

EGG DONOR CONTRACTS: CONCERNS OF RECIPIENTS AND CONCERNS OF DONORS

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MR. BENARDO:

I do not have a PowerPoint presentation for you. And I am not from California, I am from New York. So I take, to put it nicely, maybe a more realistic view of things.

As Theresa mentioned, the objective is not to get into litigation and that is true, but I imagine some of you are here today because you're thinking of practicing in this field when you graduate. And I would say that maybe one of the most important characteristics to develop or try to develop would be a thick skin, because you get yelled at a lot. I get yelled at a lot every day.

Our clients are going through some of the most terribly difficult, emotionally difficult experiences one can imagine; repeated miscarriages, hormone injections every day. It can impair the judgment of people and you have to really get used to the fact that people may not be thinking clearly when they are talking to you and you have to still represent them regardless of whether you like them or not many times.

So I want to talk about egg donors and recipients. That's the nomenclature that is used. And I don't want to presuppose too much. So if I am going through territory that you are not familiar with I apologize for that. But, I think it may be helpful before we start to talk about the contract to define some terms.

What are egg donors? Now, I am not going to ask if anyone has been an egg donor, but has anyone known anybody who's been egg donor? And you can raise your hand if you do.

Egg donors are people who wish to provide their gametes, their eggs, so that another couple or an individual can use them for appropriate purposes. I am going to talk specifically about those women, and they are all women, and they are more homogeneous than recipients in the sense that they are over the age of 21, no more than 30 or 32 if it is an anonymous donation -

these are guidelines set by the ASRM - and they are interested in helping somebody have a family, probably secondarily helping somebody have a family. To be pragmatic about it, they are interested in getting paid in order to help somebody have a family.

The ASRM, The American Society of Reproductive Medicine, they set guidelines, they are not laws, they are guidelines, and all member agencies and all IVF practices and individuals that belong to the ASRM have pledged to follow them.

They do not always follow them. Some of the places that do not follow them are located in California. Not related to Theresa's practice.

But one of the guidelines is you cannot get paid more than \$10,000. In fact, in the year 2000, it was established that payment over \$5,000 to an egg donor required justification, and payments over \$10,000 were inappropriate. They have not changed that guideline in ten years.

I am going to give you some anecdotes from my own program. I practice in New York City and several other locations. And egg donors sometimes are recruited by IVF clinics themselves. A lot of the New York clinics have their own in-house donor pools. And other times there are private programs, agencies that recruit donors and helps to match them up with recipients. And we will talk a little bit about what recipients are.

But we pay donors in our program \$10,000. That is our view. We feel that we are recruiting in New York and we are trying to attract people who are motivated. But the contract that we will get to in a minute is very interesting because there is no consideration paid for the donor's involvement until she gets to retrieval. It is a personal services contract after all, the egg donor agreeing. That is drafted by the recipient's counsel and reviewed by the donor's counsel. So donors get into this because they are interested in, you know, getting paid, they are interested in helping a family, it is usually a combination of altruism, and "I'm a graduate student, I have student loans, or I'm 25 and I left my company and I'm going freelancing and this could help me and I, you know, I don't think it's going to impact my schedule very much." Although it is a lot more work than people ordinarily think it is. I think donors should be paid more, but no one is ever going to take that cause up.

The payment to egg donors is one of the most controversial topics still around the world. And the \$10,000 (or \$8,000 as some of the New York clinics pay, or \$5,000 in other parts of the country), is largely paid upon successfully completing the retrieval. The terminology that is used is never payment for your genetic material, in fact in the contract it will say you are being paid for your time and effort involved in the donation process.

But quite realistically if the cycle is cancelled because the donor is not

responding to medications or the recipient individual or couple backs out, then there is no retrieval. If there is no retrieval, there is no payment. So it is sometimes playing around with language.

Another thing that donors have to be is—well, they cannot do it more than six times. Another ASRM guideline is that donors in their lifetime, and this is a view of doctors thinking about the risk factors in doing this repeatedly, and the hormone injections that are involved, you cannot do it more than six times in lifetime. Some clinics do not always follow that as a guideline. If you are an individual patient going through your own treatment there is no limit to how many IVF treatments you can have on your own. But donors have to be over the age of 21, not do it more than six times, not get paid more than \$10,000, and they should be working at a reputable licensed ASRM compliant clinic.

Donors are a more homogeneous group, although they have many different ethnic background, people from all different walks of life can become donors, they have to be women, they have to be over 21, that's the common ground.

But who are recipients? Recipients, sometimes the intended parents, that is the nomenclature that is used, are people who need eggs to create embryos to then use for themselves, perhaps to put into the uterus of a gestational carrier. A gestational carrier is somebody that has no genetic relationship to the child, although some would argue she still has a biological relationship with the child because it is her placenta, it is her uterus that is nourishing this child. But genetically if there were DNA tests taken, she would not show up as related to the child in any way.

