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Legal issues in posthumous conception using gametes removed from a comatose male: The case of Ex Parte SN

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In only the second case dealing with posthumous conception in South Africa – Ex Parte SN – a woman approached the High Court seeking an urgent order allowing her to have sperm removed from the body of her comatose husband, so that she could use it for reproductive purposes after his death. This raised two separate legal issues: (*i*) whether gamete removal may occur where the person from whom the gametes are being removed is unable to consent; and (*ii*) whether gametes removed in this way could be used for posthumous conception. The court held that the woman was allowed to have the gametes removed, but did not engage with whether she could use them for posthumous reproduction. The court did not provide reasons, as this case was determined on an urgent basis. This article provides a background to this case, and analyses the main arguments surrounding each of these legal issues. It concludes that the law allows that a person who has the authority to give consent to health services on the comatose patient's behalf may also give consent to gamete removal. However, whether these gametes may then be used for posthumous conception should be determined by a court, by balancing the various rights and legal interests at play. Three criteria that should guide a court's determination in cases of posthumous conception are provided.

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On 7 May 2020, the High Court of South Africa (SA) granted an order in an urgent application in which a woman sought to have her husband's sperm removed from his body and stored, so that she could use it to have a child after he died.[1] This case is only the second in which our courts have confronted the complex legal issues concerning posthumous conception – the first being NC v Drs Aevitas Inc t/a Aevitas Fertility Clinic[2] (Aevitas), in which it was confirmed that reproduction using the gametes of a deceased person (known as 'posthumous conception') is legal. This case is a significant advancement in this nascent area of law, as the court's finding confirms that it is, in principle, lawful to *remove* gametes for the purpose of posthumous conception – even without the written consent of the person from whom the gametes are removed.[3] The court did not, however, engage with the issue of whether it would, in the specific case, be lawful to *use* the said gametes for posthumous conception.

In the following discussion, I provide a brief overview of the factual background to this case. Thereafter, I provide an analysis of the core legal issues it presented: (*i*) gamete removal from a person who is unable to consent due to medical illness (henceforth referred to as 'comatose persons'); and (*ii*) posthumous conception with gametes removed from a comatose person. I conclude that there is clear legal authority that a person authorised to consent to health services on behalf of the comatose person may consent to gamete removal. However, the use of these gametes for posthumous conception is a complex issue that requires balancing a number of interrelated interests, including the wishes of the deceased person, the reproductive rights of the surviving partner, the best interests of the child and the public interest. As such, I suggest that the use of gametes removed from a comatose person should be determined by the courts on a case-by-case basis, taking into account the aforementioned factors.

Background

The main parties in this case were the comatose man, AN, a 40-year-old male, and his wife SN (the court ordered that the parties remain anonymous).[4]

AN was cognitively in a comatose state, and had been in this state for ~12 months prior to the hearing.[5] His condition had been stable during this time, until several complications shortly before the hearing caused it to deteriorate rapidly, and significantly reduced his chances of recovering. SN was informed by healthcare practitioners that her husband's body was 'shutting down', and that he would likely die very shortly. SN informed the healthcare practitioners that she and AN had had a strong desire to have children together, and in light of his imminent passing, she would still like to have AN's children. As stated in the heads of argument:

> 'The application is brought because the applicant wants to secure a legacy for her husband; she wants to nurture and cherish their lives' dream of having children; and she wants part of him to live on through his child.'[4]

Medical practitioners advised SN that it was possible to have his sperm removed and stored for her to use. However, from a medical perspective, it was preferable to do this while AN was still alive, as there was only a small window of opportunity to do so after his death. SN then sought legal advice on this issue, and was advised that an application for the extraction of male gametes from the body of her husband was complex, and there were no clear guidelines in this regard in SA law. She was further advised that it was preferable that

the sperm be withdrawn from AN while he was still alive. This was because the law regulating gamete removal only applies to living persons. In light of this advice, SN made an urgent application for an order allowing her to withdraw AN's sperm and store it for her to use after his death.

In making the application, counsel for SN considered the extant case law – including the Aevitas judgement – establishing the legal protection of autonomous decision-making in SA law,[6] and argued that the decision to have a child through posthumous conception was an exercise of the autonomous moral agency of AN, since before he became bedridden and fell into a comatose state, he had decided that he wanted to have children with SN. It was further argued that this was an exercise of the autonomous moral agency of SN herself, who had the right to use her husband's gametes to conceive their child. AN's desire to have children was supported by the testimony of witnesses who confirmed that he intended to have a child with SN.

