The Legal Nature of the Embryo: Legal Subject or Legal Object?

R Robinson*

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Author

Robbie Robinson

Affiliation

North-West University
South Africa

Email

Robbie.Robinson@nwu.ac.za

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Abstract

This contribution addresses the question regarding the legal nature of a cryopreserved embryo. Such preservation is a relatively modern development in the medical field. Neither Tennessee (USA) law nor European law provides an acceptable explanation regarding its legal nature. It is argued herein that this is mainly due to the fact that rather unscientific language is applied. It is suggested that the using of concise legal terminology may contribute to a better understanding. The terms legal subject and object and legal subjectivity are well-known and have definite legal content. By drawing an analogy between the legal status of an infant and such embryos, the conclusion is reached that embryos are not legal subjects *sui iuris* but indeed share the legal subjectivity of their parents.

Keywords

Embryo; legal subjectivity; legal subject; legal object; cryopreserved ova; person; property; legal status; foetus.

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> I disagree that there's just a sliding scale of continuum with property at one point along the spectrum and human beings at another. I think there is sharp distinction between something that is property and something that is not property.[1]

1 Introduction

The difference between the concepts legal subject and object is progressively being challenged by developments in the medical science.[2] In fact, in 1980 already Thomas complained about the law discipline's lagging behind in a contribution – *Can the lawyer keep up with the doctor?*[3] Cryopreservation of fertilized ova, a procedure whereby an egg cell is removed from the mother, united with a sperm cell from the father after which the embryo is then cryogenically frozen some 48 to 72 hours after conception normally in liquid nitrogen is but one such challenging development.[4] The frozen embryo can be thawed months or even years later and implanted into the uterus of the (not necessarily genetic) mother.[5] (For the sake of convenience and clarity the term embryo will be used as the reference for cryopreserved fertilised ova. In the various stages of the

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* Robbie Robinson. BJuris LLB LLD (PU vir CHO). Professor, Faculty of Law, North-West University. E-mail: robbie.robinson@nwu.ac.za.

1 Albert Gore quoted in *Davis v Davis* No E-14496, 1989 WL 140495 (Tenn Cir Ct Sept 21, 1989) para 9.

2 The question when human life comes into being has been debated since time immemorial and theories that life begins at conception, at birth or at specific points of development in between (eg after the first trimester, when a point of viability has been reached, or at a point of so-called brain-birth) abound and are well documented. However, the dictum in *Elliot v Joicey* (1935) 238 quoted in Slabbert 1997 *JSAL* 234 perhaps summarises the impasse between the theories best: "From earliest time the (unborn) child has caused a certain embarrassment to the logic of the law, which is naturally disposed to insist that at any given moment of time a child must either be born or not born, living or not living."

3 Thomas 1980 *SALJ* 78-79. See Young 1991 *Golden Gate UL Rev* 559-562 for an explanation of reproductive technologies, which include artificial insemination, *in vitro* fertilisation, embryo transfer and the cryopreservation of embryos.

4 Despite cryopreservation's essentially being intertwined with legal issues such as abortion and the rights to privacy and to procreate, these will be discussed only when relevant and to the extent necessary to the primary question regarding the legal status of the embryo. See *inter alia* Robertson 1990 *Virginia L Rev* 437-517.

5 See *inter alia* National Legal Research Group 2003 http://www.divorcesource.com/research/dl/children/03mar54.shtml 1; Young 1991 *Golden Gate UL Rev* 559. In the Circuit Court of Tennessee in the first *Davis* decision (see para 2.1 of this contribution) the cryopreservation process is described as one whereby several ova (unfertilised human eggs) are aspirated (a process by which ova are surgically withdrawn from the ovary) and inseminated (the process of placing together the sperm and the ovum) in a laboratory, and if the insemination process produces fertilised zygotes (fertilised ova) they can be allowed to mature in a laboratory to a medically accepted point for the purpose of either implantation (the process whereby the physician deposits a zygote in the human uterus) or cryopreservation.

pregnancy, different terms describe the product and some authors prefer to refer to it in this stage as a pre-embryo.)[6]

In a variety of situations an issue regarding the embryo, whether it is a legal subject or object, is raised. However, further aspects also arising relate *inter alia* to the autonomy of parents to procreate, the contract with the institution (normally a clinic) storing the embryo, and whether the doctrine of estoppel finds application. In this contribution attention will be paid solely to the legal nature of the embryo. The South African legislature apparently views the embryo as a legal object[7] and the so-called *Davis* judgments in Tennessee, USA will specifically be considered.[8] The approach of the Supreme Court of Tennessee has been followed in other states of the USA, however.[9] Also, in Israel[10] and Europe substantial legal development has taken place and reference will also be made to a recent judgment of the European Court of Human Rights.[11]

The term "status" is derived from the Latin verb *stare* – to stand. In the juridical sense of the word it relates to the position of the legal subject in legal reality ("regswerklikheid") or the role that it is capable of playing in legal intercourse.[12] Against this background it would appear to be more appropriate to refer to the legal *nature* of the embryo. However, in view of

6 See eg Jordaan 2005 *SALJ* 238; Slabbert 1997 *SALJ* 235.

7 See para 4.1 of this contribution.

8 Browne and Hynes 1991 *J Legis* 98; Breen-Portnoy 2013 *Md J Int'l L* 277 explains the lack of clarity and cohesion internationally on the issue. China, for instance officially maintains a one-child policy, yet there are indications that assisted reproductive technologies (hereafter ART) guidelines are being flouted, especially by the wealthy. In Western countries a full spectrum of approaches to ART is exhibited, but even countries such as Switzerland, Sweden and the UK, which regulate cryo-preservation, have no case law on the issue of the disposition of frozen embryos in situations of separation and divorce. See too Owen 1994 *J Contemp Health L & Pol'y* 497; Young 1991 *Golden Gate UL Rev* 560.

9 *Davis v Davis* 842 SW 2d. Also see *In re Marriage of Witten* 672 NW 2d 768 (Iowa 2003); *AZ v BZ* 725 NE 2d (Mass 2000); *JB v MB* 783 A 2d 707 (NJ 2001); *Kass v Kass* 696 NE 2d 174 (NY 1998); *Litowitz v Litowitz* 48 P3d 261 (Wash 2002).

10 Breen-Portnoy 2013 *Md J Int'l L* 286 explains the rather surprisingly progressive position of Israel as "unapologetically pro-natalist". All Israeli women, irrespective of their marital status, have access to *in vitro* fertilisation for up to two children at little or no cost. *In vitro* fertilisation is included in the country's National Health Plan, which was instituted in 1996. She also points out that ART is one area of Israeli life in which religious and secular law and attitudes converge. The particular value that is placed on life contributes to significant support for an individual's right to be a parent. The conclusion is drawn that the State's efforts since the 1960's have transformed procreation from a "[p]rivate life quest into a public works project."

11 See para 3 of this contribution.

12 Van der Vyver and Joubert *Persone- en Familiereg* 53; Robinson *et al Law of Persons* 8.

the conclusion reached in paragraph 5 of this contribution, “status” will be used herein.

