

CAN OWNERSHIP OF REPRODUCTIVE MATERIAL BE TRANSFERRED?

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Regulation 18 of the Regulations Relating to the Artificial Fertilisation of Persons provides for an ownership scheme in reproductive material — eggs, sperm and embryos — outside the human body. Within this regulatory scheme, the following question is pertinent: can ownership of reproductive material, once acquired in terms of reg 18, be transferred to someone else? To answer this question, reg 18 is analysed using well-established tools of statutory interpretation. The conclusion drawn is that a broad interpretation of reg 18 should be followed that allows for the transfer of ownership. Attention is drawn to case law that contradicts this conclusion, but it is shown that the rationale for the relevant decision lacks any depth. Accordingly, the decision should urgently be challenged in the public interest.

Eggs – embryos – gametes – ownership – reproductive material – sperm

INTRODUCTION

It has been a decade since the promulgation of Regulations Relating to the Artificial Fertilisation of Persons (GN R175 in GG 35099 of 2 March 2012). Regulation 18 provides for an ownership scheme in reproductive material — eggs, sperm and embryos — outside the human body. The question that I analyse in this note is whether ownership in reproductive material, once acquired in terms of reg 18, can be *transferred* to someone else. For example, can a wife and her husband agree to be the joint owners of their embryos? Can a surrogate mother agree to transfer her ownership of the embryos to the commissioning parents? Can a sperm bank transfer ownership of donated sperm to a couple who pay the bank for the sperm? Would agreements such as these be null and void? I have previously touched on the question of the transferability of ownership of in vitro embryos as part of a broader topic (D W Thaldar ‘The in vitro embryo and the law: The ownership issue and a response to Robinson’ (2020) 23 *PER/PELJ* 1 at 10). However, in this note I investigate the question of the transferability of ownership of reproductive material in more depth — and reach what I believe to be a more well-considered position.

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AN OVERVIEW OF RELEVANT LEGAL PRINCIPLES

To understand the question about the transfer of legal ownership of reproductive material, it is important to start with a brief overview of some relevant legal principles.

The concept of ownership

Ownership is best understood as a bundle of rights that an owner has in respect of the owned object (*Willow Waters Homeowners Association (Pty) Ltd v Koka* 2015 (5) SA 304 (SCA) para 22). This bundle of rights includes, most prominently, the power to use (*ius utendi*), to enjoy the fruits (*ius fruendi*), to consume (*ius abutendi*), to possess (*ius possidendi*), to dispose (*ius disponendi*), to reclaim (*ius vindicandi*) and to resist any unlawful invasion of the object (*ius negandi*) (C G van der Merwe ‘Things’ in J A Faris (ed) *The Law of South Africa* 2 ed vol 27 (2014) para 135). The right to dispose of the object is most relevant for present purposes, as this includes the power to *transfer ownership* to someone else.

It is important to note that ownership is legally restricted in many ways (Van der Merwe op cit paras 136 and 139). For example, one can use one’s car to drive to the shops, but one must do so according to the rules of the road; and one may smoke one’s own marijuana privately, but one cannot sell it (*Minister of Justice and Constitutional Development v Prince* 2018 (6) SA 393 (CC)). Several restrictions also apply to the ownership of reproductive material. Most prominently, s 60 of the National Health Act 61 of 2003 restricts trade in gametes to a cost–recovery regime.

The determination of the scope of ownership rights that an owner enjoys in the owned object is therefore a subtractive exercise. It starts with the full complement of rights encompassed by the bundle and subtracts specific instances of legal restriction on ownership.

The acquisition of ownership

South African law differentiates between the *original* acquisition of ownership and the *derivative* acquisition of ownership (Van der Merwe op cit para 169). Derivative acquisition refers to situations where an owner acquires ownership from a previous owner (Van der Merwe *ibid*). Our daily lives are filled with examples where this transpires: for example, when we buy groceries at the local supermarket or give pocket money to our children. When a person buys groceries, ownership of the groceries is transferred from the shop to the buyer (assuming that the shop was the owner), and when a mother gives pocket money to her child, ownership of the money is transferred from her to the child (again, assuming that the mother was the owner).

Original acquisition, by contrast, refers to situations where an owner does not acquire ownership from a previous owner (Van der Merwe *ibid*).

