

# The pitfalls of international surrogacy: A South African family law perspective\*

Jacqueline Heaton\*\*

*BLC LLB LLM*

*Professor of Law, University of South Africa*

## OPSOMMING

### Die slaggate van internasionale surrogaatmoederskap: 'n Suid-Afrikaanse perspektief

'n Regsvraag wat dikwels in die geval van internasionale surrogaatmoederskap opduik, is na wie regtens die kind se ouers is. In Suid-Afrika laat die Kinderwet 38 van 2005 altruïstiese surrogaatmoederskap toe en verleen die reg erkenning aan die gevolge van 'n surrogaatmoederskapsoreenkoms wat deur die Hoë Hof bekragtig is. Behalwe dat die Kinderwet poog om internasionale surrogaatmoederskap te beperk deur te vereis dat die surrogaatmoederskapsoreenkoms in Suid-Afrika onderteken moet word deur partye wat in Suid-Afrika gedomisileerd is, swyg die Wet oor internasionale surrogaatmoederskap en die regsgevolge daarvan. Verder reël nóg die Kinderwet, nóg enige ander wet, die gevolge indien Suid-Afrikaners na die buiteland gaan om daar 'n kind deur middel van surrogaatmoederskap te bekom. Laasgenoemde situasie word tans deur die reëls van die internasionale privaatreg gereguleer en aan die howe oorgelaat. Die hoofoogmerk van die artikel is om die posisie te bespreek indien persone wat nie in Suid-Afrika gedomisileerd is nie, deur middel van surrogaatmoederskap 'n kind in Suid-Afrika bekom, en indien Suid-Afrikaners deur middel van surrogaatmoederskap 'n kind in die buiteland bekom. Die bespreking fokus op familieregkwessies, en in die besonder op die vraag wie regtens die kind se ouer is. Sommige wyses waarop Suid-Afrika die probleme wat uit bogenoemde gevalle van internasionale surrogaatmoederskap ontstaan, kan aanspreek, word kortliks oorweeg.

## 1 INTRODUCTION

International surrogacy,<sup>1</sup> or cross-border surrogacy as it is sometimes called,<sup>2</sup> is a very topical issue. A spate of academic contributions has been published recently

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<sup>1</sup> International surrogacy refers to surrogacy involving parties from more than one country. One can think of all manner of complicated permutations of international surrogacy, eg. the commissioning parents might be from Country A, the surrogate mother from Country B, the ovum donor from Country C and the sperm donor from Country D, the surrogate motherhood agreement might be signed in Country E, the implantation of the embryo in the surrogate mother might take place in Country F, and the birth might take place in Country G. For purposes of this article, the much simpler scenario of only two countries, one of which is South Africa, is used and it is assumed that the commissioning parent(s) and gamete donor(s) (if any) all have the same country of origin, that the artificial fertilisation of the

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on the topic,<sup>3</sup> at least three international or transnational bodies are in the process of investigating international surrogacy or have recently published reports resulting from their investigations,<sup>4</sup> and in several countries cases involving international surrogacy have ended up in court.<sup>5</sup> In South Africa, however,

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surrogate mother or the implantation of the embryo in her occurred in her country of origin, and that the birth also occurred in the country of origin of the surrogate mother.

- 2 Strictly speaking, “cross-border surrogacy” is broader than “international surrogacy” as it refers not only to surrogacy across national borders but also to surrogacy across the borders of various states, provinces or territories within a single country where surrogacy is regulated by different statutes that operate at local level (eg the United States of America, Canada and Australia). In this article, the term “international surrogacy” is used since the article adopts a South African perspective and, in this country, surrogacy is governed at national level.
- 3 To cite but a small sample of the international academic literature published since 2013: Trimmings and Beaumont (eds) *International surrogacy arrangements: Legal regulation at the international level* (2013); Henaghan “International surrogacy trends: How family law is coping” 2013 *Australian J of Adoption* 1; Nelson “Global trade and assisted reproductive technologies: Regulatory challenges in international surrogacy” 2013 *The J of L, Medicine & Ethics* 240; Crockin “Growing families in a shrinking world: Legal and ethical challenges in cross-border surrogacy” 2013 *Reproductive BioMedicine Online* 733; Lin “Born lost: Stateless children in international surrogacy arrangements” 2013 *Cardozo J of Int and Comp L* 545; Knoche 2014 *Int J of Gynecology and Obstetrics* 183; Tobin “To prohibit or permit: What is the (human) rights response to the practice of international commercial surrogacy?” 2014 *ICLQ* 317; Van Beers “Is Europe ‘giving in to baby markets?’ Reproductive tourism in Europe and the gradual erosion of existing legal limits to reproductive markets” 2014 *Medical LR* 1; Bromfield and Rotabi “Global surrogacy, exploitation, human rights and international private law: A pragmatic stance and policy recommendations” July 2014 *Global Social Welfare* (online) <http://bit.ly/1zAY7eW> (accessed 6 July 2014).
- 4 The Permanent Bureau of the Hague Conference on Private International Law submitted its *Preliminary report on the issues arising from international surrogacy arrangements* (Preliminary Document 10 of March 2012) (hereafter Permanent Bureau *Preliminary report*) to the Council on General Affairs and Policy of the Hague Conference on Private International Law in 2012 and released two provisional editions of preliminary documents emanating from its study in March 2014: Preliminary Document 3B of March 2014 *The desirability and feasibility of further work on the parentage/surrogacy project* (hereafter Permanent Bureau *Preliminary Document 3B*) and Preliminary Document 3C of March 2014 *A study of legal parentage and the issues arising from international surrogacy agreements* (hereafter Permanent Bureau *Preliminary Document 3C*). The Committee on Legal Affairs of the European Parliament commissioned a study on surrogacy in the European Union, which was authored by Brunet *et al* *A comparative study of the regime of surrogacy in EU member states* PE 474.403 (2013). Finally, the Family Law Committee of the International Law Association prepared a *Report on international surrogacy, 2012*, which was submitted for approval at the 76th Biennial ILA Conference in Washington DC, United States of America in April 2014.
- 5 On the burgeoning case law, see eg Brunet *et al* 72–136 and the sections on case law in the various country reports in the document; Malhotra and Malhotra “Law and surrogacy arrangements in India” in Atkin (ed) *Int Survey of Family L 2013 Edition* (2013) (hereafter Malhotra and Malhotra *Int Survey*) 151; Gamble “Crossing the line: The legal and ethical problems of foreign surrogacy” 2009 *Reproductive BioMedicine Online* 151; Storrow “Assisted reproduction on treacherous terrain: The legal hazards of cross-border reproductive travel” 2011 *Reproductive BioMedicine Online* 540–543; Carnelley “*Ex parte WH* 2011 6 SA 514 (GNP)” 2012 *De Jure* 187–188; Mohapatra “Stateless babies & adoption scams: A bioethical analysis of international surrogacy” 2012 *Berkeley J of Int L* 417–421; Mortazavi “It takes a village to make a child: Creating guidelines for international surrogacy” 2012 *Georgetown LJ* 2274–2277; Malhotra and Malhotra “All aboard for the fertility express” 2012 *Commonwealth L Bulletin* 32–34; Henaghan 2013 *Australian J of Adoption* 5–12; Lin 2013 *Cardozo J of Int and Comp L* 570–579; Wolf “Why Japan should legalize surrogacy” 2014 *Pacific Rim L and Policy J* 472–477.