2 American perspectives on the legal nature of the cryopreserved embryo – *Davis v Davis*

In America, IVF (*in vitro* fertilisation) is regulated by federal law, and *Davis v Davis* in Tennessee serves as a clear illustration of the lack of clarity in the legal status of the frozen embryo. The case arose from the divorce proceedings of the Davis couple. The issue in question, albeit somewhat simplified, related to the disposition of seven frozen embryos in cryogenic storage. After several unsuccessful IVF procedures the cryopreservation technique was applied and two of the embryos were unsuccessfully implanted in Mrs Davis. The remaining seven were stored cryogenically for future implantation. At the time of the procedure the couple was informed that the likely storage life for the frozen embryos would be two years and that they could donate the remaining seven embryos to another couple. They made no decision at the time and did not sign any agreement with the clinic. In later divorce litigation Mrs Davis initially asked for control over the frozen embryos with the intention of having them transferred to her own uterus in a post-divorce effort to become pregnant. Mr Davis objected and preferred to leave the embryos in their frozen state until he decided whether or not he wanted to become a parent outside the bounds of marriage. This "custody" battle raised the question whether the pre-embryos[13] should be considered as persons or as property. In coming to a decision, the position of the American Fertility Society was extensively referred to by the Supreme Court of Tennessee:[14]

> Three major ethical positions have been articulated in the debate over the pre-embryo status. At one extreme is the view of the pre-embryo as a human subject after fertilization, which requires that it be accorded the rights of a person. This position entails an obligation to provide an opportunity for implantation to occur and tends to ban any action before transfer that might harm the pre-embryo or that is not immediately therapeutic, such as freezing and some pre-embryo research (*hereafter referred to as Position 1*).
>
> At the opposite extreme is the view that the pre-embryo has a status no different from any other human tissue. With the consent of those who have decision-making authority over the pre-embryo, no limits should be imposed on actions taken with pre-embryos (*hereafter referred to as Position 2*).
>
> A third view – one that is most widely held – takes an intermediate position between the other two. It holds that the pre-embryo deserves respect greater

13 See the discussion of *Davis 3* in para 2.3.
14 See the discussion of *Davis 3* in para 2.3.

> than that accorded to human tissue but not the respect accorded to actual persons. 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, is not yet established as developmentally individual, and may never realize its biologic potential (*hereafter referred to as Position 3*).

Davis v Davis[15] (hereafter *Davis* 1) was the first case to deal with the specific issue. *Davis* 1 was revisited twice, namely in *Davis v Davis*[16] (hereafter *Davis* 2) and *Davis v Davis*[17] (hereafter *Davis* 3). Each of these courts adopted a different approach to the question. Essentially the saga related to the provisions of the *Wrongful Death Statute,*[18] which prohibits the wrongful death of a "*person.*" Hence, the distinction to be drawn is that between *persons* and *property*.

2.1 Davis 1

The court accepted that the Davis couple participated in the IVF programme for one single purpose – to produce a human being to be known as their child, and the facts were to show whether they accomplished their intent.[19] In order to come to a conclusion in this respect, the court held that the true question to be answered was when human life begins. In view of the medical evidence placed before it, the court identified two specific issues to address the primary question: (i) is there a difference between a pre-embryo and an embryo; and (ii) whether (pre-)embryos are property (that may eventually become human beings). Three eminent medical scholars who held different views on the question when life begins testified before the court. In coming to a decision, however, the court relied solely on the evidence of the expert who argued that a human being comes into existence directly after fertilisation. It must be noted, however, that even though the experts were not unanimous, they all agreed that the cryopreserved embryos were human; "[t]hat is belonging or relating to man; characteristic of man …"[20]

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15 *Davis v Davis* No E-14496, 1989 WL 140495 (Tenn Cir Ct Sept 21, 1989) (hereafter *Davis* 1).

16 *Davis v Davis* No 180, 1990 WL 130807 (Tenn Ct App 13, 1990) (hereafter *Davis* 2).

17 *Davis v Davis* 842 SW 2d (hereafter *Davis* 3). The position in *Davis 3* has been accepted quite widely in the USA, but for the purposes of the convenience hereof, reference will be made only to *Davis*. However, see *In re Marriage of Witten* 672 NW 2d 768 (Iowa 2003); *AZ v BZ* 725 NE 2d (Mass 2000); *JB v MB* 783 A 2d 707 (NJ 2001); *Kass v Kass*, 696 NE 2d 174 (NY 1998); *Litowitz v Litowitz* 48 P 3d 261 (Wash 2002).

18 *Wrongful Death Statute* Tenn Code Ann 20-5-106.

19 *Davis* 1 para 3.

20 *Davis* 1 para 4. See too the discussion of Browne and Hynes 1991 *J Legis* 113. She refers to *Kelly v Gregory* 282 App Div 542, 125 NYS 2d 696 (1953), where the New

2.1.1 Is there a difference between a pre-embryo and an embryo?

The medical evidence placed before the court was not unanimous in this respect. One approach was to the effect that embryos are merely at a stage of development where they simply possess the potential for life.[21] On the other hand the argument was put forward that human embryos are in ""[b]eing"; they are "[i]n existence; conscious existence; as things brought into being by generation …" or "living, alive."[22] After scrutiny of the evidence the court concluded that the term pre-embryo serves as a false distinguishing term. The cryopreserved entities are human embryos.[23] In essence the court based its argument on the evidence regarding cell differentiation of the medical expert who rejected the argument that there is a difference between a pre-embryo and an embryo. It found that "[t]he life codes for each special, unique individual are resident at conception and animate the new person very soon after fertilization occurs."[24] The cells of human embryos are comprised of differentiated cells; they are unique in character and specialised to the highest degree of distinction.[25] In fact, the court accepted that

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York State Appellate Division explains that an important issue affecting the rights of the unborn is the separability of the unborn from its parents. If an embryo is merely the mother's tissue without its own identity, it would not make sense to assert that it has rights. However, an embryo is more than that. Legal separability should begin where there is biological separability. Separability begins at conception and even if the fetus may not live if its protection and nourishment are cut off earlier than the stage of viability, it is not to destroy its separability – it is rather to describe the conditions under which life will not continue.

21 In this respect the testimony of the experts was to the effect that there is first a one cell gamete, a zygote (after the first cell divides), a pre-embryo (up to 14 days after fertilization) and after 14 days, an embryo. A pre-embryo according to this approach would then be a zygote up to 14 days which consists largely of undifferentiated cells. After attachment to the uterus wall and the appearance of the primitive streak, the cells become different and organs, organ systems and body parts are formed. At the time of fertilisation the genetic controls which determine who the embryo will later be are locked in. The argument in essence therefore is that the pre-embryo primarily consists of undifferentiated cells. Also see the discussion in Jordaan 2005 *SALJ* 238 and Slabbert 1997 *JSAL* 237.

22 *Davis* 1 para 3.

23 *Davis* 1 para 6. There were various pro-and anti-difference arguments put before the court. One such argument ran that a human pre-embryo is an entity composed of a group of undifferentiated cells which have no organs or nervous system. At about 10-14 days the pre-embryo attaches itself to the uteran wall, after which it develops a primitive streak, whereupon life commences – it is not clear "[t]hat a human pre-embryo is a unique individual; that simply because fertilization has occurred, the gamete contributors have not procreated" (para 4).

24 *Davis* 1 para 8.