This is most often the case when a new legal object comes into existence. Examples are (a) a puppy that is born, (b) wine that is made from grapes, and (c) a tube of blood that is withdrawn from a patient. This is not to say that the puppy did not exist as a *physical* object before it was born — of course it did — but it only becomes a *legal* object when it has its own independent existence. In the context of medically assisted reproduction, examples of new legal objects coming into existence would be when gametes are separated from a human body, or when an embryo is created (see D W Thaldar ‘Performing IVF for surrogacy before confirmation of the surrogacy agreement by the court: A critical analysis of recent case law in South Africa’ (2023) 10 *Humanit Soc Sci Commun* 1 at 4). As with the puppy, the gametes existed qua *physical* objects prior to being separated from a human body, but not as *legal* objects. While the gametes were still in a human body, they were part of the relevant person’s legal subject status and were not legal objects. The reverse happens when a woman is inseminated with sperm, or when an embryo is transferred to her uterus. Once inside the woman’s body, the reproductive material loses its legal object status and becomes part of the woman’s legal subject status.

Who would be the owners of the new legal objects mentioned in (a) to (c) above? The answers are: (a) (the puppy) the owner of the puppy’s mother dog (because the owner is entitled to the fruits of the owned object); (b) (the wine) assuming that the wine is more valuable than the grapes, the winemaker (because of the legal doctrine known as *specificatio*); (c) (the blood sample) the pathology laboratory, if there was proper informed consent (because of the operation of the National Health Act and its regulations). It should be noted that these answers are the *default* legal positions, that is, the positions that apply in the absence of agreements that sufficiently arrange the legal relationships. The persons involved can *agree* that someone else will be the owner of the new legal object upon its creation — provided, as always, that such an agreement is within the bounds of the law. For example, the winemaker and the owner of the vineyard who provides the grapes can agree that they will be joint owners of the wine that the winemaker intends to make.

Can reproductive material be owned at common law?

Reproductive material is a kind of human biological material — that is, any part of the human body that is separated from the body itself (D W Thaldar et al ‘Human biological material’ in J A Faris (ed) *The Law of South Africa* 3 ed vol 26(1) (2020) para 2). Given the origin of human biological material in the human body, which is not susceptible of ownership, the question of whether human biological material is susceptible of ownership at common law has been contested (Academy of Science of South Africa ‘Human genetics and genomics in South Africa: Ethical, legal and social implications’ (2018) at 85, available at <http://research.>

assaf.org.za/handle/20.500.11911/106, accessed on 23 September 2020). However, in a recent article, Thaldar & Shozi investigate this issue in the context of human biological material such as blood and tissue samples that are used in research (Donrich W Thaldar & Bonginkosi Shozi 'The legal status of human biological material used for research' (2021) 138 *SALJ* 881). The authors highlight that South Africa's common law — Roman-Dutch law — is a flexible system that develops with the times, and that in Roman-Dutch law anything that is useful and valuable and not part of something else or of a human body, and which is capable of human control, qualifies as a legal object that is susceptible of private ownership (ibid at 884). Accordingly, we suggested that although human biological material such as a tissue sample would not have been susceptible of ownership in Roman times (because the Romans did not have much use for it), a tissue sample that is currently used for an activity such as research is indeed susceptible of ownership, because it is (a) useful and valuable in research, (b) removed and hence separate from a human body, and (c) capable of human control (ibid at 884–9; see also D W Thaldar et al op cit para 3). We supported our conclusion with reference to judgments in jurisdictions that share the same principles as found in Roman-Dutch law (*R v Kelly and Lindsay* [1999] QB 621 (England & Wales); *Roche v Douglas* [2000] WASC 146, (2000) 22 WAR 331 (Australia); *CC v AW* 2005 ABQB 290 (Canada); *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1 (England)).

In a subsequent article, Shozi and I turned our attention to the passages in the Digest that were historically interpreted as casting doubt on whether human biological material can be susceptible of ownership (D W Thaldar & B Shozi 'South Africa's latest medically assisted reproduction draft regulations: Close, but no cigar' 2022 *TSAR* 1). These passages include 'liberum corpus aestimationem non recipiat' (D 9.1.3 (Gaius 7 ad ed provinc)) and 'liberum corpus nullam recipit aestimationem' (D 9.2.13pr (Ulpianus 18 ad ed)) which can both be translated as meaning 'the body of a free person is not susceptible of valuation' and 'dominus membrorum suorum nemo videtur' (D 9.3.7 (Gaius 6 ad ed provinc)) which means 'no one is deemed to be the owner of his own limbs'. We suggested that, if read in context, these passages contemplate limbs that are still *part of* the body, whereas human biological material is by definition *separated from* the body (Thaldar & Shozi 2022 *TSAR* op cit at 6). Accordingly, we suggested that it would be an overbroad construction to apply these passages to human biological material. We furthermore highlighted that Grotius's definition of property — 'Zaken noemen wy hier al wat daer is buiten den mensch, den mensch eenichsints nut zijnde' (Grotius *Inleiding* 2.1.3), which means 'property is everything excluding or external to humans that has some use' — is remarkably broad and would include reproductive material outside the human body, as it is useful in medically assisted reproduction

