

# Fertility clinic consent forms and the disposition of reproductive material upon a fertility patient's death: Legal reflections

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South African fertility clinics often include a provision in their consent forms that deals with the disposition of reproductive material (gametes and embryos) after a fertility patient's death. This practice is problematic as such a provision is not legally valid. If the clinic acts in pursuance of such a provision upon a fertility patient's death, the fertility clinic may be committing a civil wrong and a crime. Accordingly, consent forms should not include any provision that deals with the disposition of reproductive material after a fertility patient's death. Instead, to address the practical concern of keeping reproductive material cryopreserved without receiving payment, fertility clinics' storage agreements should use non-payment by fertility patients (or their successors in title) as the trigger event for the disposition of reproductive material. The importance of dealing with reproductive material in both its property rights dimension and its personality rights dimension is highlighted.

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The case of *NC v Aevitas*<sup>[1]</sup> made it clear that a person's cryopreserved gametes can be used posthumously for reproduction.<sup>[2-4]</sup> This highlights the issue of the disposition of reproductive material (gametes and embryos) after the owner's death. A number of South African (SA) fertility clinics include a provision on the disposition of reproductive material after the owner's death in their consent forms, and request their patients to select between the following typical options: (i) discard; (ii) use for scientific research; or (iii) offer for donation to other fertility patients. In this article, I analyse whether such a provision is legally enforceable, and consider the legal consequences for fertility clinics.

## The legal nature of reproductive material

In this article, the term 'property' denotes a legal object (or 'thing') that is susceptible of private ownership. While some scholars do not consider human reproductive material as property,<sup>[5]</sup> there is little doubt that reproductive material is indeed property.<sup>[6]</sup> In fact, the Regulations Relating to the Artificial Fertilisation of Persons<sup>[7]</sup> explicitly provide for the ownership of reproductive material. Moreover, even if the provision in the regulations did not exist, an independent case can be made that reproductive material is property, based on SA's common law. At common law, the criteria for something to qualify as property are that it must be (i) useful and valuable; (ii) not merely part of something else; (iii) not part of a human body; and (iv) capable of human control.<sup>[8]</sup> In ancient Roman times, embryos could not be created outside the human body, and sperm would not have been deemed useful and valuable. By contrast, in our contemporary world of high-tech medically assisted reproduction, sperm, eggs and embryos fulfil all four of the criteria. They have an independent existence outside the human body, where humans can control them and – although they may not be traded – they are undoubtedly useful and valuable to fertility patients. Accordingly, in our contemporary world, reproductive material qualifies as property.

Note that the statutory trade ban on reproductive material is simply a partial limitation on one of the rights entailed by ownership, namely the right to alienate. Alienation of property usually occurs when that property is traded. However, there is another way to alienate property: donation. This limitation must be seen in context. The law places multiple limitations on ownership of many kinds of property. For example, although a rhinoceros is property, its owner may not trade its horn; although a cat is property, the cat's owner may not mistreat the cat; and although a car is property, its owner may not drive it on a public road in any way the owner pleases. The point is that the fact that the law places certain limits on ownership of certain kinds of property does not mean that the relevant property ceases to be property. It only means that the law shapes ownership of each kind of property aligned with policy objectives.

However, human biological material is a special kind of legal object, as it contains a person's genetic information. Since genes are unique to each person, human biological material has a nexus with a person's identity. SA law protects personal identity through personality rights. These personality rights exist independently from and despite ownership rights. For example, if X takes a photograph of Y, X is the copyright owner of the photograph. However, if Y did not consent to the taking of the photograph, and it shows her naked, she would be entitled to demand the photograph's deletion, and could get a court order to this effect. Why is this the case? In this scenario, Y's personality rights override X's ownership rights. In the same way, I suggest that one has a personality right in using one's genes for reproduction. Even if somebody else legally owns one's reproductive material, one's consent to the use thereof would still be required.

This is not a far-fetched scenario, as the regulations provide that when an embryo is created, it is owned by the woman who is the intended recipient of such an embryo.<sup>[8]</sup> In other words, even if the woman is married to the man who provided the sperm to create the embryo, the current legal default position is that she is the sole owner. Elsewhere I have argued that making the woman – rather than both

the intended parents – the default owner is discriminatory, and likely unconstitutional.<sup>[6]</sup> Regardless, the woman as the sole owner is free to contractually agree with her husband (or anybody else for that matter) to be joint owners of the embryo, as the regulations in no way limit her common-law contractual freedom. But, for the sake of argument, assume that the woman decides to retain sole ownership. Assume further that the parties' marriage ends in divorce. Would the woman still be able to use the embryo for reproductive purposes if her ex-husband has retracted his consent? Remember that she is the sole owner of the embryo. The answer, I suggest, is 'no'. The personality rights of her ex-husband limit her ownership rights, and he would be able to stop her from using the embryo. Why? Because of the nexus between genes and human identity, and because the law protects a person's interest in his or her identity. Of course, if the ex-husband waived his personality rights in the embryos at any stage, the answer would be different.

Therefore, the legal nature of reproductive material has at least two legal dimensions: a property rights dimension and a personality rights dimension. The interaction between these dimensions will depend on the facts of each case. Any contractual disposition of reproductive material needs to deal with these two dimensions, or risk being fraught with legal void.

### The inheritance of reproductive material

An essential difference between the two dimensions described above is that while personality rights are bound up with a person's personality,<sup>[9]</sup> property rights relate to an object. Accordingly, whereas one's personality rights cease to exist at the time of one's death, one's property rights do not. Instead, property rights are automatically transferred to one's deceased estate, and eventually to one's heirs. Who one's heirs are is determined either by one's will, or in the absence of a valid will, by the rules of intestate succession.