25 *Davis* 1 para 8. The conclusion of the court in this respect serves to reject the argument that the cells of a four-cell zygote are undifferentiated and that they lack any differentiation. The argument raised before the court was that even a skilled

> There is no need for a subclass of the embryo to be called preembryo, because there is nothing before the embryo; before the embryo there is only a sperm and an egg; when the egg is fertilized by the sperm the entity becomes a zygote; and when the zygote divides it is an embryo. When the first cell exists, all the 'tricks of the trade' to build itself into an individual already exist. Shortly after fertilization at the three-cell stage a '… tiny human being ….' exists. When the ovum is fertilized by the sperm, the result is '… the most specialized cell under the sun …', specialized from the point of view that no other cell will ever have the same instructions in the life of the individual being created.[26]

2.1.2 Are (pre)embryos property or are they persons?

Having accepted the medical evidence that the cells of human embryos are comprised of differentiated cells which are unique and specialised "[t]o the highest degree of distinction",[27] the court reverted to the question whether the embryos are human beings. It concluded that they indeed are and that they definitely are not property.[28] As a consequence human life begins at the moment of conception. However, the legal status of such embryos needs to be established and for such a purpose the court found that public policy does not prevent the continuing development of common law.[29] It concluded therefore that "[n]o public policy prevents the continuing development as it may specifically apply to the *seven human beings existing as embryos*, in vitro, …" (own emphasis). As a result the doctrine of *parens patriae* controls these "children" as it has always supervised and controlled the children of a marriage at live birth in domestic relations cases.[30] After referring to the intention of the parties to create children to be known as their family, the court found it in the best interests of the children *in vitro* that they be made available for implantation to assure their opportunity for live birth; implantation would be their only hope of survival. Furthermore, it would serve the best interests of these children for Mrs Davis to be permitted the opportunity to bring them to term through implantation.[31]

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scientist could not distinguish the cells of one zygote from those of another, nor could such a scientist distinguish between any of the four cells within the hypothetical zygote (para 7).

26 *Davis* 1 para 5.

27 *Davis* 1 para 8.

28 *Davis* 1 para 9.

29 *Davis* 1 para 10.

30 *Davis* 1 para 10. The court explained the concept of *parens patriae* as the power of the sovereign to watch over the interests of those who are incapable of protecting themselves. The thrust of the doctrine is its focus on the best interests of the child; its concern is therefore not for those who claim “rights” to or custody of the child, and its sole objective is to achieve justice for the child (para 11).

31 *Davis* 1 para 11.

2.1.3 Conclusion

The court clearly identified Position 1 as the solution to the problem. In essence, the court's finding was that since there is no difference between pre-embryos and embryos, the medical evidence which argued that human life begins at the moment of conception must be correct. Therefore, the entities were not pre-embryos but indeed children *in vitro*. After invoking the doctrine of *parens patriae,* it was held that it would be in the best interests of the children to be born rather than destroyed. No public policy prevented the development of the common law in this respect.

It is suggested that terms such as "children", "human beings" and "persons" reflect a rather generic application of terminology. Essentially these are unscientific terms which, it is submitted, contribute to the difficulty in explaining the status of the embryo.

2.2 Davis 2

In *Davis 2* the Court of Appeals of Tennessee dealt with the matter on the basis of the following medical explanation:

> There are significant scientific distinctions between fertilized ova that have not been implanted and an embryo in the mother's womb. The fertilized ova at issue are between 4 and 8 cells. Genetically each cell is identical. Approximately three days after fertilization the cells begin to differentiate into an outer layer that will become the placenta and an inner layer that will become the embryo. This "blastocyst" can adhere to the uterine wall, the hallmark of pregnancy. Once adherence occurs, the inner embryonic layer reorganizes to form a rudimentary 'axis' along which major organs and structures of the body will be differentiated. It is important to remember that when these ova were fertilized through mechanical manipulation, their development was limited to the 8 cell stage. At this junction there is no development of the nervous system, the circulatory system, or the pulmonary system and it is thus possible for embryonic development to be indefinitely arrested at this stage by cryopreservation or freezing. … In IVF programs the embryo will be transferred to a uterus when it reaches the four-, six-, or eight-cell stage, some forty-eight to seventy-two hours after conception. It is also at this stage that the embryo would be cryopreserved for later use.[32]

The court proceeded to analyse Tennessee statutory law and concluded that as embryos develop they are accorded more respect than mere human cells because of their burgeoning potential for life. Yet, even after viability they do not have the legal *status of a person* already born.[33] The court

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32 *Davis* 2 para 1.
33 *Davis* 2 para 2.

therefore had no hesitation in ordering that Mr and Mrs Davis have "[j]oint control of the fertilized ova with equal voice over their disposition".[34]

2.2.1 Conclusion

It would appear that the Court of Appeals may have adopted the exposition in Position 2, even regarding the embryos as property.[35] Though the court did not explicitly find that they were property,[36] its awarding of joint control over them with an equal voice over their disposition bears out on such possibility. This conclusion is substantiated by the Supreme Court of Tennessee in *Davis* 3, where it was found that *Davis* 2's reliance on the dictum in *York v Jones*[37] definitely left an impression that it considered the interests in the embryos of Mr and Mrs Davis as being of a property nature.[38]

2.3 Davis 3

According to the Supreme Court of Tennessee the essential dispute was not the status of the embryos but rather whether the parties would become parents. For this purpose the court focused strongly on the constitutional right to privacy, concluding that the right to procreational autonomy is composed of two rights – to procreation and to avoid procreation. However, turning to the debate regarding the legal status of the embryos, it explained that *pre-embryos are neither persons, nor property.* They occupy an interim category that entitles them to special respect because of their potential for human life. It pointed out that semantical distinctions are important because language defines legal status and can limit legal rights. For example, the legal status of an adult is different from that of a child. It proceeded that "child" means something other than a "fetus", and a "fetus" differs from an

34 *Davis* 2 para 3. Also see Owen 1994 *J Contemp Health L & Pol'y* 499.

35 *Davis* 2 595.

36 The court indeed found that a distinction had to be drawn between pre-embryos and embryos after it considered Tennessee statutory law. See *Davis* 2 594-595.

37 *York v Jones* 717 F Supp 421 (ED Va 1989) 424-425. Also see the discussion in Browne and Hynes 1991 *J Legis* 102.

38 *In casu* there was a dispute between the Yorks, a married couple who underwent IVF procedures, and the Jones Institute for Reproductive Medicine in Virginia. The couple decided to relocate to California and asked the Institute to transfer a frozen embryo that they had produced to a fertility clinic in San Diego for later implantation. The Institute refused the request and the couple went to court. The federal district court assumed without deciding that the subject matter of the dispute was property. It found that the cryopreservation agreement created a bailment relationship which obliged the Institute to return the subject of the bailment to the couple once the purpose of the bailment had terminated.

"embryo". On this basis the court expressed criticism of *Davis* 1 where it was held that four-to-eight cell entities are embryos and not pre-embryos.[39]

The court accepted the *Davis* 2 explanation that pre-embryos are not *persons* under Tennessee law, but rejected the implication of the decision that the interest of the parents "[i]s in the nature of a property interest."[40] This conclusion stemmed from the court's reference to statutory prescriptions reflecting the State of Tennessee's treatment of foetuses in the womb.