(Thaldar & Shozi 2022 *TSAR* op cit at 7; see also D W Thaldar 'Fertility clinic consent forms and the disposition of reproductive material upon a fertility patient's death: Legal reflections' (2022) 112 *SA Medical J* 744).

Note that these articles postdate the Regulations. At the time that the Regulations were promulgated in 2012, the question whether reproductive material is susceptible of private ownership at *common law* was still under-investigated in the academic literature, and the answer far from certain. Another vexing question that is an unavoidable consequence of the propretisation of reproductive material is: which mode of original acquisition would apply to *in vitro* embryos? In other words, when an embryo is created by an embryologist in a laboratory by fertilising an egg (that is owned by one person) with a sperm (that may be owned by another person), and there is no agreement between the persons involved regarding the ownership of the embryo, who will at *common law* be the owner of the embryo? This question too was under-investigated in 2012 when the Regulations were promulgated, and remains so. It is against this background that reg 18 should be interpreted.

INTERPRETING REGULATION 18

Regulation 18 reads as follows:

- (1) Before artificial fertilisation, the ownership of a gamete donated for the purpose of artificial fertilisation is vested –
- (a) in the case of a male gamete donor but –
 - (i) before receipt of such gamete by the authorised institution to effect artificial fertilisation by the authorised institution which removed or withdrew the gamete; and
 - (ii) after receipt of such gamete by the authorised institution that intends to effect artificial fertilisation, in that institution;
 - (b) in the case of a male gamete donor for the artificial fertilisation of his spouse, in that male gamete donor; and
 - (c) in the case of a female gamete donor, for the artificial fertilisation of a recipient, in that female gamete donor.
- (2) After artificial fertilisation, the ownership of a zygote or embryo effected by donation of male and female gametes is vested –
- (a) in the case of a male gamete donor, in the recipient; and
 - (b) in the case of a female donor, in the recipient.'

Two possible interpretations of reg 18 seem reasonable, and will be analysed:

- The supple interpretation: reg 18 determines the *default* position regarding ownership of reproductive material; this default position *can be changed* by the persons involved.

- The rigid interpretation: reg 18 determines the *permanent* position regarding ownership of reproductive material; this permanent position *cannot be changed* by the persons involved.

South African law adheres to a *purposive* approach to the interpretation of statutes (see eg *Moyo v Minister of Police* 2020 (1) SACR 373 (CC) para 54). This means that a statutory provision will be interpreted in such a way as to be true to its purpose. Several interpretative tools can be applied to ascertain the purpose of a statutory provision. In my analysis below, I use textual analysis, the mischief rule, and the practical consequences of the two possible interpretations. I conclude my analyses with the overriding consideration in statutory interpretation: alignment with South Africa's constitutional regime.

Textual analysis

A striking feature of reg 18 is that its determination of ownership is based on time periods. It contemplates two main time periods: *before* IVF, and *after* IVF. It also contemplates a secondary branch within the 'before IVF period' in the case of sperm that is not intended for the fertility treatment of the man's wife, namely *before* and *after* receipt of such sperm by the authorised institution that will effect 'artificial fertilisation' (reg 18(1)(a)). Because reg 18 uses these time *periods* to determine ownership — rather than just *points* in time — it can be argued that the ownership of reproductive material must *remain* as per the determination of reg 18 for these entire *periods*. In other words, reg 18 does not provide for only the *original acquisition* of ownership at certain points in time, but also makes peremptory the *retention* of ownership thus acquired for the relevant time periods.

On this interpretation, the time-period-based nature of the ownership determinations of reg 18 implicitly *restricts* the right to transfer ownership — one of the rights entailed by ownership. This is problematic, as it is a well-established principle of statutory interpretation that where legislation restricts or inhibits a person's rights — such as the right to transfer ownership — it must be done in the *clearest language* (*R v Padsha* 1923 AD 281). An example of clear language in this context would have been: 'Ownership of X is vested in Y, *who may not transfer ownership*', or 'Ownership of X is vested in Y *for the entire duration of ...*'. By contrast, reg 18 merely provides that 'Before/After artificial fertilisation, the ownership of ... is vested ... in'. It is doubtful whether this qualifies as a restriction of the right to transfer in the clearest language.

