

The *in Vitro* Embryo and the Law: The Ownership Issue and a Response to Robinson

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Abstract

In 2012 the Minister of Health made the Regulations Relating to the Artificial Fertilisation of Persons, which provide that the woman who intends to be made pregnant with an *in vitro* embryo owns such an embryo and can control the embryo's fate in specified ways. Given that *in vitro* embryos are outside the woman's body, the rationale for these provisions cannot be to protect the woman's bodily integrity. These provisions are, however, problematic from a constitutional perspective, as they: exclude fathers across the board, and impede the right of all intended parents who will not gestate the pregnancy, like surrogacy commissioning parents, to make decisions regarding reproduction – which include the right *not* to reproduce and hence to veto the further use of an *in vitro* embryo for reproductive purposes. Robinson argues that the legislative intent with the 2012 Regulations was not to establish *ownership* of *in vitro* embryos, and that *in vitro* embryos are not legal objects (or subjects), but rather form part of the legal subjectivity of their parents. I respond that the language used in the relevant provision is plain and clear in establishing *ownership* of *in vitro* embryos, and that *in vitro* embryos are therefore legal objects. I further suggest that Robinson's proposition of *in vitro* embryos forming part of the legal subjectivity of their parents may address the gender equality concern with the 2012 Regulations, but that it in turn causes other problems. In particular, Robinson's rationale for his proposition is problematic, as it appears to conflate the *embryo* with the *prospective child*. I rely on the important recent judgment in *Ex Parte KAF* 2019 2 SA 510 (GJ) that held explicitly that the *in vitro* embryo should not be equated with the prospective child. Finally, I respond to Robinson's critique of my 2005 article, by clarifying the research questions and answers of that article. I highlight the importance of the moral status of the *in vitro* embryo to legal and ethical debates relating to the *in vitro* embryo, and invite academic debate on the topic.

Keywords

Embryo; moral status; legal status; ownership; artificial fertilisation.

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1 Introduction

We are fortunate, however, to live in an era where the effects of infertility can be ameliorated to a large extent through assistive reproductive technologies. The technological advances seen over the last half century have greatly expanded the reproductive avenues available to the infertile. These reproductive avenues should be celebrated as they allow our society to flourish in ways previously impossible.¹

In vitro fertilisation ("IVF") entails that embryos are created outside a woman's body in a laboratory – so-called "*in vitro* embryos" – before being placed in the woman's body. The main purpose of this technology is to overcome various infertility issues. When using IVF, a fertility clinic would typically create a batch of six to eight embryos at a time. These embryos are closely monitored over a number of days. Embryos that show signs of being unviable would be discarded. At five or six days after fertilisation, one or two viable embryos – sometimes more – are transferred to the mother's womb. The remaining embryos will typically be cryopreserved. If a pregnancy does not ensue, some of the remaining embryos can be thawed and transferred to the mother's womb. If a pregnancy does ensue, the remaining cryopreserved embryos can be destroyed, kept in cryopreservation for future use by the same woman (but for no longer than ten years), donated for use by another woman, or donated for research. According to the most recent available data on IVF in South Africa, more than 4 000 IVF cycles were performed in 2014, resulting in 803 live births.²

While there has been a steady stream of reported cases regarding *in vitro* embryo-related disputes in some foreign jurisdictions, South Africa has not experienced any such (reported) litigation. The first case in South Africa to address the legal status of the *in vitro* embryo – although not in the context of any dispute, but in the context of a surrogacy agreement confirmation hearing – was *Ex Parte KAF*,³ being a recent judgment of the Johannesburg High Court that I discuss in this article.

Perhaps because of – or maybe despite – the paucity of South African case law dealing with the *in vitro* embryo, legal scholars have weighed in on the

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¹ *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 3. Minority judgment by Khampepe J.

² South African Registry for Assisted Reproductive Techniques 2015 <http://anara-africa.com/wp-content/uploads/2017/09/SARA-2014-22.05.2017.pdf> 13.

³ *AB v Minister of Social Development* 2017 3 SA 570 (CC).

subject. In a recent article⁴ in this journal, Robinson presents a thoughtful analysis of the question whether the *in vitro* embryo is a legal subject or a legal object – or, as he proposes, neither: He concludes that the *in vitro* embryo is included in its parents' legal subjectivity. In his article he critiques, among others, my own 2005 article⁵ on a related topic. I gladly pick up the gauntlet. In this response article, I set out to defend and expand on my position, and to provide reasons why I do not agree with Robinson's proposition that the *in vitro* embryo is included in its parents' legal subjectivity.