> We conclude that pre-embryos are not, strictly speaking, either '*persons*' or '*property*,' but occupy an interim category that entitles them to special respect because of their potential for human life. It follows that any interest that Mary Sue Davis and Junior Davis have in the pre-embryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning

39 *Davis* 3 593. The court referred to a report of the American Fertility Society of June 1990, which explains the development process as follows: "[a] new hereditary constitution (genome) contributed to by both parents through the union of sperm and egg. The stage subsequent to the zygote is cleavage, during which the single initial cell undergoes successive equal divisions with little or no intervening growth. As a result, the product cells (blastomeres) become successively smaller, while the size of the total aggregate of cells remains the same. After three such divisions, the aggregate contains eight cells in relatively loose association …. [E]ach blastomere, if separated from the others, has the potential to develop into a complete adult … Stated another way, at the 8-cell stage, the developmental singleness of one person has not been established. Beyond the 8-cell stage, individual blastomere begin to lose their zygote-like properties. Two divisions after the 8-cell stage, the 32 blastomeres are increasingly adherent, closely packed, and no longer of equal developmental potential. The impression now conveyed is of a multicellular entity, rather than of a loose packet of identical cells. As the number of cells continues to increase, some are formed into a surface layer, surrounding others within. The outer layers have changed in properties toward trophoblast …, which is destined [to become part of the placenta]. The less- altered inner cells will be the source of the later embryo. The developing entity is now referred to as a blastocyst, characterized by a continuous peripheral layer of cells and a small cellular population within a central cavity … It is about this stage that the [normally] developing entity usually completes its transit through the oviduct to enter the uterus. Cell division continues and the blastocyst enlarges through increase of both cell number and [volume]. The populations of inner and outer cells become increasingly different, not only in position and shape but in synthetic activities as well. The change is primarily in the outer population, which is altering rapidly as the blastocyst interacts with and implants into the uterine wall … Thus, the first cellular differentiation of the new generation relates to physiologic interaction with the mother, rather than to the establishment of the embryo itself. *It is for this reason that it is appropriate to refer to the developing entity up to this point as a preembryo, rather than an embryo*."

40 *Davis* 3 596. Also see the discussion of the judgment by Owen 1994 *J Contemp Health L & Pol'y* 502.

> disposition of the pre-embryos, within the scope of policy set by law.[41] (italics added)

2.3.1 Conclusion

The court in *Davis* 3 clearly opts for Position 3 – a middle-ground approach. It would appear that the embryos are viewed as being on a continuum somewhere between persons and property. This approach is out of step with Gore's exposition that there is a sharp distinction between something that is property and something that is not property.[42] This preliminary conclusion raises further questions - what would the nature of the decision-making authority concerning disposition be, and does it bear the same meaning as in ordinary property law? It is suggested that the policy set by law is rather vague and leaves a measure of uncertainty.[43] Adding to the uncertainty is the conclusion drawn by the National Legal Research Group that "[f]rozen embryos have … been added to the list of unusual types of property with which divorce courts must contend."[44]

3 The position of the European Court of Human Rights

The European Court of Human Rights delivered judgment in the case of *Parrillo v Italy*[45] on 27 August 2015. *In casu* the applicant wanted to donate

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41 *Davis* 3 597. The court referred to *Roe v Wade* 410 US 113, 705 at 731, where the Supreme Court explicitly refused to hold that a fetus possesses independent rights under law. It concluded that "[t]he unborn have never been recognized in the law as persons in the whole sense." At 159 the court further held that: "[W]e need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge is not in a position to speculate as to the answer." As for the state's interest in potential life, the court held that the compelling point is at viability, because the fetus then presumably has the capability of meaningful life outside the mother's womb (at 163). Also see *Webster v Reproductive Health Services* 492 US 490.

42 See introductory note.

43 See Robertson 1990 *Virginia L Rev* 485.

44 National Legal Research Group 2003 http://www.divorcesource.com/research/dl/children/03mar54.shtml 1. Also see *Kass v Kass* 91 NY 2d 554, 673 NYS 2d 350 (1998), which dealt with the interpretation of the consent form the parties had signed. It read as follows: "Our frozen pre-zygotes will not be released from storage for any purpose without the written consent of both of us … In the event of divorce … *we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court …*" (own italics). In *Litowitz v Litowitz* 146 Wash 2d 514, 48 P 3d 261 (2002) the issue before the court dealt with the provisions of a contract with the egg donor, which provided that "[A]ll eggs produced by the Egg Donor … shall be deemed the property of the Intended Parents and … the Intended Parents shall have the sole right to determine the disposition of said egg(s)."

45 *Case of Parrillo v Italy* Application no 46470/11 (27 August 2015) (hereafter *Parillo v Italy).*

her and her deceased partner's embryos to scientific research. She relied on article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that "[E]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions …" The applicant, the director of the centre where the embryos were kept, refused to comply with her request on the grounds that this type of research was banned and punishable as a criminal offence under Italian statutory law.[46]

The Italian Government submitted that the human embryo could not be regarded as a "thing" and that it was unacceptable to assign economic value to it. The Government observed that in the Italian legal system the human embryo was considered a "[s]ubject of law" entitled to the respect due to human dignity. The Government further argued that it was the approach of the Court to afford member states to the Convention a wide margin of appreciation regarding the determination of the beginning of life – particularly in areas where complex moral and ethical questions were at issue. The director's refusal consequently had not been a violation of article 1 of the Protocol.[47]

The applicant submitted that the embryos could not be regarded as "individuals" because if they were not implanted they were not destined to develop into foetuses and be born. Consequently, they were "possessions." She therefore contended that she had a right of ownership upon which the state had imposed restrictions.[48]

The Court concluded that it is not necessary to establish when life begins, as article 2 of the Convention had not been placed in issue. However, the Court ruled that article 1 did not apply *in casu* – "[H]aving regard to the economic and pecuniary scope of the Article, human embryos cannot be reduced to 'possessions' within the meaning of that provision." This conclusion followed from the Court's observation that the concept of "possession" has an

> [a]utonomous meaning which is not limited to ownership of material goods … certain other rights and interests constituting assets can also be regarded as 'property rights' and thus as 'possessions' … *In each case the issue that needs to be examined is whether the circumstances of the case, considered*

46 *Parrillo v Italy* para 199.

47 *Parrillo v Italy* paras 199-202. See too the approach of the European Centre for Law and Justice in para 205. It argued that the concept of "possession" had an inherently economic connotation which had to be ruled out in the case of human embryos.

48 *Parrillo v Italy* para 203.

> *as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol 1.* (italics added)[49]

The Court held that article 1 applies only to a person's existing possessions. Future income cannot be considered to be a "possession" unless it has already been earned or is definitely payable. Also the hope that a long-extinguished property right may be revived cannot be viewed as "possession" and neither can a conditional claim which has lapsed as a result of a failure to fulfil the condition be regarded as a "possession." However, in certain circumstances a legitimate expectation of obtaining an asset may fall under the provisions of article 1. Where a proprietary interest for instance is in the nature of a claim, the person in whom it is vested may be regarded as having a legitimate expectation if there is a sufficient basis for the interest. However, despite this extensive interpretation that had previously been attached to the notion the court held that having regard to the economic and pecuniary scope of the provision, human embryos could not be reduced to possessions within its meaning.[50]

It is suggested that the decision of the European Court of Human Rights is indicative of a strict interpretation of the provisions of the Protocol and leaves the question regarding the legal nature of the embryos open. It does little more than state the obvious.

4 South African perspectives

Seemingly relevant provisions of the *Constitution of the Republic of South Africa*, 1996 do not really provide an explanation of the legal status of embryos. Section 11 provides that everyone has the right to life and section 12(2)(a) reads that everyone has the right to bodily and psychological integrity, which include the right *inter alia* to make decisions concerning reproduction. However, after *Christian Lawyers Association of South Africa v Minister of Health,*[51] which reiterates in no uncertain terms that "everyone" does not include a foetus, it is clear that constitutional provisions do not have a direct bearing on the situation.

4.1 Statutory provisions

As will be discussed in paragraph 4.2 of this contribution, South African common law leaves little doubt that birth means living birth. This approach

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49 *Parrillo v Italy* paras 211 and 215.