Counsel for SN argued that in terms of s55(a) of the National Health Act No. 61 of 2003 (NHA)[7] and the relevant regulation, the removal of gametes can only occur with the consent of the person they are to be removed from, and that no such consent was present in this case, but further argued that the decisive consideration ought to be whether AN would have consented had he had the opportunity to do so. Given the evidence of his desire to have a child with SN, AN 'would have given consent to the extraction of gametes from his body for purposes of artificial fertilisation of his wife under the circumstances had he been conscious and been able to express his will and/or desire'.[4] As such, counsel for SN argued that the extant law, which was clearly not designed to cater for such exceptional circumstances, should not be applied rigidly by the court. Instead, the court should regard SN's consent to the gamete removal to be 'inferred'.

Shortly before the hearing of the matter, Prof. Donrich Thaldar was invited by the court to join the case as an *amicus curiae*, and provided insight on some of the pertinent legal issues and advised the court on relevant comparative law.

In his written submission, the *amicus curiae* differentiated between two distinct but interrelated legal issues relevant to this case, namely the issue of sperm removal from a living but comatose person, and the issue of posthumous conception.[8] In relation to the first issue, he took a different approach to the one that the counsel for the applicant proposed. He submitted that sperm removal from a living but comatose person was already provided for by statute in our law, and that its lawfulness depends on whether the person who wants to have the sperm removed has the required legal authority to consent on behalf of the comatose person. He submitted that SN did have the required legal authorisation, given that she was previously appointed as AN's *curatrix ad personam* and had the authority to consent to health services on AN's behalf in terms of s7(1) of the NHA. As such, the court did not need to create an exception in order to grant SN's application.

In relation to the second issue, the *amicus curiae* pointed out that given the content of the court order in Aevitas, posthumous conception is, in principle, legal in SA. However, he noted that there is legal uncertainty regarding the exact requirements for posthumous conception. The *amicus curiae*'s submissions are discussed in more detail below.

On 7 May 2020, the Johannesburg High Court granted SN's application, ruling that:

> 'The applicant is authorised, in terms of section 7(1)(a)(ii) read with section 55(a) of the National Health Act 61 of 2003, to consent to the withdrawal of male gametes from AN by a competent person […];
> Alternatively to paragraph 1 above, authority is hereby granted for the withdrawal of male gametes from the body of AN by a competent person.'[3]

In the following, I consider the court's judgment in light of the two core legal issues in this case, namely gamete removal from a comatose person, and posthumous conception using gametes removed from a comatose person.

Gamete removal from comatose persons

As alluded to above, gamete removal is a procedure that ordinarily may only occur with the written consent of the man whose sperm is being removed. However, this was not possible in this instance, because of AN's comatose state.[4] The NHA provides for the issue of consent to health-related services for persons who are incapable of providing consent in s7(1). Of particular relevance to this case is s7(1)(a)(ii), which states that where an individual is unable to consent to a 'health service', consent may be given by an individual 'authorised to give such consent in terms of any law or court order'.

That SN was authorised to give consent to health services on behalf of AN was established by her status as AN's *curatrix ad personam*. The pertinent question was whether this authority extended to sperm removal, which turned on whether this procedure falls within the definition of a 'health service' provided in s7(1)(a)(ii). The reasons that sperm removal falls within the ambit of a health service were highlighted by the *amicus curiae*: the NHA defines 'health services' as 'healthcare services, including reproductive healthcare'. Accordingly, the removal of sperm for use in artificial reproduction is a health service.

Questions were raised by the court as to whether there was a potential conflict of interest, since SN as the *curatrix ad personam* would be consenting to a medical procedure because it would be in her own interests for it to be performed, and not because it was in the best interests of the patient. The *amicus curiae*, speaking to this issue, referred the court to the case of Clarke v Hurst.[9] In this case, the court was seized with a matter where a husband was also in a comatose state and on life support, and where the wife applied to be made *curatrix ad personam* of her husband and to have the right to end his life support. The court in Clarke v Hurst granted the order, finding as follows:

> 'The patient in the present case has, however, passed beyond the point where he could be said to have an interest in the matter […] In my view it cannot be said that the *curatrix* would not be acting in the best interests of the patient if she were to discontinue the artificial nutritional regime of the patient.'