This article is structured as follows: In Part 2, I familiarise the reader with key terms relevant to this article. Next, in Part 3, I sketch some background regarding the politics of the debate on whether an embryo should qualify *qua* legal subject. My analysis of the law relating to the embryo's legal subject/object status, including Robinson's arguments in this regard, is presented in Part 4. This is followed in Part 5 by general remarks on the ownership of embryos. I discuss practical questions, such as whether ownership in embryos can be transferred, and highlight some constitutional concerns with the way in which embryo ownership is currently provided for in our law. This sets the stage to engage, in Part 6, with Robinson's proposition that an *in vitro* embryo is part of its parents' legal subjectivity. Part 7 is my response to Robinson's critique of my 2005 article. I conclude the article in Part 8 by calling for legislative action to address the deficiencies in the extant law related to the *in vitro* embryo.

2 Notes on terminology

2.1 *Pre-embryo versus embryo*

Jurisdictions that allow research on embryos almost universally employ the "fourteen-day rule".⁶ South Africa is no exception.⁷ This rule entails that research on embryos can be permitted only up to the fourteenth day after fertilisation. Dr Anne McLaren, a member of the influential Warnock Committee that first proposed the fourteen-day rule, coined the term "pre-embryo" to describe the embryo within the first fourteen days after fertilisation.⁸ Given the influence of the fourteen-day rule, using the term "pre-embryo" seemed convenient, and gained currency in bioethical

⁴ Robinson 2018 *PELJ*.

⁵ Jordaan 2005 *SALJ* 237-249.

⁶ Hyun, Wilkerson and Johnston 2016 *Nature* 169, 171.

⁷ *National Health Act* 61 of 2003 ("NHA") s 57(4).

⁸ Trounson "Why do Research on Human Pre-embryos?" 14.

discourse. In my 2005 article, I indeed used the term pre-embryo. However, as I have noted in my more recent work,⁹ the term pre-embryo has increasingly been subject to critique.¹⁰ From both sides of the bio-political spectrum – those who view the fourteen-day rule as an arbitrary and unnecessary limit on scientific research, and those who view any research on embryos as morally objectionable – the term pre-embryo has been described as a semantic ploy designed to give a scientific appearance to the legal *status quo* of the fourteen-day rule. Accordingly, in the interest of focussing on substance rather than on semantics, in this response article I simply refer to the embryo, or the *in vitro* embryo as the case may be, and not the pre-embryo. However, references to my previous article still use the term pre-embryo. Where this occurs, the term is intended to convey only its meaning as defined in my previous article, namely the embryo within the first fourteen days after fertilisation, and not to convey any bio-political agenda.

2.2 Moral status

"Moral status" (also referred to as "moral standing" or "moral considerability") typically means that an entity has interests that we must – from a moral perspective – respect for the entity's own sake. For instance, most people agree that a table or a chair does not have any moral status. One cannot wrong the chair by kicking it. (One can of course wrong the chair's owner or possessor by kicking the chair, but that is something extrinsic to the chair itself.) On the other side of the spectrum, most people would agree that kicking a child (without good cause, such as self-defence) is wrong in relation to the child. But what about a dog or a cat? Is causing unnecessary suffering to a sentient animal *morally* wrong in relation to that animal? (I emphasise *morally* to remind the reader not to confuse this moral question with a legal one.) If the answer to this question is affirmative, it means that sentient animals have a moral status.

Some scholars adhere to a *threshold* concept of moral status, meaning that an entity is perceived to either possess full moral status or not. Others, including myself, adhere to a *scalar* concept of moral status, which makes provision for the gradual upscaling of levels of respect for the entity's interests aligned with certain criteria. For example, one may agree that a dog or a cat has moral status (and is morally wronged by being kicked gratuitously), but this does not mean that one necessarily posits canine or

⁹ Jordaan 2017 *SAJHR* 429-451.

¹⁰ See, eg Williams, Kitzinger and Henderson 2003 *SHI* 793.

feline moral status on a par with the (fuller or more respect-demanding) moral status of a human being.