The mischief rule

A useful way to ascertain the purpose of a statutory provision is the *mischief rule* — inquiring what was the mischief that the provision was designed

to suppress. More generally, one can refer to the *problem* that a provision was designed to *solve*. I suggest the problem as perceived pre-2012 was the following: when gametes are separated from a human body, do they constitute objects that can be owned? Also, when embryos are created through IVF, do they constitute objects that can be owned? If the answer is yes, the follow-up question is: by whom? These are all new legal objects, so some mode of original acquisition of ownership should apply — but which mode exactly? All the existing modes of original acquisition of ownership originate from ancient Rome, and neither ancient legal texts, nor later legal treatises provide any insight into exactly how to deal with gametes and embryos. Ancient Romans knew neither cryopreservation, nor IVF. In sum, there was legal uncertainty regarding the following: (a) whether reproductive material is susceptible of ownership and, if so, (b) who owns reproductive material when it comes into existence — that is, the original acquisition of ownership in reproductive material. This, I suggest is the problem that reg 18 aims to solve. It follows that the purpose of reg 18 is to provide legal certainty regarding questions (a) and (b) — nothing more, nothing less. Accordingly, reg 18 provides for the original acquisition of ownership in reproductive material (who owns it when it comes into existence) but does not affect the subsequent transfer of ownership of reproductive material. This aligns with the supple interpretation.

By contrast, it is difficult to conceive of any problem that is solved by interpreting reg 18 as conferring non-transferable ownership, as the rigid interpretation suggests. Admittedly, freedom to contract regarding reproductive material — and transfer of ownership — is sure to contribute to *complexity*. However, avoiding complexity is not a legitimate government purpose. Restricting freedom to contract — which has its basis in the right to dignity (*Barkhuizen v Napier* 2007 (5) SA 323 (CC)) — with no better reason than to maintain simplicity or uniformity regarding the ownership of reproductive material, is unlikely to pass constitutional scrutiny. Once questions (a) and (b) above are answered, South Africa has an entire system of private law to deal with the complexity brought about through contractual arrangements.

Practical consequences

I now sketch two scenarios — an abandonment scenario and a death scenario — and consider the practical consequences of the two possible interpretations of reg 18.

First, there is the abandonment scenario. A woman, X, has some of her own eggs cryopreserved for possible future use — so-called fertility preservation. However, after some years, X decides that she is not going to use these eggs. X advises her fertility clinic that she does not want the eggs anymore, that they should stop charging her for the eggs' cryopreservation,

and that they can dispose of the eggs as they deem fit. On the rigid interpretation of reg 18 this would be impossible. Ownership of the eggs must remain with X until the eggs are used in IVF and the 'after IVF period' commences. If she is not legally allowed to abandon or transfer ownership, she remains legally liable for the cost of cryopreservation. If she wants to avoid this liability, her only choice would be to have the eggs discarded. This raises the question whether forcing such a choice on a woman serves any legitimate government purpose. I suggest not. If the supple interpretation is followed, it would be possible for X to abandon her eggs (*res derelicta*), rendering them things that belong to no one (*res nullius*). The first person to take control of these abandoned eggs with the intention of becoming the new owner would acquire ownership in them. Clearly, the fertility clinic is well positioned to do this, as the clinic is already in physical control of the eggs (see Thaldar 2023 *Humanit Soc Sci Commun* op cit at 5). The clinic can then donate the eggs to a fertility patient when such a need arises. This will be at the discretion of the fertility clinic qua owner. I suggest that this is a satisfactory solution from both a practical and a policy perspective. It is workable and avoids the unnecessary loss of eggs which can help an infertile couple to realize their dreams of parenthood.

Secondly, there is the death scenario. A batch of embryos is created for use by a woman, Y. She is married to Z. However, Y dies unexpectedly. As she has no will, the intestate law of succession applies, according to which her husband, Z, inherits her estate. On the rigid interpretation, it would be impossible for Z to inherit the embryos, as it entails transfer of ownership. The only possible solution would be to find a new 'recipient' for these embryos and argue that the embryos are then intended for her (the new recipient), hence making her the owner. However, on what legal basis will anyone have the right to decide who this new recipient will be? As the embryos are ownerless, nobody has the right to do so. The embryos will remain ownerless with no way to decide their future. By contrast, if the supple interpretation is followed, Z (the widower of Y) will inherit the embryos. Accordingly, the legal uncertainty that would be unavoidable if the rigid interpretation is followed, is avoided by following the supple interpretation.