Recipients can be couples in their thirties, couples even younger sometimes, or individuals who have some ovarian issue that prevents them from using their own eggs. But, by and large, they seem to fall into the category of being on the older side, a couple in their forties who has gone through many rounds of IVF, and because of advanced maternal age or because of other issues it is advised by their physician that using their own eggs is not going to be possible, it is not viable.

So people look for egg donors to substitute for the recipient mother. And whatever is important to people can be found - if it is somebody's height, if it is somebody's ethnic background and educational background, sporting ability, musical ability, whatever's important can be located through all the IVF clinic programs and private programs that are out there.

Recipients generally select donors. If you are familiar with some of these databases that have lots of donors - you have to register if you are a patient some place to be able to find a donor. It is largely anonymous, but it does not have to be. It does not have to be, and there is a trend now

towards known donations. A lot of people want to be able to tell their child about his or her heritage and history and you can do that better if you know more about the donor or even have met the donor.

But most donors are not into this to make it too real, it's sort of "I am giving you a piece of my DNA, but don't make me feel like I'm creating a baby or something," or "I am giving a baby of my own away."

So these are the concerns that donors and recipients have. And these concerns are incorporated or memorialized to use legal parlance, into an egg donor agreement.

When you go to an IVF clinic to do this and you go to Albany Medical Center, I do not even know if they have their own donor program, they probably only require you to sign informed consent forms. You would not have to have a lawyer; you wouldn't have to have a contract.

As lawyers we think it is better and more appropriate and more protective to have an agreement. And what goes into the agreements are categories that are of importance to both recipients and donors.

Primary perhaps, especially from the donor's side, is payment. Primary from the recipient's side might be liability. What happens if something goes wrong and this donor is injured during the course of the retrieval process? I am signing an agreement. I am putting them into this position. They are working on this arrangement for me. Can they sue me? Well, they might be able to if they get past possibly the cause and other things, but there's an insurance policy that's almost always purchased on behalf of the donor. It's called an Oocyte Accident Insurance Policy, and it covers complications related to the retrieval process. It has paid for by the recipient.

Other concerns that donors have and recipients have, what if they do not want to do it? What if they back out during the course of this? That is when we get back to the fact that this is a personal services contract. There's no specific performance. When there used to be Lehman Brothers or Bear Sterns we would have clients, when things were imploding back at the end of I think it was '08, we would have people that wanted to stop the process. We cannot do it right now, financially it is just not possible for us, but their donor had already started taking medication, but had not gotten up to retrieval yet. Can she force them to go through with it? Not when they get paid upon retrieval.

Similarly, recipients sometimes get pregnant on their own and no donor can be forced or no recipient can be forced to continue on with something.

What if the donor, you know, gets a job offer right before she's about to go to retrieval and she does not want to lose that opportunity? It is more valuable to her than making the six, seven, eight, ten thousand dollars that

she might be making. She cannot be forced to do it.

Some lawyers put penalty clauses into these egg donor contracts. I call them penalty clauses, they do not because they view it differently. And it says, and I am still astounded that sometimes these things are actually drafted, it says that if a donor does not continue on with the retrieval process and she has no valid excuse for dropping out, that she's going to be responsible for paying back all expenses that the recipient family incurred.

Now, a donor will look at that and she will look at that with her lawyer who will almost always say we're going to take that out, or that's never going to carry any weight, what judge is going to say, you are not going through with this - well, then you have to pay this family back their twenty or thirty thousand dollars that they've paid. What judge is going to say, oh, you must go through with this, they are going to wheel you in and require you to have the retrieval process. It is sort of a coercive element.

So other concerns would be disposition of embryos, and Theresa started talking about people's concerns with leftover embryos, frozen embryos.

What about a donor that may not know the recipient family, but does not like the idea of their embryos being destroyed or even provided for research?

All those things can be put into the contract and those are enforceable things.

Meeting later on, which is something I talked about just a little while ago, is of increasing importance. Many families would like the idea of having their donor available to meet with their child when he or she is twelve or 13 or 15 or old enough to understand what's going on and what happened to bring them about. It is a nice concept. Is it something that can be enforced? No. It is more of an expression of intent at the time the contract is signed than anything else.

A donor who is 25 who says, sure, I think it is a great idea, I will meet the child when, you know, when the child is twelve. May be twelve years later at thirty-seven with three kids of her own, she is not interested at that point in revisiting that part of her life. Nobody can force her to because she signed an agreement twelve years ago.

So there are certain elements of the egg donor contract that are necessary, are important, and are enforceable. There are other elements that are there possibly to provide some sort of coercive aspect and are not going to be enforceable, but at least show some sort of intent for a meeting of the minds at the time it is happening.

Let me see if I have—I think I have covered everything. If you have questions later I'd be more than happy to take those questions and I appreciate your being here.