2.3 *Legal status*

"Legal status" can refer to any position that something or someone holds in law. Three examples will suffice: The *legal status* of the white rhinoceros is that of a protected species; the *legal status* of cannabis is that it has been decriminalised by the Constitutional Court for personal consumption by adults in private; and the *legal status* of a hypothetical plaintiff in a lawsuit can be that of a woman over the age of majority, who is widowed, and is a refugee. One kind of legal status that is fundamental in our law is the legal subject—legal object dichotomy. A "legal subject" – which in law is used synonymously with the word "person" – is an entity that is capable of having legal rights, duties, and capacities.¹¹ A "legal object" is the opposite, namely an entity that is *not* capable of having legal rights, duties, and capacities.¹² Given the above definitions, there is no space in between or outside this twofold division of entities: Either an entity *is* capable of having legal rights, duties and capacities, or he, she or it *is not*. In the South African legal universe, all entities are either subjects or objects.

3 The politics of qualifying *qua* legal subject

Although ethics and the law can influence each other, they are distinct systems. Determining whether an entity is capable of having legal rights, duties and capacities is a matter of legal policy, and is not dependent – at least not directly – on factors that are often relied on in moral status debates, like cognitive ability and sentience. Even having a physical body is not a factor. For instance, juristic persons certainly have no cognitive ability and sentience themselves, and exist only as mental constructs, and yet the law deems them capable of having legal rights, duties, and capacities. This highlights an important aspect of legal subjectivity: Being capable of *having* legal rights, duties, and capacities does not mean being capable of oneself personally enforcing legal rights, complying with legal duties, or even understanding any of these. Another legal subject better capable of personally performing the relevant juristic acts can act on one's behalf; another legal subject can even be legally duty-bound to act on one's behalf in certain situations. Accordingly, the *in vitro* embryo's lack of cognitive ability and sentience (and its microscopic size) are not *necessarily* obstacles

¹¹ Kruger and Skelton *Law of Persons in South Africa* 13.

¹² Kruger and Skelton *Law of Persons in South Africa* 13.

to being legally deemed capable of having legal rights, duties, and capacities.

Legal subjects can be divided into two main categories: natural legal subjects and juristic legal subjects. Natural legal subjects, which is the category relevant to the topic of this article, are human organisms from the moment of being born alive, until they die. Although natural persons are legally deemed to be *capable* of having legal rights, duties, and capacities, such capability does not equate to actually having *all* conceivable legal rights and duties, and *full* capacities that are provided for in our law; natural persons may have different sets of rights and duties, and different levels of capacity to perform legal acts. Importantly, however, all natural persons enjoy the rights enumerated in the Constitution. (The entitlement of juristic persons to enjoy these rights is more circumscribed: it depends on the nature of the right and the nature of the juristic person.) The Bill of Rights is like a giant safety net that automatically provides a minimum level of legal protection to all natural legal subjects. Accordingly, if one believes that the embryo has full moral status, having the law recognise embryos as legal subjects in their own right would be a rational – and ambitious – objective.

Legal objects, on the other hand, are per definition not *capable* of having any rights, and can therefore never qualify for the protection of any of the rights enumerated in the Constitution. Nevertheless, being a legal object does not mean that an entity can simply be treated in any way. The way in which one interacts with a legal object within one's dominium may be subject to legal rules aimed at the protection of such a legal object, like animals that are protected against inhumane treatment and buildings that are declared as national monuments. However, from the perspective of those who believe the embryo to have full moral status, having the law denote embryos as legal objects – even with specific protections – may seem morally perilous, and the proper object of legal or political activism for change.

Should one believe that *in vitro* embryos have a degree of moral status, but not full moral status, classifying them as legal objects, while putting certain protections in place, seems to be the appropriate legal avenue. However, a common approach worldwide is to associate "respect" for the *in vitro* embryo with putting in place strict legal and ethical rules regarding the use of the *in vitro* embryo – especially in respect of research using embryos.¹³ It is not clear how this approach is always rationally connected to "respect" for the *in vitro* embryo – especially if the relevant rules do not ultimately

¹³ See Jordaan 2008 *J Med & L* 417-437.

protect the *in vitro* embryo. A more rational approach would require that the interests that should be respected for the embryo's own sake be identified, and that legal protections be designed to protect these interests.