The general rule in SA law is that agreements during one's life that purport to dispose of a person's property on the person's death, called *pacta successoria* (succession agreements), are not legally valid.<sup>[10]</sup> The classic example of a *pactum successorium* is where two brothers purchase a farm together as joint owners and enter into an agreement that if one of them dies, the other will become the sole owner. If one brother indeed dies, the surviving brother will not be able to enforce the agreement against the deceased estate of the late brother. The deceased estate and eventually the heirs will become joint owners of the farm with the surviving brother. Note that *pacta successoria* do not need to be reciprocal but include unilateral agreements.

What is the reason for the law's antipathy to *pacta successoria*? The answer is that as a matter of legal policy: (i) it fetters freedom of testation; and (ii) it constitutes an evasion of the formalities required regarding testamentary instruments.<sup>[10]</sup>

### Provisions in fertility clinics' consent documents regarding the disposition of reproductive material upon the fertility patient's death

What is the legal nature of a provision in a consent document to the effect that a fertility patient instructs or requests the fertility clinic to dispose of reproductive material in a certain way when the patient dies? There are two possible scenarios. First, if the fertility patient is the legal owner of the reproductive material – through the operation of statute or otherwise – such a provision is a *pactum successorium*, and will therefore be visited with invalidity. The only valid way in which one can dispose of one's reproductive material that is stored at a fertility clinic upon one's death is through one's will.

The second scenario is that the fertility patient is not the owner of the reproductive material. Under the current statutory regime, this will be the case with a husband if his wife has not contractually agreed to joint ownership of the embryos. While the provision would not be a *pactum successorium*, it would likely be unenforceable for another reason: what right do non-owners have to dispose of property that is not theirs – whether during their lives or at death? None.

If a fertility clinic acts in terms of the invalid disposition provision of its consent form by, for example, discarding the reproductive material or 'donating' it to other fertility patients, it would be problematic. Consider the following hypothetical scenario set in everyday life: X has a heart attack and dies. Upon learning the news of X's death, his lover, Y, arrives at X's home, grabs the keys to X's sports car, and announces: 'X told me that if he dies, I can have the yellow Ferrari!' She drives away with the car. Is this lawful? Clearly not. It is theft. Ownership of the car vests in the deceased estate and will be inherited according to the rules of the law of succession. By physically taking the car, Y is intentionally depriving the deceased estate – and the rightful heirs – of the car. Now, consider a slight change to the hypothetical scenario: upon learning the news of X's death, his neighbour, Z, arrives at X's home, pours petrol over X's sports car, and sets it alight. He explains: 'X told me that if he dies, I must destroy the yellow Ferrari to ensure that nobody gets it!' Is this lawful? Again, clearly not. It is malicious damage to property. Again, ownership of the car vests in the deceased estate. By setting the car alight, Z is intentionally damaging property that does not belong to him.

The same applies to a fertility patient's reproductive material when the patient dies. Ownership immediately passes to the deceased estate. Therefore, discarding the reproductive material would constitute malicious damage to property, and 'donating' the reproductive material to another fertility patient or patients would constitute theft. It is also important to note that such purported 'donation' would be void, and the executor (or eventually the heirs) would have the full array of civil remedies available against the individual healthcare professionals and the clinic involved. In addition, the executor (or eventually the heirs) will also be able to claim possession of the reproductive material from any person to whom it was purportedly 'donated'.

Fertility clinics' consent forms often include indemnification clauses. Would these not be binding on deceased patients' successors in title? The answer is affirmative, but it cannot assist the clinic or the individual healthcare professionals involved. As a matter of legal policy, persons can only indemnify themselves for damage caused by their negligence, not for damage caused intentionally. For example, if an embryologist accidentally dropped a Petri dish containing an embryo, it would constitute negligence. But disposing of or 'donating' the embryo upon the patient's death is not negligent – it is an intentional act. Accordingly, no indemnification clause, irrespective of how broadly it is worded, would be able to shield the clinic or the individual healthcare professionals involved.

### Conclusion

Since provisions in fertility clinics' consent forms regarding the disposition of fertility patients' reproductive material upon their deaths are invalid, they can only cause misunderstandings or disputes, and unnecessarily expose fertility clinics and fertility healthcare professionals to civil and criminal liability. Accordingly, fertility clinics should avoid these kinds of provisions in their consent documents.

From a practical perspective, the question might be posed: how can a clinic avoid having to store reproductive material *ad infinitum*

without getting paid? The suggested solution is as follows: include a provision in the storage agreement that if patients (or their successors in title) fail to pay the clinic for storage after a specified number of attempts to contact them, the reproductive material will be deemed to be abandoned property (*res derelicta*) and the clinic will acquire ownership in it. This would entitle the clinic to destroy the reproductive material, but not donate it for other fertility patients' reproductive use. Remember that, as discussed above, ownership is but one dimension of reproductive material, and that the persons whose genes are contained in the reproductive material also have personality rights in the reproductive material. This means that the reproductive material cannot be used for reproduction without their consent. To allow the fertility clinic to donate the abandoned reproductive material for the reproductive use of other fertility patients, the storage agreement should provide that if fertility patients abandon their reproductive material, they are deemed to have consented to their reproductive material being used by other fertility patients selected by the clinic.

In sum, therefore, the solution to the practical problem is to contractually provide (i) for the disposition of reproductive material to be triggered by non-payment instead of death; and (ii) that such non-payment be deemed a surrender of rights on both legal dimensions relevant to reproductive material – property rights and personality rights.

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