The *amicus curiae* further submitted that the same reasoning would apply in the present case: The patient (AN) had passed beyond the point where he could be said to have interests, and the applicant (SN) cannot be said to be acting against the patient's best interests if she consented to the sperm removal. Accordingly, regarding the sperm removal, there can be no conflict of interest. This point is supported

by the Health Professions Council of SA (HPCSA)'s Guidelines for Good Practice.[10] Paragraph 9, entitled 'The "best interests" principle', provides as follows:

> '9.1 In deciding what options may be reasonably considered as being in the best interests of a patient who lacks capacity to decide, health care practitioners should take into account:
>
> 9.1.1 The options for investigation or treatment which are clinically indicated;
>
> 9.1.2 Any evidence of the patient's previously expressed preferences, including an advance statement;
>
> 9.1.3 Their own and the health care team's knowledge of the patient's background, such as cultural, religious or employment considerations;
>
> 9.1.4 Views about the patient's preferences given by a third party who may have other knowledge of the patient, for example, the patient's partner, family, carer or a person with parental responsibility;
>
> 9.1.5 Which option least restricts the patient's future choices, where more than one option (including non-treatment) seems reasonable in the patient's best interests.'

Taking these various factors into account, in particular 9.1.4, it seems that in the absence of evidence indicating that the patient (AN) was opposed to sperm removal, healthcare practitioners may perform sperm retrieval if this procedure is requested by the patient's partner (in this case, SN).

The court was ostensibly not confident that this was the case, given that the order provides s7(1)(a)(ii) of the NHA as one of two alternative legal justifications for finding in SN's favour, the other being a declaration by the court that SN had the authority to have AN's sperm removed. Alternative grounds for a judgment are usually given in cases in which courts are unwilling to commit to a single legal conclusion as the basis of their judgment. In this instance, the court was presented with two grounds for finding in favour of SN, by counsel for the applicant and the *amicus curiae*. In effect, the court avoided committing to either side, stating that either one was correct.

While this approach is understandably cautious on the part of the court, considering that the urgency surrounding this case did not allow for a thorough examination of the merits of either argument, the alternative declaration of authority is problematic. It implies that SN did not already have the authority to consent to the sperm removal on AN's behalf, and, accordingly, that other persons in similar circumstances may not have their spouse's gametes removed without a court order declaring that they have the authority to do so. In my view, such a declaration is not necessary, as s7(1)(a)(ii), considered together with the relevant case law and the HPCSA's guidelines, sufficiently establishes that a spouse who has the authority to consent to health services on their comatose spouse's behalf has the authority to consent to gamete removal on behalf of a comatose spouse, for the reasons outlined by the *amicus curiae*.

In conclusion, despite the ambivalence regarding the basis of the court's order, *Ex Parte* SN establishes that the decisive issue in determining whether gamete removal from a comatose person can occur is whether the person requesting such removal is duly authorised to consent to the removal on the comatose person's behalf.

Posthumous conception using gametes removed from a comatose person

In making its order, the court states that 'the issue regarding the applicant's [SN's] posthumous fertilisation is postponed *sine dine*'.[3] The court here seemingly presumes that SN will make a further application for a court order authorising her to use AN's sperm for posthumous conception. However, there is no legal requirement on SN to make such a further application, since the court in Aevitas held that posthumous conception is legal, and there is no law requiring SN to procure a court order before proceeding with posthumous conception.

Upon removal, AN's sperm is owned by him in terms of regulation 18(1) of the Regulations Relating to Artificial Fertilisation of Persons.[11] The NHA and the regulations are unclear on what becomes of this ownership if the man dies; however, if the gametes are capable of being owned, they may be considered property, and thus form part of his estate upon death.[12,13] Accordingly, ownership of the gametes should pass to SN as his spouse, and SN would thus have the right to proceed with posthumous conception in the absence of written consent from AN. It should, however, be noted that in terms of regulation 26 of the Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes,[14] the sperm bank in possession of AN's sperm would have 'exclusive rights' to use the sperm 'for the purposes for which it has been donated'.[14] It is unclear from this provision what exactly such 'exclusive rights' entail, but what is clear is that they do not amount to ownership. Therefore, while they may have the sole right to use the sperm for reproductive purposes, SN, as the owner, would have the final prerogative to determine if, when and how the sperm is used.

On the one hand, SN having the freedom to use medical technology to fulfil her desire to mother a child genetically related to both herself and her husband is a positive affirmation of her right to reproductive autonomy, as per s12(2)(a) of the SA Constitution.[15] It has been established in our law that reproductive autonomy extends to medically assisted reproduction using new reproductive technologies such as *in vitro* fertilisation,[16,17] and individuals have the right to use these technologies for posthumous conception.[12] On the other hand, the prospect of posthumous conception in the absence of consent from the person from whom the gametes were removed raises a number of concerns.