Lastly, should one believe that *in vitro* embryos lack moral status, any protections for the *in vitro* embryo would be unnecessary and irrational. Moreover, a strict legal-ethical regime regarding the use of the *in vitro* embryo would be perceived as only serving to frustrate and obstruct the interests of other entities who actually do have moral status. To illustrate with an example: cancer patients have an interest in a cure for cancer being developed through embryonic stem cell research, which in turn requires research on *in vitro* embryos, but the latter research is frustrated by over-regulation.¹⁴

4 The law relating to the embryo's legal subject/object status

4.1 *The in vitro embryo as object of ownership*

In 2012 the Minister of Health promulgated the Regulations Relating to the Artificial Fertilisation of Persons¹⁵ ("the 2012 Regulations") in terms of section 68 of the *National Health Act* ("NHA").¹⁶ Regulation 18(2) provides that:

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.

In 2016 the Minister of Health published updated *draft* Regulations Relating to the Artificial Fertilisation of Persons¹⁷ ("the 2016 draft Regulations") for public comment. It is noteworthy that the embryo-ownership provision is retained in exactly the same formulation in the 2016 draft Regulations.

A "recipient" is defined in Regulation 1 as "a female person in whose reproductive organs a male gamete or gametes are to be introduced by other than natural means; or in whose uterus/womb or fallopian tubes a

¹⁴ See Jordaan 2007 SALJ 618-634.

¹⁵ Regulations Relating to the Artificial Fertilisation of Persons (GN R175 in GG 35099 of 2 March 2012).

¹⁶ *National Health Act* 61 of 2003.

¹⁷ Regulations Relating to the Artificial Fertilisation of Persons (GN 1165 in GG 40312 of 30 September 2016).

zygote or embryo is to be placed for the purpose of human reproduction". In other words, the "recipient" is the intended gestational mother – not necessarily the intended legal mother or the genetic mother.

The *in vitro* embryo's being the object of ownership has a clear and necessary implication for the *in vitro* embryo's legal subject/object status: Only legal objects can be owned; ergo, the *in vitro* embryo is a legal object. However, Robinson presents two arguments to counter this implication of the *in vitro* embryo being a legal object. In the following paragraphs, I analyse each of these counter-arguments.

4.2 Counter-argument 1: The embryo-ownership provision is not explicit enough

The first counter-argument can be summarised as follows:

- Premise 1: At common law, the *in vitro* embryo is not owned.
- Premise 2: A legislative provision that purports to alter the common law must do so explicitly.
- Premise 3: Regulation 18(2) does not explicitly enough provide for the *in vitro* embryo to be owned.
- Conclusion: The *in vitro* embryo is not owned.

Robinson's proposition that at common law the *in vitro* embryo is not owned (Premise 1) is not substantiated with reference to any passage from any common law source. However, this is not even relevant, because the claim that Regulation 18(2) is not sufficiently explicit in providing for the ownership of *in vitro* embryos (Premise 3) is a denial of the obvious. The reader is invited to again read Regulation 18(2) as quoted above. It uses plain and clear language. In fact, it could not have been more explicit in providing that *ownership* is established over the *in vitro* embryo. Therefore, even if Premise 1 is true (which is unlikely), Premise 3 is false, hence rendering the conclusion invalid.

4.3 Counter-argument 2: The embryo-ownership provision is not comprehensive enough

The second counter-argument appears to be: Regulation 18(2) fails to provide who the owner of an *in vitro* embryo will be in *all* possible situations.

Therefore, the Minister of Health could not have intended for *any in vitro* embryo to be *owned*.

Clearly the logic of the second counter-argument is flawed. Assuming that it is true that Regulation 18(2) fails to provide who the owner of an *in vitro* embryo will be in all possible situations, it does not follow that ownership of an *in vitro* embryo in situations that are clearly provided for, is somehow unintended.

4.4 Conclusion on the *in vitro* embryo's legal subject/object status

The 2012 Regulations definitely have shortcomings that I explore below. However, one thing is certain: Regulation 18(2) provides in plain and clear language that the *in vitro* embryo is the object of *ownership*. The unavoidable implication is that the *in vitro* embryo is a *legal object*. Note that this does not imply that the *in vitro* embryo is necessarily a *typical* legal object. On the contrary, it is unique, as I explore further below.

5 General remarks on the ownership of embryos

The premise of Robinson's second counter-argument, namely that the 2012 Regulations fail to provide who the owner of an *in vitro* embryo will be in *all* possible situations, raises important questions of statutory interpretation and potential impact: Is there such a gap in the legislative scheme regarding embryo ownership, and, if so, how consequential is it?