50 *Parrillo v Italy* para 215.

51 *Christian Lawyers Association of South Africa v Minister of Health* 1998 4 SA 1113 (T).

is echoed by statutory provisions.[52] Earlier enacted statutory law appears to take a more nuanced approach than common law and seems to indicate that embryos are accorded more respect than mere human cells (Position 3) due to their burgeoning potential for life.[53] The *Choice on Termination of Pregnancy Act*[54] for instance came into operation on 1 February 1997. It repealed the *Abortion and Sterilisation Act*[55] to the extent that it was applicable to abortion. In accordance with section 2 of the *Choice on Termination of Pregnancy Act,* a pregnancy can be terminated during the first 12 weeks thereof at the request of the woman. From the thirteenth to the twentieth week, the pregnancy can be terminated if a medical practitioner, after consultation with the pregnant woman, is of the opinion that:

- the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or
- there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality; or
- the pregnancy resulted from rape or incest; or
- the continued pregnancy would significantly affect the social or economic circumstances of the woman.

After the 20th week, the pregnancy can be terminated if a medical practitioner, after consultation with another medical practitioner, registered midwife or registered nurse, is of the opinion that the continued pregnancy:

- would endanger the woman's life;
- would result in a severe malformation of the foetus; or

52 See eg s 1 of the *Registration of Births and Deaths Registration Act* 51 of 1992, which provides that "birth" means the "[l]iving birth of a child." For a comprehensive discussion see Slabbert 1997 *SALJ* 246 *et seq*.

53 Section 71(b) of the *Correctional Services Act* 8 of 1959 for instance provided that any prisoner whose release was expedient on grounds of *advanced* pregnancy could on recommendation of a medical officer be released by the Minister, either conditionally or unconditionally. This provision was not retained in the *Correctional Services Act* 111 of 1998. Regulation 26D of the regulations issued in terms of the Act provides for pregnant remand detainees. See GN R323 in GG 35277 of 25 April 2012.

54 *Choice on Termination of Pregnancy Act* 92 of 1996.

55 *Abortion and Sterilisation Act* 2 of 1975.

- would pose a risk of injury to the foetus.

From the provisions set out above it appears that even "advanced" foetuses in the mother's womb are not entitled to the same protection as persons. The provisions of the *Choice on Termination of Pregnancy Act* indicate, however, that as embryos develop they are accorded more respect and protection than mere human cells.[56] These progressive measures of respect and protection flow from the recognition of their burgeoning potential for life. On the other hand, though, it has expressly been stated by South African courts that the killing of an unborn child by a third party does not amount to murder.[57] Only a living person can be killed, that is trite. Furthermore, one is certainly left with the impression that the Act promotes the interests of the mother *qua* living person rather than the interests of the unborn.

The *National Health Act* 61 of 2003 also does not provide an unequivocal indication as to the legislator's viewpoints on the status of the embryo. Chapter eight, for instance, pertains to the control of the use of blood, blood products, tissue and gametes, and although terminology such as "acquire, use or supply", "remove", "manipulate", "transfer", "import and export" is used, it will be argued herein that the products should not be viewed as property in the sense of legal objects. It is furthermore submitted that despite the meaning of these terms typically relating to aspects of disposal by an owner (a legal subject) of a thing (a legal object) it cannot be the true intention of the legislature to accord ownership in the common law sense of the word.

In 2016 the Regulations Relating to Artificial Fertilisation of Persons[58] were published. Some indications that the embryo is viewed as property emerge *inter alia* from Regulation 18, which stipulates that –

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56 Such a conclusion is borne out *inter alia* by the preamble to the Act, which reads that the Act promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an *early,* safe and legal termination of pregnancy. As the pregnancy develops the right diminishes, of course.

57 *S v Mshumpa* 2008 1 SACR 126 (E) para [53]. In terms of s 239(1) of the *Criminal Procedure Act* 51 of 1977, which relates to the killing of a newly born child. Proof is required that the child has breathed.

58 GN R1165 in GG 40312 of 30 September 2016. Some guidance may also be gleaned from the provisions of the *National Health Act* 61 of 2003. S 57(4) implicitly prohibits embryo research. However, permission may be obtained by written application to the minister for research on stem cells and zygotes which are not more than 14 days old. It needs to be noted that this approach of the legislature follows on previous regulations in Reg 26 in GN R179 in GN 35099 of 2 March 2012 (Regulations regarding the general control of human bodies, tissue, blood and blood products and gametes). This provision reads that "[A]ny person who acquires the

> 18(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 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 the male gamete donor; and
> (c) in the case of a female gamete donor, for the artificial fertilisation of a recipient, in that female 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. (italics added)

It is suggested that a careful approach needs to be adopted when considering the true intention of the legislature reflected by the Act and Regulations. Per definition, the exposition implies that embryos are property since only *qua* property is it susceptible of ownership. Should this have been the true intention, it speaks for itself that it would bring legal certainty not only to the status of the embryo but also to the issue of the ownership thereof. However, it is suggested that these provisions should not be understood as conveying a clear intention on the part of the legislature. In fact, it is submitted that the wording is instead indicative of a lack of apposite terminology to convey the true nature of the relationship. In the first place, one of the rules pertaining to the interpretation of statutes makes it clear that the legislator must alter the common law explicitly if it wishes to do so.[59] It goes without saying that the wording of the Act and Regulations does not meet this requirement. In the second place, Van Niekerk[60] points out that the Regulations fail to mention those instances where embryos are being cryo-preserved for future use. Although fertilisation has taken place it is possible that no one qualifies as a recipient as defined in the Regulations. If no such person has been nominated, therefore the Regulations do not provide an answer. She furthermore expresses doubts as to the correctness of the term ownership and concludes that it is problematic and should be replaced with the term "proprietary interest".

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body of a deceased person or any tissue, blood or gamete, shall acquire exclusive rights in respect thereof." Also see Mahesh 2015 *SAJBL* 11.

59 See eg *Gordon v Standard Merchant Bank* 1983 3 SA 68 (AD); *Seluka v Suskin and Salkow* 1912 TPD 265 and *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811, where the court explained on 823 that "[I]t is a sound rule to construe a statute in conformity with the common law rather than against it, *except where and so far as the statute is plainly intended to alter the course of the common law*." (italics added)

60 Van Niekerk 2017 *Obiter* 170.

An embryo is defined in the NHA (*National Health Act*) as "… a human offspring in the first 8 weeks from conception" and in the Regulations Relating to the Import and Export of Human Tissue, Blood, Blood products, Cultured cells, Stem cells, Embryos, Foetal tissue, Zygotes and Gametes as "… a human offspring in the first 8 weeks of conception". Despite these operational definitions (the latter of which is conceptually confusing i.e. "of conception"), our current legislation does not provide any guidance on whether an embryo may fulfil the requirements to be categorised as property. Therefore, the exact characterisation of an embryo in South African law remains unknown and will have to be dealt with on a case-by-case basis, taking into consideration relevant factors. It is submitted that the use of the word "ownership" in the NHA Regulations is problematic and that it should have been replaced with a "proprietary interest", which denotes something different from the legal understanding of ownership.[61]

4.2 Jurisprudential interpretations of the common law

4.2.1 The legal subject

South African common law leaves little doubt that birth means living birth.[62] Birth is also the moment when legal subjectivity comes into being. Legal subjectivity as the characteristic defining a legal subject describes the qualities over which an entity disposes in order to participate in legal intercourse as a subject and not an object.[63] Essentially, this entails disposing of the capacity to be the bearer of juridical competencies, subjective rights and capacities.[64]

The requirements for birth *qua* moment of coming into existence of subjectivity are regulated by common law. From the writings of Voet[65] in particular, it would appear that there are only two requirements for birth.