The most commonly raised concerns relate to the act of causing a person to become a parent after his or her death when this is not what (s)he would have wanted. Legal scholars such as Joel Feinberg[18] have argued that posthumous conception without prior written consent may be a violation of the deceased's rights. The reasoning behind this is that certain acts committed after a person's death can harm or promote a person's interests.[19] It is argued that without consent, posthumous conception deprives an individual of the opportunity to be the conclusive author of a highly significant chapter of his life. Therefore, posthumous conception is respectful to the deceased's posthumous interests only if there is clear evidence of a desire to reproduce posthumously.

The dead do not have any rights or legally protected interests under SA law. However, our law reflects the high premium our state places on showing respect for the wishes of the dead. For instance, SA law gives recognition to the wishes of the deceased by giving effect to the right to freedom of testation, as long as the provisions

of a person's will are not, *inter alia*, *contra bonos mores*.[20] SA law also grants certain legal protections to deceased bodies through various means – including the common-law crimes of violation of a dead body and violation of a grave.[21] These are indicative of the interest our state has in ensuring that the deceased are treated with respect, including by ensuring that their wishes are honoured after death. As Nienaber points out, in her discussion of whether s12(2)(a) of the Constitution may be extended to a deceased person, what we are dealing with is not whether the deceased has a right to choose whether to procreate, but rather whether we choose to honour his or her choices regarding procreation that were made while (s)he was still alive.[22] Evidently, SA law chooses to do so. Accordingly, posthumous conception that is contrary to the deceased's wishes ought to be avoided.

Another point of concern that is often raised in relation to posthumous conception is the potential impact on the child who is born as a result of this procedure. Objections of this nature can broadly be summed up in the following three statements:

(*i*) Posthumous conception is harmful to children because children are harmed by being born into a single-parent household.

(*ii*) Posthumous conception is harmful to children because being deprived of knowing one's parent is psychologically harmful to a child.

(*iii*) Posthumous conception is harmful to children because children are harmed by not being able to inherit from the deceased's estate or not being able to collect survivor benefits.[12]

Section 28 of the Constitution provides that in all matters concerning children, the best interests of the child are paramount, and posthumous conception is undoubtedly a matter concerning children. As such, posthumous conception ought not to be permitted if it is not in the best interests of the prospective child.

In summing up then, posthumous conception in the absence of written consent by the deceased, while not prohibited by SA law, touches on the rights of several stakeholders. As such, it is advisable – but not currently legally required – that posthumous conception in such cases be subject to an application before a court, where a full inquiry can be conducted, balancing the various interests at play. Legal development in this regard would be welcomed.

Conclusion: How should posthumous conception be governed?

The provisions of the NHA ostensibly confer upon a person authorised in terms of s7(1) to consent to gamete removal on behalf of a person who is unable to give consent him- or herself. This authority does not, however, extend to the authorised person consenting to posthumous conception. That being said, there is no apparent legal barrier to posthumous conception in such cases; however, whether it should be allowed in such cases touches on the rights of multiple stakeholders. In particular, in the absence of written consent, posthumous conception may show disregard for our state's interests in showing respect for the right to autonomy by respecting the wishes of the deceased.

In light of the above, I suggest that posthumous conception in the absence of explicit written consent to such should be subject to approval by a court. In considering such an application, a court should consider the following three questions:

(*i*) Does the requesting party have a legal claim to the gametes? That is, has the deceased granted the requesting party authority to use his or her stored gametes – such as by making a posthumous donation in terms of s63 of the NHA? Alternatively, does (s)he have ownership rights over the gametes? If this is the case, there is good reason for the order to be granted.

(*ii*) Will granting the request be contrary to the deceased's wishes? If there is no written consent to the posthumous conception, the court must take into account evidence regarding the deceased's wishes. If there is evidence that the deceased would not have wanted to have a child posthumously (such as where the deceased has previously expressed this), the order ought not to be granted.

(*iii*) Will granting the request be in the prospective child's best interests? Finally, the court must consider whether granting the order would not be contrary to the best interests of the prospective child. This entails ascertaining whether the requesting party is competent and capable of providing for the posthumous child, in that (s)he can provide the child with a healthy upbringing. It is worth reiterating that the child welfare principle in SA law is not a maximalist standard – meaning that it is not the case that the requesting party must be required to provide the best possible circumstances for the prospective child.[23] Rather, the court must be satisfied that granting the order will not 'cause harm to the prospective child' by causing him or her to be born into circumstances where his/her basic needs may not be met, or where (s)he may endure undue suffering.[24]

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