5.1 Original acquisition of embryo ownership

Let us first consider Regulation 10(2)(a) of the 2012 Regulations, which reads as follows:

A competent person shall not effect *in vitro* fertilisation except for embryo transfer, to a specific recipient and then only by the union of gametes removed or withdrawn from the bodies of –

- (i) such recipient and an individual male gamete donor; or
- (ii) an individual male and an individual female gamete donor;

The formulation of this Regulation is clumsy, but I suggest that it means to say the following: A competent person (in this context, an embryologist) may create an *in vitro* embryo only if the following conditions are met: (a) the *in vitro* embryo is intended for reproduction in general (and not for scientific research, for instance); (b) there is a specific recipient for the *in vitro* embryo; and (c) the *in vitro* embryo will be created from gametes (not from

a denucleated egg and the nucleus of a skin cell, or from an induced pluripotent stem cell, for instance). Condition (b) is relevant to our present purposes. Clearly an *in vitro* embryo may be created only if there is a specific woman who intends to become pregnant with such an embryo. Accordingly, the legislative scheme intends all *in vitro* embryos to have owners from the moment of creation.

5.2 Can embryo ownership be transferred?

What appears to be problematic, as highlighted by Robinson, is what happens after an embryo's creation. This, I suggest, will largely depend on the degree to which embryo ownership is deemed to be transferable. Let us analyse two possible interpretations: The first interpretation would be that embryo ownership is *freely transferable*. An argument in favour of this interpretation could be based on the following considerations: Our common law generally favours autonomy, such as the freedom of contract, and the freedom of testation; and although sections 60(1)(a) and 60(2) of the NHA ban trade in embryos, the NHA and the Regulations are silent on non-trade-related transfer of ownership such as donation and inheritance. If this interpretation is adopted, the original owner, namely the recipient, will be able to transfer ownership to other legal subjects, or contractually to make provision for the joint ownership of the embryos – presumably (but not necessarily) with her spouse or partner. In the event of the embryo owner's death, the embryos will fall in her deceased estate, and will be inherited either according to her will, or intestate, whichever the case may be. However, an embryo owner would also be able to intentionally abandon her *in vitro* embryos, and such embryos would consequently become *res derelicta*. Given that an embryo owner always has the option to donate her embryos or simply to have them destroyed, intentional abandonment seems like an unlikely but theoretically possible occurrence in the context of the freely transferable interpretation, hence minimally vindicating Robinson's premise (namely that Regulation 18(2) fails to provide who the owner of an *in vitro* embryo will be in *all* possible situations).

An alternative interpretation of the Regulations would be that embryo ownership is *transferable only to another specific recipient*. An argument in favour of this interpretation would need to rely on implied legislative intention. In this regard, Regulation 10(2)(c) of the 2012 Regulations can be relied upon. It reads as follows:

a competent person shall destroy an embryo, which she or he has in storage as soon as the recipient for whom that embryo has been effected conceives

or as soon as it is decided not to go ahead with the embryo transfer into that recipient, unless –

- (i) the competent person decides, and with the informed consent of the recipient, to store such embryo for a further period for the purpose of a subsequent embryo transfer to that recipient; or
- (ii) the recipient consents in writing that the competent person-
 - (aa) may, with the informed consent of such recipient, use such embryo for transfer to another specific recipient; or
 - (bb) may, with the informed consent of such recipient, use the embryo for a purpose, other than embryo transfer, which purpose shall be stated in that consent.

Note the terminology of this provision: It consistently refers to the informed consent of the *recipient* – not the *owner*. Also note that such informed consent by the recipient is not only necessary but also *sufficient* to trigger the various discretionary powers of the competent person listed in the provision relating to the use or the destruction of the *in vitro* embryo. Accordingly, assuming that ownership can be transferred to anybody other than a specific recipient, the transferee would receive ownership in name only, without any actual rights attached to it. The presumption against ineffective provisions would suggest that allowing for such futile transactions could not be the legislative intent. This argument tilts the scales in favour of the specific-recipient-only embryo ownership interpretation.

In the context of this interpretation, the issue of intentional abandonment by an embryo owner has a ready solution: Given that the embryo owner is always a specific recipient, abandonment will necessarily constitute a decision "not to go ahead with the embryo transfer into that recipient", as contemplated in Regulation 10(2)(c) – which will automatically trigger the competent person's duty to destroy such embryos. In the assumedly brief period from abandonment to destruction, the embryos would be *res derelicta*. Although this conclusion again minimally vindicates Robinson's premise that the Regulations fail to provide who the owner of an *in vitro* embryo will be in *all* possible situations, this failure – if one can even call it that – is relatively insignificant as it has a straight-forward solution.