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61 Mahomed, Nöthling-Slabbert and Pepper 2013 *SAJBL* 19 also express serious doubts that ownership in the legal-technical sense was the true intention of the legislator. Also see Van Niekerk 2017 *Obiter* 170.

62 *Road Accident Fund v Mtati* 2005 6 SA 215 (SCA). Also see *S v Mshumpa* 2008 1 SACR 126 (E) for an exposition of criminal law on the question when life begins.

63 See Van der Vyver and Joubert *Persone- en Familiereg* 33.

64 Davel and Jordaan *Law of Persons* 3. Also see Cornescu 2010 *Annals Constantin Brancusi U Targu Jiu Juridical Sci Series* 139.

65 See Van der Vyver and Joubert *Persone- en Familiereg* 35. It is suggested that the extra-corporeal embryo cannot be included in this exposition of birth. This is due to its rudimentary biological status and also because it must be transferred to a uterus for development and eventually birth to occur.

a) In the first place the foetus must be separate from the mother's body. The cutting of the umbilical cord need not have taken place. The completion of the birth is also not influenced by the use of scientific aids or by the death of the mother.[66]
b) In the second place the foetus must have lived independently after its separation from the mother's body. Any sign of life, even if only for a moment, may serve as evidence in this regard. If it can, for example, be proven that the child had breathed or cried or that there had been a perceptible heartbeat, the child can be deemed to have lived. Medical evidence will naturally be important in this regard. Viability is not a requirement for birth.[67]

By interpreting the so-called *nasciturus* fiction[68] to include delictual claims for the unborn, some authors have concluded that it extended legal subjectivity to the unborn.[69] This response followed the decision in *Pinchin v Santam Insurance Co Ltd,*[70] where the court held that:

> [T]he point remains whether the fiction … must with any good reason be limited to the law of property. Why should an unborn infant be regarded as a person for the purposes of property but not for life and limb? I see no reason for limiting the fiction in this way, and the old authorities did not expressly limit it. It is probably because the state of medical knowledge at the time did not make it possible to prove a causal link between pre-natal injury and a post-natal condition that it did not occur to them to deal with this situation.[71]

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66 This requirement follows logically from *D* 25.4.1.1: *partus enim antequam edatur, mulieris portio est vel viscerum.* (because the child is part of the woman or her insides before it is born).

67 Van der Vyver and Joubert *Persone- en Familiereg* 60; Davel and Jordaan *Law of Persons* 13 indicate that certain authors also set a third requirement for birth, namely the requirement of viability. Viability means that the child must have reached such a stage of development within the mother's body that he or she could live independently, with or without aids, but without being fed from the mother's bloodstream. In essence this requirement has to do with the stage of development of the child's most important organs. There is no unanimity regarding the question of whether or not viability was a requirement for birth in Roman law. It was not stressed as a requirement in Roman Dutch law, however, and Van der Vyver and Joubert *Persone- en Familiereg* 61 come to the conclusion that it can be accepted with reasonable certainty that viability was not a requirement for birth in the legal technical sense. Also in South African law there exist no grounds to assume that a child has to be viable at birth in order to be considered a legal subject.

68 Common law has three requirements for the application of the adage: (1) it must be to the advantage of the *nasciturus*. If the *nasciturus* in question will gain a benefit from the application of the adage, it can be applied; (2) the benefit must accrue to the *nasciturus* after the date of conception; and (3) the *nasciturus* must eventually be born in a legal-technical sense.

69 See eg Van der Merwe and Joubert 1963 *THRHR* 293; Van der Vyver and Joubert *Persone- en Familiereg* 64.

70 *Pinchin v Santam Insurance Co Ltd* 1963 2 SA 254 (W).

71 *Pinchin v Santam Insurance Co Ltd* 1963 2 SA 254 (W) 259D.

> I hold that a child does have an action to recover damages for pre-natal injuries. This view is based on the rule of the Roman law, received into our law, that an unborn child, if subsequently born alive, is deemed to have all the rights of a born child, whenever this is to its advantage. There is apparently no reason to limit this rule to the law of property and to exclude it from the law of delict.[72]

This view was emphatically rejected in *Road Accident Fund v Mtati.*[73] *In casu* the legal question specifically related to the *Multilateral Motor Vehicle Accidents Fund Act* 93 of 1989, which prescribed that the Fund is under an obligation to compensate any "person" for damages as a result of injury. The question was whether a *nasciturus* was a person for the purposes of the Act. The court referred to foreign authority and quoted with approval as follows from the Canadian case in *Martell v Merton and Sutton Health Authority*:[74]

> In law and in logic no damage can have been caused to the plaintiff before the plaintiff existed. The damage was suffered by the plaintiff at the moment that, in law, the plaintiff achieved personality and inherited the damaged body for which the defendants … were responsible. The events prior to birth were mere links in the chain of causation between the defendants' assumed lack of skill and care and the consequential damage to the plaintiff.[75]

It is clear, therefore, that specific requirements exist for the birth of an entity before it will be legally recognised as a (natural) legal subject. An embryo does not meet these requirements and clearly cannot be regarded as a legal subject.

4.2.2 The legal object

It is commonly accepted that Herman Dooyweerd was a prominent exponent of the theory of subjective rights as it is applied in South African law. In essence he taught that subjective rights vest in a legal subject the entitlement to dispose of an object ("*beschikkingsbevoegdheid*") and an entitlement to enjoy and benefit from the use or control of the object ("*genotsbevoegdheid*"). In this sense the legal entitlements define the relationship between a legal subject and object. His theory flows from his systematic philosophy of the created order, in which he distinguished fifteen distinct and irreducible modal aspects which all creatures display. Each of

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72 *Pinchin v Santam Insurance Co Ltd* 1963 2 SA 254 (W) 260B.

73 *Road Accident Fund v Mtati* 2005 6 SA 215 (SCA). Also see *Christian Lawyers Association v Minister of Health* 2005 1 SA 509 (TPD).

74 *Martell v Merton and Sutton Health Authority* 1992 3 All ER 820 (QB).

75 *Martell v Merton and Sutton Health Authority* 1992 3 All ER 820 (QB) para 31. The court followed the line of argument of Van der Merwe and Joubert 1963 *THRHR* 296 that delicts typically comprise of different elements which may be removed in time and space.

these modal aspects is sovereign and builds on the ones below it. Modal laws govern the functions of creatures in each aspect – inorganic things are subject to the first four modal laws of number, space, motion and energy; plants are subject to the first five laws through the following modality of the biotic, animals to the first six laws through the next modality of the psychic and (only) human beings are subject to all fifteen modal laws, including the logical, historical, lingual, social, economic, aesthetic, juridical, moral and pistical aspects.[76] Van Zyl and Van der Vyver[77] therefore conclude that:

> Die mens in sy volheid is nooit 'n regsobjek nie en tree in *al* die wetskringe op as regsubjek. Die mens is by uitstek 'n religieuse wese (iemand wat in 'n direkte verhouding tot God staan; wat vir al sy doen en late teenoor God toerekenbaar en verantwoordelik is; wat in die kern van sy bestaan die tyd transendeer). As sodanig kan die mens nooit geobjektiveer word nie.

