public policy grounds

Nancy and Daniel's frozen embryos in the event of a future divorce also involves the expression of their intent regarding parentage as set forth in the EDA.

Although it did not involve preembryos created through egg donation, the seminal New York case, *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998), involved a divorcing couple who was fighting over whether the wife would be able to use their remaining frozen preembryos to have more children, against her soon-to-be ex-husband's wishes. In determining which party could use the frozen preembryos, the New York Court of Appeals looked to a long line of cases relying on the parties' *intent* at the time they entered into their fertility treatment. In determining how to resolve the couple's dispute, the court in *Kass* relied on a medical consent form the couple had signed at the clinic prior to commencement of their fertility treatment. Pursuant to this medical consent form, the divorcing couple agreed that in the event of divorce they would destroy any remaining frozen preembryos. *Id.* at 175–76

form at their fertility clinic addressing how their preembryos would be disposed of in the event of divorce. Even absent a medical consent form, *Kass* and other similar cases reveal how important it is to ensure that the EDA accurately reflects the intended parents' intent regarding disposition of frozen embryos in the event of divorce.

However, the inquiry does not end with whether or not a medical consent form designates the manner in which frozen embryos will be disposed of in a divorce. Another issue to consider is whether the medical consent and/or the provision in the EDA with respect to disposition of frozen preembryos in the event of divorce will be enforceable at the time of the divorce. See *Kass*, 696 N.E.2d 174; *Davis*, 842 S.W.2d 588.

The case law in the area of third-party assisted reproduction is clear that you cannot force someone to be a parent against his or her will. See, e.g., *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000) (following *Davis* and upholding in a divorce dispute one parent's right not to procreate

ment potentially is subject to challenge on public policy grounds. Even more important, Nancy and Daniel could try to avoid compensating their donor if they do not get pregnant, by arguing that the donor is only entitled to compensation if the egg donation was successful. The EDA should explicitly address this issue and the donor's entitlement to compensation regardless of outcome, or the entire EDA could be at risk.

This brings us to another important aspect of the EDA. At what point in time do the donor's eggs become Nancy and Daniel's eggs? Is there a statute that supports their assumption of "ownership" or "custody" of those eggs and the donor's relinquishment of any parental or other rights? Absent an egg donation statute, such as Conn. Gen. Stat. § 45a-775 (2011) ([http://www.cga.ct.gov/lco/statute/Web\\_Site\\_LCO.htm](http://www.cga.ct.gov/lco/statute/Web_Site_LCO.htm)), there are several points in time at which the donor could be deemed to have completed her donation and relinquished parental rights.

Typically, the donation is deemed to take place at or around the time of the surgical aspiration if the donor's eggs, the retrieval procedure. Hopefully you practice in a jurisdiction that provides statutory guidance on these issues. In its absence, consider the donor who is hazy and confused after being anesthetized and decides while in the recovery room that she has made a mistake and changes her mind about her decision to donate. Unfortunately, however, her eggs have already been combined with Daniel's sperm and there are preembryos developing in the embryology lab on the other side of the recovery room wall. What then? Are those now

the donor's and Daniel's preembryos?

The EDA should either specifically identify the applicable statute or identify a point in time at which the donation is complete and Nancy and Daniel's rights have fully vested, if for no other reason than to guide the parties in their decision-making during the conduct of the egg donation cycle. The identification of the time at which the donation is complete provides a clear course of action for everyone involved, including the medical professionals. Indeed, the entire point of a carefully crafted EDA is to make sure that the donor, Nancy, and Daniel all understand the implications and ramifications at every step in the egg donation process.

Absent an egg donation statute, such as the one in Connecticut, any dispute regarding parental rights will boil down to the parties' intent. *See, e.g., Johnson v. Calvert*, 851 P.2d 776,

782 (Cal. 1993) (holding that when defining or identifying a mother in third-party assisted reproductive arrangements, it is: "she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under [the] law.").

By addressing these top ten concepts at play in egg donation arrangements, the EDA should specifically outline the parties intent, thus ensuring that Nancy and Daniel—not the donor and/or her husband—are Mom and Dad. **FA**



**Elizabeth Swire Falker** is an attorney practicing in the areas of reproductive and adoption law. To contact her, visit [www.storklawyer.com](http://www.storklawyer.com).

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