5.3 Embryo ownership and the Constitution

Why does Regulation 18(2) vest ownership of *in vitro* embryos to the intended gestational mother, but leave possible other intended legal parents out in the cold? Similarly, why does Regulation 10(2)(c) concentrate all the decision-making power regarding the fate of the *in vitro* embryo in the

intended gestational mother, to the exclusion of possible other intended legal parents? To illustrate: In the context of a heterosexual couple where the woman is both the intended legal mother and the gestational mother, all these rights will vest in her, while the intended legal father will have no rights; in the context where this couple made use of a surrogate mother, all these rights will vest in the surrogate mother, while the commissioning couple will have no rights. The answer to these questions may be that public policy jealously guards the right of a pregnant woman to determine the future of her pregnancy. It is well established in our law that the *in vivo* embryo – *id est* the embryo in a woman's body – is legally not a distinct legal object, but merely a part of the woman's body, and consequently the woman is the sole decision-maker about the embryo's fate; the woman's right to bodily integrity outweighs the interests of the embryo's intended father, who has no legal control over the *in vivo* embryo's fate. However, the *in vitro* embryo is per definition *outside* a woman's body, and hence the woman's right to bodily integrity does not apply. I struggle to see how the 2012 Regulations' privileging the intended gestational mother to the exclusion of possible other intended legal parents can be constitutionally justified. At least the right to equality and the right to make decisions regarding reproduction are implicated. If a woman wants to proceed to use *her in vitro* embryos to become pregnant after ending the relationship with the embryo's biological father, what *legal* rights does the father have in terms of the 2012 Regulations to stop her? Seemingly none. The father will have to rely directly on his constitutional rights. In this context of *in vitro* embryos, which is distinguishable from the context of *in vivo* embryos where the woman's right to bodily integrity applies, it can be argued that the right to make decisions regarding reproduction would entail that nobody can be forced to reproduce against their will, and that any one of the original intended legal parents should at any time be able to veto further use of the *in vitro* embryos.

5.4 What happens to an embryo's legal status when it is placed in a woman's body?

Once an *in vitro* embryo is transferred to a woman's uterus, what happens to the ownership of the embryo? I suggest that at the moment of transfer, the embryo *qua* distinct legal object ceases to exist, and becomes part of the woman's body. Accordingly, analogous with the common law doctrine of *accessio*, ownership of the embryo will cease to exist at the moment of transfer.

5.5 Ownership versus proprietary interest

Should the concept "ownership" in Regulation 18(2) be replaced with "proprietary interest", as suggested by Van Niekerk and cited without critique by Robinson? I believe that such a move is unnecessary and only detracts from the actual constitutional problem inherent in the 2012 Regulations, namely that the 2012 Regulations privilege the intended gestational mother to the exclusion of possible other intended legal parents. Also, regarding the *in vitro* embryo's legal subject/object status, replacing "ownership" with "proprietary interest" would make no difference, as the *in vitro* embryo would then simply be the *object* of a proprietary interest.

6 Robinson's part-of-parents proposition

6.1 Analysis

Flowing from his rejection of ownership of *in vitro* embryos, Robinson suggests that an *in vitro* embryo is part of its parents' legal subjectivity. I understand Robinson to mean that from a legal perspective, an *in vitro* embryo is not a distinct entity with its own legal subject/object status, but rather part of both its parents, who are legal subjects. I will refer to this as the "part-of-parents proposition". Notable in the part-of-parents proposition is that it includes *both parents*. Given the concern that I have articulated above with the gender inequality inherent in the 2012 Regulations, I am sympathetic toward the inclusive nature of the part-of-parents proposition. However, I am unconvinced that the part-of-parents proposition is either an accurate description of the legal *status quo* (for reasons already discussed above), or an ideal legal position that is worth pursuing.

In support of the part-of-parents proposition, Robinson draws an analogy between the parent-*child* legal relationship and the parent-*embryo* legal relationship. He points out that a human infant does not have personal capacity to act, and that his or her parents act on his or her behalf; he describes the legal subjectivity of the child as being "interwoven" with that of his or her parents. This analogy does not convince: First, the analogy does not logically support the part-of-parents proposition. Infants are legally distinct entities from their parents, and legal subjects in their own right. The part-of-parents proposition proposes something different, namely that the embryo is not a distinct legal entity, but is consumed within the parents' legal subjectivity. Second, from a legal policy perspective the analogy between the parent-*child* legal relationship and the parent-*embryo* legal relationship is untenable. Parents act on behalf of their child, and are expected to act in

their child's *best interests*. It is impossible for parents to act in the best interests of something that is simply part of themselves (according to the part-of-parents proposition), and therefore does not have *any* interests of its own.