The legal object is typically viewed as "[p]rimair de juridische objectiveering van een economisch belang voor een rechtssubject."[78] In principle anything that is capable of being valued in economic terms can be a legal object. Economic value is not only monetary value but may also include things that are scarce or useful. It relates to Dooyeweerd's explanation in terms of which the economic aspect of reality ("[d]e economische wetskring in de

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76 Dooyeweerd *De Wijsbegeerte* 405. Also see Witte 1993 *SALJ* 550. Witte provides a thorough summary of Dooyeweerd's theory.

77 Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* 41. Roughly translated this explanation conveys that the human being in his/her fullness can never be a legal object and acts as a legal subject in all modalities. The human being per definition is a religious being (someone who stands in a direct relationship to God and who is accountable to God for all his/her action and inaction. In the essence of his/her existence he/she transcends time and can therefore never be objectified.)

78 For the purposes hereof it will be accepted that an economic interest is the true qualification for an entity. There is, however, a difference of opinion in this respect, and some authors conclude that not only economic value but all values of all the aspects preceding the juridical should be considered. See *inter alia* Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* 406; Joubert 1958 *THRHR* 108; Van der Vyver and Joubert *Persone- en Familiereg* 10. Also see Bahadur 2002 *Human Reproduction* 2770, who explains that while sperm has not specifically been classified as property in the sense that it cannot be passed on like a chattel, UK and European laws seem unclear on its status. Human body parts or products cannot be sold for profit, yet in transporting such body parts or products across EU countries, sperm is classified as “goods” and unavoidably becomes property. The conclusion is reached that even though the embryo is often regarded as being special it is not accorded special legal status. Also see Owen 1994 *J Contemp Health L & Pol'y* 500. Owen refers to *Del Zio v Presbyterian Hospital of New York* No 74-3588 (SDNY Nov 14, 1978), where the court rejected a claim for economic loss due to the wrongful destruction of embryos by a hospital. Instead, damages were awarded for emotional distress.

kosmische orde") immediately precedes the juridical aspect of reality, and economic value must hence be understood in terms of relative scarcity.[79]

In view of the exposition above it would appear that the fundamental difference between a legal subject and object is reflected in the fact that the human being ("mens") functions in his/her fullness ("volheid") in all modal aspects; also those that transcend the economic sphere, namely the juridical, moral and pistical. In contradistinction to the position of the legal subject, the legal object cannot function as the subject in these aspects. As a consequence it is suggested that the embryo, even though it appears *prima facie* to meet the requirement of economic scarcity, is not a legal subject.

4.3 The views of authors

A number of South African authors have involved themselves with various aspects regarding the embryo. Reference will be made to more recent contributions.

4.3.1 Jordaan

Jordaan approaches the question regarding the status of the embryo with reference to its moral status – is it wrong to harm the embryo? He relates to Kantian terminology by asking whether the embryo has intrinsic worth that makes it inherently worthy of protection.[80] In order to come to a conclusion he develops an argument that the embryo is not inherently worthy of protection.[81] After explaining foetal development in clear, elucidating terminology he rejects "traditional" arguments that the embryo is human life[82] or potential human life that must be protected:[83]

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79 Dooyeweerd *De Wijsbegeerte* 405.

80 Jordaan 2005 *SALJ* 241; Jordaan 2007 *SALJ* 625. This rather blunt formulation of course gives rise to uncertainty. Suffice it simply to say that both legal objects and subjects are worthy of protection. What is not worthy of protection is therefore something that falls outside of these categories.

81 Jordaan 2005 *SALJ* 249.

82 Jordaan 2005 *SALJ* 241 *et seq.* He concludes on the basis of *Clarke v Hurst* 1992 4 SA 630 (D) that a distinction needs to be drawn between "biological life" and "human life." He accepts the conceptual distinction drawn by the court of allocating less moral value to biological life than to human life. It is suggested that while this line of argument may hold water for cases of passive euthanasia it should not be applied in instances of active euthanasia or murder. Would it not be murder as per the definition of the felony if a terminally ill person was killed intentionally?

83 These were, *mutatis mutandis,* the conclusions of the courts in *Davis* 1 and 3 respectively. See para 2 of this contribution.

> I have also argued that if a particular stage of reproductive process is accorded more protection than earlier stage, there must exist a morally significant differentiating element between the two stages. On the premise that the gametes are not inherently worthy of protection, a morally significant differentiating element must therefore exist between the gametes and the pre-embryo for the latter to qualify for any protection. … In the absence of a morally significant differentiating element, it must be concluded that the pre-embryo is not inherently more worthy of protection than the gametes. The answer to the question 'what should the legal status of the pre-embryo be?' is therefore that the legal status of the pre-embryo should be the same as the gametes, namely that of being afforded no legal protection.[84]

It is suggested that Jordaan does not really answer the question he sets out to address – the legal status of the pre-embryo. Concluding, as he does, that it is not inherently worthy of protection does not explain the legal status of the embryo and is in a similar vein to *Parrillo*. Clearly it is not a legal subject, but is it a legal object? Jordaan seems to argue that it is not even a legal object/property. What is it then? Or in more practical terms – what would the advice to be given to the Davis couple be? Their litigation is about something not recognised by law? Litigation regarding the nature of the embryo the world over illustrates the fallacy of this argument. It is suggested that the Kantian point of departure that Jordaan applies is perhaps not sufficiently nuanced to explain the status of the embryo. Furthermore and more practically - if one were to apply Jordaan's argument it is suggested that an agreement between parents or parents and a medical institution for cryopreservation would not have any significance as it relates (in legal terms) to nothing – the product of the performance contract would not be recognised by law.

4.3.2 Slabbert

The question Slabbert[85] addresses is "[t]hat a definition of life must be attempted in the field of law, for the law needs to know what it is protecting." She concludes that theories regarding "personhood" do not provide a sufficient basis on which legal personality can be established. The conclusion she draws builds on the potential of the embryo and foetus to become human persons. She points out that the embryo and foetus have legitimate interests that deserve protection and that these interests can effectively be protected by steps short of constitutional protection. Such would include specific legislation and ethical guidelines. In fact, "[a] regime of protection has emerged with multiple tools adapted to different stages of humanlife, (*sic!*) different technologies and interests involved. …. [b]elieves

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84 Jordaan 2005 *SALJ* 249. He consequently concludes that the current legal position is morally sound and should be maintained.

85 Slabbert 1997 *JSAL* 234.

that this type of protection, paradoxically provide better protection in the long run."[86] It appears that Slabbert endorses Jordaan's conclusion that the law currently accords sufficient protection for the embryo (and foetus).

