

Embryo Donation – Where Do We Go From Here?

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It is actually estimated that there are well over 100,000 frozen embryos in storage in the United States alone. And, with the recent advances in Assisted Reproductive Technologies (ART) and improved cryopreservation techniques, this technology has led to the wider use of frozen embryos for both donation and research. With that in mind, embryo donation still remains a comparatively new possibility that is just gaining ground as another viable option for those individuals and couples who have been desperately wishing for a child. In fact, it is often the only remaining viable alternative for those who have already been on the rollercoaster of infertility for many years and who have already invested significant amounts of time and money into their journey.

Although the number of available embryos may seem high, the actual number of embryos available to couples and individuals is really *much lower* since it is often a difficult decision to donate leftover embryos to someone else. In fact, many couples choose to destroy their remaining embryos or maintain them in the frozen state indefinitely since they are not willing to be contacted by any resulting child. On the other hand, the major motivations for the donation of one's embryos are usually to give the embryo a chance at life or to allow other infertile couples to have a child.

What the ideal solution for any person is, whether to thaw and destroy, donate to stem cell research or donate to another person, may be the biggest decision faced by those with embryos in storage – in fact, it is a decision that is highly ethical, morally, and emotionally charged. For example, full siblings may never know one another, and there is the issue of contacting genetic siblings and parents in the event of health and medical issues.

Legally, it is also often confusing since one school of thought believes it to be an adoption while others a donation – with those choosing adoption seeing the embryos as children awaiting their destiny. Whatever way you choose to view this possibility – every donor must certainly consider the following possibilities when making your decision: a.) whether you will want the embryos for future siblings for any of your existing children; b.) how you feel about the real possibility that there may be other children alive who are the result of your own genetic material or that of your partner and a donor; and, c.) the pain of not knowing the result of your donation.

Once a couple has decided to donate their embryos, there is one additional legal issue that cannot be disregarded; this issue revolves around the agreement between the donor parents of the embryos and any egg or sperm donor that was involved in the creation of these embryos. Specifically, if an egg donor or sperm donor agreement is in place that spells out the donor parents cannot donate these embryos to another couple without his or her consent, then this must absolutely be followed in order to protect the rights of the recipient parents. It would be a tragedy to the recipient parents to have to deal with any litigation that may result if an egg donor discovered that the embryos from her donation were donated to another couple without her consent. Although the rights of the egg donor have already been terminated, this sort of dispute can be a very scary discovery for a recipient couple that has already given birth to their resulting child.

On the other hand, the options that are available to recipient couples and individuals are very few and far between once it has been determined that they need to move onto donor embryos. For example, you can sign up with a doctor's office that has a lengthy waiting list for available embryos, or you can contact an adoption agency such as the *SnowFlakes Embryo Adoption Program*, whereby the participants are required to follow the same requirements that exist for traditional adoption. The other options are to locate embryos independently online (which is absolutely not recommended without some guidance from a physician, lawyer or psychologist) or to sign up with a non-profit agency, such as *Embryo Options*, which provides the parties the option to tailor their arrangement to their own needs and desires, such as whether to have a relationship with the other party that is open, semi-anonymous or totally anonymous. Each of these programs are different in many aspects, and it is really a personal choice of any recipient couple or individual to choose the program that best fits their needs, whether religious, financial or otherwise.

In fact, once a couple or individual has reviewed the available programs, they need to be certain of a number of things before making a decision: 1.) Be aware of all financial requirements that are involved with these embryos, including but not limited to medications and clinic fees, if any, and whether the donors are requesting any fees in return; 2.) Ask questions about the program's own guidelines and protocol; 3.) Ask the program how donor parents and recipient parents are selected and matched. Discover if the parties have the option to turn down embryos that have been offered to them or not; 4.) Ensure that the recipients and their doctor are entitled to the embryo quality reports, the (redacted) medical records of the donors and the results of any successful pregnancies.

Yet, no matter if you are a donor or a recipient, the parties must follow a protocol that protects everyone, to include any resulting children. In fact, the parties must sign legal consents, have a counseling session with a psychologist or social worker, and undergo infectious disease screening. The purpose of counseling is to discuss issues such as disclosure to the child at an appropriate age – both for medical and social reasons.

From a legal standpoint, the legal system, nor the states' legislatures, have clarified the actual donation of embryos from one couple to another. However, the case of *Davis v. Davis* (Tenn. 1992), as well as several others, have essentially given embryos the status of property when a dispute over the embryos arises out of a marital dissolution action. The courts chose to decide against "forced procreation," instead of providing the embryos with a higher (protected) status due to their ability to become life. In an effort to clarify the status of the embryos from the standpoint of donation, attorneys in this field have chosen to use this same argument to treat the embryos as the donation of genetic material, or property in a sense, from one couple to another much like egg donation.

Essentially, the lessons learned over the last decade have shown those attorneys practicing in this field that precise contract drafting is absolutely essential – your attorney must carefully scrutinize the contract terms since there is strong dicta favoring enforceability. Furthermore, the reimbursement of costs that may be requested by a donating couple must be considered very carefully before agreed upon by a recipient couple. Certainly, any additional medical testing required by the recipients' clinic, as well as any outstanding storage fees, are acceptable fees to be paid; however, anything additional can make the donation itself questionable. To be sure, the donation of embryos does not involve the same sort of pain and suffering associated with the donation of eggs; therefore, it is best to stay away any additional reimbursements that can be construed as the purchase and/or sale of embryos.

Finally, the success rates from the transfer of frozen embryos is certainly lower than that of a fresh embryo transfer, as is reported by the American Society for Reproductive Medicine (ASRM); however, the availability of this option of donor embryos is certainly one that should be considered by everyone, donors and recipients alike. To donors, it is the chance to help others and provide life to their frozen embryos; while, to recipients, it is a viable alternative in their journey to creating their families – just remember to ensure that all parties, to include the resulting children, are protected.

*The information in this article is not, nor is it intended to be, legal advice. You should consult an attorney for individual advice regarding your own situation.