6.2 Recent case law provides conceptual clarity

In footnote 98 of his article, Robinson refers to section 295(e) of the *Children's Act*¹⁸ in support of the part-of-parents proposition. This section reads as follows:

A court may not confirm a surrogate motherhood agreement unless – ...

- (e) in general, having regard to the personal circumstances and family situations of all the parties concerned, but above all the interests of the child that is to be born, the agreement should be confirmed.

In other words, Robinson appears to argue that this statutory protection of the best interests of the child that is to be born equates to the protection of the interests of the *in vitro* embryo. This is a conflation of the concepts "child that is to be born" and "*in vitro* embryo", and is incorrect.

This very issue of whether the law can consider the best interests of an embryo came up in the 2018 case of *Ex Parte KAF*.¹⁹ The case was a surrogacy agreement confirmation hearing in the Johannesburg High Court. Prior to opting for surrogacy, the commissioning mother, K, underwent IVF treatment herself. For the purposes of such IVF treatment, K's fertility clinic created a number of embryos using her eggs and her husband's sperm. At the stage when K's healthcare practitioners declared her unable to carry a pregnancy to term she became eligible to use a surrogate mother, and four of these embryos were still unused and cryopreserved at the fertility clinic. The intention of the parties to the surrogacy agreement was to use these four already-created embryos for the surrogate pregnancy. During the hearing the question was raised as to whether the court should consider the best interests of these embryos in making its decision. The court provided a clear answer in its judgment:²⁰

the commissioning mother intends utilising four of the remaining embryos previously created for the purposes of IVF for the surrogacy agreement. Yet,

¹⁸ *Children's Act* 38 of 2005.

¹⁹ *Ex Parte KAF* 2019 2 SA 510 (GJ).

²⁰ *Ex Parte KAF* 2019 2 SA 510 (GJ) para 14.

not one of these embryos can be legally equated with the "child that is to be born".

In a footnote to this paragraph of the judgment, the court elaborated as follows:²¹

The embryos are merely the human biological material that may ... give rise to the child that is to be born.

This judgment is profound, as it conceptually disentangles the embryo from the prospective child. The prospective child, whose interests are protected even before his or her birth, is an abstraction in our minds; he or she is not the same as the physical embryo. Stated differently, the prospective child is not as yet embodied in a physical body. But is it possible to protect the interests of the prospective child if he or she does not have a body? Yes, because actions that are taken in the present will have consequences in the future when, and if, the child comes into existence (and thereafter when the child is growing up). It should be clear, however, that protecting the interests of the prospective child is not the same as the notion of protecting an embryo.

The question can be asked: What was the position pre-KAF? The answer is: the same. The KAF judgment made explicit what was already implicit in the law. Previous reported surrogacy-related judgments implicitly dealt with "the child that is to be born" as a mental abstraction of the child that may exist *in future* as a result of the surrogacy arrangement; there is no authority for interpreting "the child that is to be born" as referring to the embryo. Also, the following mind experiment illustrates why interpreting "the child that is to be born" as referring to the embryo can be rejected on the basis of legal principle. Assume for the sake of argument that the phrase "the interests of child that is to be born" does include embryos. Whenever there are already embryos *in vitro*, this would pose an impossible situation: given that all the embryos have an equal "interest" in realising their potential to develop into infants, which embryo should be chosen for transfer? There would be no grounds on which to decide, leading to paralysis. Clearly, this could not have been the intention of the *Children's Act*.

6.3 Conclusion on the part-of-parents proposition

The 2012 Regulations are deeply problematic, and the 2016 draft Regulations fail to address these problems. Does the part-of-parents proposition offer a solution? I suggest not. The reasons that Robinson

²¹ *Ex Parte KAF* 2019 2 SA 510 (GJ) para 14.

tendered in support of the part-of-parents proposition are clearly *contra* the interpretation of the law by the Court. Also, the idea that an entity can be part of the legal subjectivity of two legal subjects is new and is hence veiled in legal uncertainty. Robinson does not provide reasons as to why such a novel legal idea will in practice work better than, for instance, a well-known legal concept like co-ownership.