Slabbert's criticism of theories which explain the nature of the embryo as property or as a person, similarly to that of Jordaan, is clear and comprehensively illustrates the philosophical and legal dimensions of the conundrum. However, it is suggested that in a situation where a decision needs to be taken whether the entity is a person or property (such as the case with the cryo-preserved embryo) a principled approach is required. Ambivalence in this regard may result in vastly different approaches regarding the protection afforded – would it be the object or subject of protection measures? As Van Niekerk quite correctly points out, parenthood brings with it responsibilities that cannot be ignored.[87]

4.3.3 Lupton

Lupton supports a so-called brain birth criterion as the moment when an entity can have interests – neither embryos, nor even mature organisms can have interests.[88] He argues that the entity meeting the description of "[t]hat state of being which we can neither become nor cease to be without ceasing to exist" is "[I] have a brain." On this basis he concludes before the brain comes into existence (after a period of approximately 22 weeks of intra-uterine development[89]) there is no human being to consider.[90]

> No one would disagree that it is wrong to deliberately kill a human being. From this it follows that unless the interests of another being are affected thereby it is morally permissible to do whatever one likes with a human embryo or foetus prior to the formation of its brain. This would include aborting it or experimenting on it. … [b]ut it would appear that society operates what, for want of a better term, can be described as a scale of revulsion which is in direct proportion to the stage of development (particularly mental development) …[91]

Similarly to Jordaan, Lupton places strong emphasis on brain activity. However, it is submitted that while his explanation may be valid for the

86 Slabbert 1997 *JSAL* 254.
87 Van Niekerk 2017 *Obiter* 170. The focus of Van Niekerk's contribution pertains to the legal framework for addressing disputes involving frozen embryos and therefore only brief reference is paid to the status of the embryo. Essentially she elaborates on Positions 1-3, as explained in para 2 of this contribution.
88 Lupton 1988 *Acta Juridica* 213.
89 Lupton 1988 *Acta Juridica* 214.
90 Lupton 1988 *Acta Juridica* 210.
91 Lupton 1988 *Acta Juridica* 212.

foetus, it does not explain the nature of the embryo – what is it in a legal-technical sense?

5 Conclusion

From the explanation above it is clear that the embryo is neither a legal subject *sui iuris*, nor a legal object. *Qua sui generis* entity it transcends the economic modal aspect as explained by Dooyeweerd and therefore cannot be viewed as a legal object. On the other hand it does not dispose of the capacity to be the bearer of juridical competences, subjective rights and capacities. From this perspective the judgment in *Davis* 3 that the parents "[h]ave an interest in the *nature of ownership* to the extent that they have decision-making authority concerning *disposition* of the pre-embryos"[92] needs to be considered carefully; *prima facie* human beings and property are viewed as entities on the two sides of a continuum and that embryos occupy an interim category somewhere on the continuum. On the other hand, one would tread dangerous grounds if one endeavoured to explain it exclusively as a legal subject *sui iuris* or legal object. For instance, if it were to be regarded as a subject it would of necessity mean that the embryo must be provided the opportunity for implantation and that it may not be destroyed or harmed. In the case of divorce it would also result in the embryo being viewed as a child of the marriage. If it were to be treated as a legal object, it would in all probability be classified as property (*'n saak*) – something over which there may be ownership. Such conclusion would lead to untenable results. For instance, would *accessio* be the way of acquiring ownership? *In casu* the sperm and egg belong to different owners which through *accessio* would become a single object that cannot be separated without injury. Furthermore it would seem that the nature of ownership would not be exclusive (absolute) but rather qualified.[93] If exclusive it would belong to one owner exclusively to enjoy it and dispose of it in any manner not contrary to law. If qualified, it would belong to more than one person.

> Ownership of property entitles the owner to certain incidents of ownership. Owners have absolute dominion over their property and may do so as they choose with it. Thus, it is reasonable to assume that the egg and sperm providers have decision-making authority and they are free to transfer their control to others. Arguably, then, the egg and sperm providers could do whatever they want with the frozen embryo. As owners, it would seem that they could implant the embryo, give the embryo away, dispose of the embryo,

92 *Davis* 3 para [3].

93 It is suggested that the absence of a provision in the *Choice on Termination of Pregnancy Act* 92 of 1996 that the consent of a father of an embryo is needed for an abortion serves as s strong indication that the legislature does not view the embryo as a legal object which has come into being by way of *accessio.*

> and possibly even sell the embryo. The embryo might also be left frozen indefinitely.[94]

The explanation above clearly explains the general characteristics of ownership and obviously would not apply *sito sito* in respect of the cryo-preserved embryo. Proprietary rights are typically restricted to reasonable uses, but the State may indeed regulate the acquisition, enjoyment and disposition of property. Therefore, absent State regulation and provided the use is reasonable egg and sperm donors would have "unlimited" ownership rights in the frozen embryo. In the case of divorce such approach would lead to further peculiar results – the embryos would be marital property.

Neither *Davis* 3 nor *Parrillo* refer to legal subjects or objects. Rather the terminology used refer to "personhood" or "property". *Davis* 3 concludes that embryos fall somewhere on a continuum between a person and property while *Parrillo* simply conveys that such embryos are not property. The use of IVF techniques raises sensitive moral and legal questions in a dynamic and constantly evolving area[95] and it may reasonably be expected that the South African legislature and/or courts may shortly be confronted with this issue.

It is suggested that the terms person and property (as applied in the *Davis* decisions) do not allow for explaining the status of the embryo and that application of concise legal terminology will contribute to a better understanding of the position. Such terminology finds expression in the terms legal subject, object and legal subjectivity as set out above and is flexible enough to allow for a tenable explanation of the legal nature of the embryo.

The argument is put forward that despite the fact that conception of an embryo has taken place artificially and it's being removed from the mother's body, it has to be viewed as being included in its parents' legal subjectivity. This conclusion follows by analogy from an exposition of the bio-ethical

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94 Young 1991 *Golden Gate UL Rev* 584.

95 It needs to be noted that in a European context there is no consensus on an issue related to the one currently under discussion, namely whether the donation of embryos not destined for implantation should be permitted. Some European member states have adopted a non-prohibitive approach and seventeen of the forty member states allow research on human embryonic cell lines. In other states there are no regulations but the relevant practices are non-prohibitive. In some states, including Latvia, Croatia, Malta and Andorra, there is legislation expressly prohibiting any research on embryonic cells. However, in the case of Germany, Austria, Slovakia and Italy, research is allowed subject to strict conditions requiring, for instance, that the purpose of the research must be to protect the embryo's health. See *Parrillo v Italy* paras 174-176.

nature of the parent-child relationship from which it is clear that the legal subjectivity of (especially a young) child *qua* legal subject is interwoven with that of its parents. The position of the infant – a legal subject with no personal capacity to act – bears out on this conclusion. He or she cannot personally conclude any juristic act since the law does not attach any consequence to his or her psychological intention; his/her psychological intention is not legally recognized. The only way in which an infant can participate in legal intercourse is if his/her parent/guardian performs the juristic act for him/her and on his/her behalf. *It can be said that the parent's psychological intention is legally recognized as that of the infant and that the infant has acted legally*.[96] Juridical imputation therefore joins the legal actions of one with the rights and duties of the other.[97] This explanation does not detract from the fact that the infant is a legal subject, however.

It may therefore be concluded that embryos are not legal subjects *sui iuris* but that does not mean that they are legal objects; the bio-ethical nature of the parent-child relationship simply means that as product of a biological process the embryos are included in their parents' legal subjectivity.[98]

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96 See eg Van der Vyver and Joubert *Persone- en Familiereg* 142.

97 Dooyeweerd *De Wijsbegeerte* 278.

98 Confirmation of this conclusion, it is submitted, stems from the provisions of the *Child Care Act* 38 of 2005, which provides in s 295(e) in respect of surrogate motherhood for a court having regard of the interests of the child to be born. Also see *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP).

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List of Abbreviations

Annals Constantin Brancusi U Targu Jiu Juridical Sci Series	Annals Constantin Brancusi University of Targu Jiu Juridical Science Series
ART	assisted reproductive technologies
Conn L Rev	Connecticut Law Review
Golden Gate UL Rev	Golden Gate University Law Review
J Contemp Health L & Pol'y	Journal of Contemporary Health Law and Policy
J Legis	Journal of Legislation
Md J Int'l L	Maryland Journal of International Law
SAJBL	South African Journal of Bioethics and Law
SALJ	South African Law Journal
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
Virginia L Rev	Virginia Law Review