As illustrated by both the abandonment and the death scenarios, the non-transferable nature of ownership as per the rigid interpretation yields deeply problematic practical consequences. Instead of solving legal uncertainty, reg 18 would add to legal uncertainty if the rigid interpretation is followed. The supple interpretation, on the other hand, allows the normal legal mechanisms to operate and to present solutions.

Constitutional justification supporting the supple interpretation

Section 39(2) of the Constitution enjoins the court to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. As suggested above, the supple interpretation enables freedom of contract and therefore promotes the values of freedom and dignity. By contrast, the rigid interpretation is anathema to these values as it suppresses freedom of contract and promotes no conceivable constitutional value. The conclusion is inevitable: the supple interpretation must be followed.

Next, I analyse the one case that considered transfer of ownership of reproductive material: *Ex Parte WP* (unreported case 3167/2019, Western Cape High Court, 24 June 2019).

A CRITICAL ANALYSIS OF *EX PARTE WP*

The main issue that *Ex Parte WP* addressed was the practice of sperm mixing, which is where a gay couple have their sperm mixed before IVF so that both intended fathers *symbolically* contribute to the conception of the embryos. Another issue that featured in the judgment but only received brief attention was the fact that the applicants' proposed surrogacy agreement contained a clause that stipulated that the surrogate mother would transfer all rights in the embryos to the commissioning parents. This must be seen against the background of reg 18, which bestows ownership of embryos on the 'recipient', which in the case of surrogacy would be the surrogate mother. According to the judgment, the applicants justified their ownership transfer by arguing that it could never have been the intention of the legislature to make the surrogate mother the owner of the embryos (*Ex Parte WP* para 35). This argument misses the point. According to reg 18, the default position is clearly that the surrogate mother is the owner. The point is that qua owner the surrogate mother has the right to transfer ownership to whomever she pleases. Instead, the applicants' argument commits the error of *assuming* that the *default* ownership position provided for in reg 18 is the *permanent* position. In other words, it *assumes* the rigid interpretation of reg 18.

Unsurprisingly, the court ruled against the applicants. The court held that the Regulations are clear that the surrogate mother is the owner, refused to confirm the ownership transfer clause contained in the proposed surrogate motherhood agreement, and remarked that the clause amounted to a circumvention of the Regulations (*Ex Parte WP* para 36). In other words, the court — without further interrogation — accepted the *assumption* of the rigid interpretation of reg 18 that underlaid the applicants' argument. This is unfortunate and erroneous.

THE WAY FORWARD

The decision in *Ex Parte WP* regarding the transfer of ownership of embryos should be reconsidered at the earliest opportunity. I suggest that applicants in surrogacy applications should include an ownership transfer clause in their surrogacy agreements, draw the court's attention to the clause and to the *Ex Parte WP* judgment, but file argument showing that the supple interpretation should be followed and, therefore, that the proposed ownership transfer clause is lawful. Given the poverty of the court's rationale regarding the issue of transfer of ownership in *Ex Parte WP*, convincing the court that *Ex Parte WP* was wrongly decided in this respect should not be too difficult.

There is the legal technical issue that the *Ex Parte WP* judgment would, as a rule, be binding authority in the Western Cape. However, there is an exception to this general rule, namely when a decision is clearly wrong (*Patmar Explorations (Pty) Ltd v Limpopo Development Tribunal* 2018 (4) SA 107 (SCA)), which I suggest can be argued convincingly. In any event, applicants in any surrogacy application can always appeal any specific aspect of the court's ruling to a full bench of their provincial division, or to the Supreme Court of Appeal. Such a decision will then be binding for the whole country. The applicants who bravely prosecute such an appeal would be acting in the public interest and would be helping everyone using medically assisted reproduction in South Africa.

This legal roadmap may seem challenging. However, I suggest it is necessary. Consider the following scenario: a commissioning couple — using their hard-earned savings — have a batch of embryos created. Should their surrogate mother have the legal power to decide to have all these embryos discarded at her pleasure? Clearly not. The legal fix is easy, namely an ownership transfer clause in the surrogacy agreement, as intended by the applicants in *Ex Parte WP*. However, this requires overturning *Ex Parte WP* in favour of the supple interpretation of reg 18.