7 Robinson's critique of my 2005 article

7.1 Overview of my 2005 article

In my 2005 article I set out to answer three related questions:

- a) What is the *legal status* of the pre-embryo with relation to whether it is protected in any way? The legal status of the pre-embryo with relation to whether it has legal subjectivity or not was not my stated research question.
- b) What is the *moral status* of the pre-embryo?
- c) Is the pre-embryo's legal status in relation to protection aligned with its moral status, if any?

I answered these questions as follows:

- a) *The pre-embryo is not legally protected.* The pre-embryo *in vitro* can in principle be used for training or research, and destroyed in the process; or it can simply be destroyed at the will of the recipient; also, the pre-embryo *in vivo* can be aborted at the will of the pregnant woman.
- b) *The pre-embryo does not have moral status.* My overarching argument in this regard can be summarised as follows:
 - Premise 1: Gametes do not have moral status. (Do you shed a tear for the sperm-massacre that occurs every time a man masturbates, or for the death of an egg every time a woman ovulates?)
 - Premise 2: Although there are many factual differences between the pre-embryo and the gametes that precede it in the process of reproduction, none of these differences is *morally relevant*.

- Conclusion: It would be inconsistent and arbitrary to allocate any moral status to the pre-embryo.
- c) Accordingly, the pre-embryo's legal status (of not being protected) is aligned with its (lack of) moral status.

7.2 Critique and response

Robinson's critique on my 2005 article is that I purportedly failed to answer my own research question of what the legal status of the pre-embryo is. Clearly, this critique is based on an overly narrow concept of the meaning of legal status as referring *only* to legal subject/object status. As I have explained above with reference to everyday examples, legal status can refer to any position that something or someone holds in law – not only legal subject/object status. Also, in my 2005 article I clearly stated that the kind of legal status I would be investigating was whether the pre-embryo is legally protected in any way. And this I have done, and I proposed an answer.

Regarding the related but distinct question about the legal subject/object status of the *in vitro* embryo, I have now presented my view in this response article, and shown why I differ from Robinson's view.

7.3 Invitation to engage in academic debate

Most of my 2005 article is dedicated to analysing a broad spectrum of arguments relating to the moral status of the pre-embryo. These include arguments based on the pre-embryo's being human life, having potential, having a complete and unique genotype, being a self-growing entity, and having symbolic value. In the context of the bio-politics of the *in vitro* embryo, it is essential to confront arguments about its moral status, as the law and ethics mutually influence each other. The moral status of the *in vitro* embryo is not only relevant in the context of infertility treatment, but will gain increasing significance with the advent of gene editing and in particular its application in humans. I therefore invite all interested South African legal and ethics scholars to engage with me on the arguments that I formulated in my 2005 article on the issue of the moral status of the *in vitro* embryo.

A note for clarity: I do not claim that the moral status of the *in vitro* embryo is necessarily dispositive of all issues that relate to it, such as heritable genome editing. Various other ethical considerations would also be relevant. However, I do claim that the moral status of the *in vitro* embryo is

an indispensable, foundational consideration in any legal-ethical matter that relates to it.

8 Conclusion

In this article, I argued that the *in vitro* embryo is a legal object that is subject to ownership, and rejected Robinson's proposition that the *in vitro* embryo is included in its parents' legal subjectivity. By addressing practical issues related to embryo ownership, I attempted to highlight that my debate with Robinson is not just of legal theoretical relevance – the issue of embryo ownership has real-world ramifications for persons who make use of IVF, such as whether embryos can be inherited.

As remarked by Khampepe J in the introduction to her dissenting judgment in *AB v Minister of Social Development*, new reproductive technologies "should be celebrated as they allow our society to flourish in ways previously impossible".²² People who may otherwise not be able to experience the wonder of pregnancy, of expecting a baby, and of raising children, are given this opportunity by new reproductive technologies. But the way in which extant law regulates these new reproductive technologies is a cause for concern. By ventilating the issue of embryo ownership, related problematic issues have been highlighted: the 2012 Regulations privilege women above men in the context of artificial reproduction. Also, the 2012 Regulations disregard a person's right *not* to reproduce most pertinently by failing to make provision for men to withdraw embryos containing their genetic material from the artificial reproduction process. These are serious deficiencies that should be rectified by the Minister of Health in revised regulations.

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List of Abbreviations

IVF	In vitro fertilisation
J Med & L	Journal of Medicine and Law
NHA	National Health Act
PELJ	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SHI	Sociology of Health and Illness