international surrogacy has not yet received much academic or judicial attention.<sup>6</sup>

The growing interest in international surrogacy probably is due partly to the increased incidence of international surrogacy<sup>7</sup> and partly to the contentious nature of international surrogacy and surrogacy in general. Surrogacy (particularly, commercial surrogacy)<sup>8</sup> is an issue that gives rise to many cultural, moral, ethical, medical and legal concerns, including the commodification of, and creation of a market for children; the exploitation, degradation and commodification of surrogate mothers; uncertainty as to who the child's parents are; the risks associated with ovulation induction treatment of the surrogate mother and/or the ovum donor; the unanticipated surge of love a surrogate mother might experience for the child, making it difficult for her to give up the child; and the possibility of the commissioning parents<sup>9</sup> changing their mind about proceeding with the surrogacy after the surrogate mother has fallen pregnant.<sup>10</sup>

Of course, there are also arguments in favour of surrogacy. They include allowing a woman to exercise her reproductive rights as she sees fit; enabling infertile persons to obtain a child who is genetically related to them; and giving childless persons the joy of raising a child.<sup>11</sup>

6 Apart from a recent Master's dissertation on the topic (Groenewald *Internasionale regulering van surrogaatmoederskap* (LLM dissertation North-West University 2014), academic discussions with a specifically South African focus have tended to be brief: see Oppong *Private international law in Commonwealth Africa* (2013) 233–234; Slabbert and Roodt "South Africa" in Trimmings and Beaumont (eds) (hereafter Slabbert and Roodt) 342–344; Nöthling-Slabbert "Legal issues relating to the use of surrogate mothers in the practice of assisted conception" 2012 *SAJBL* 27 31; Bonthuys and Broeders "Guidelines for the approval of surrogate motherhood agreements: *Ex parte WH*" 2013 *SALJ* 493–494; Louw "Surrogacy in South Africa: Should we reconsider the current approach?" 2013 *THRHR* 585–588. *Ex parte WH* 2011 6 SA 514 (GNP) is the only reported South African decision that (briefly) touches on international surrogacy.

7 For statistics on international surrogacy arrangements, see Permanent Bureau *Preliminary report* 8 and *Preliminary Document 3C* paras 125–129; Nelson 2013 *The J of L, Medicine & Ethics* 241; Nicholson "When moral outrage determines a legal response: Surrogacy as labour" 2013 *SAJHR* 497–498; Knoche 2014 *Int J of Gynecology and Obstetrics* 183–184.

8 In the case of commercial surrogacy, the surrogate mother uses the surrogacy for financial gain. In the case of altruistic surrogacy, she does not undertake the surrogacy primarily for financial gain. In either case, the surrogacy can be either gestational (full) or traditional (partial). Gestational surrogacy occurs when a surrogate mother carries a foetus which is genetically unrelated to her because it is the product of fertilisation of a donor ovum with donor sperm (eg the ovum of the commissioning mother and the commissioning father). Traditional surrogacy occurs when the foetus the surrogate mother carries is genetically related to her because it is the product of fertilisation of the surrogate mother's ovum with donor sperm: see eg Louw in Davel and Skelton (eds) *Commentary on the Children's Act* (2007) (hereafter Louw *Commentary*) 19–3; Knoche "Health concerns and ethical considerations regarding international surrogacy" 2014 *Int J of Gynecology and Obstetrics* 183.

9 Commissioning parents are called "intended parents" or "intending parents" in some countries.

10 The commissioning parents may change their mind because they have separated or are getting divorced, or because prenatal medical examinations have shown that the child will be handicapped: see eg *Baby Manji Yamada v Union of India (UOI)* AIR2009 SC 84 29 September 2008.

11 On these and other arguments for and against surrogacy, including international surrogacy, see Kruger and Skelton (eds) *The law of persons in South Africa* (2010) 94–95; Schäfer *Child law in South Africa. Domestic and international perspectives* (2011) 263–264;

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In the case of international surrogacy, additional concerns and problems arise. They include cultural, moral, ethical and religious differences in perspectives on surrogacy and the parent-child relationship. Legal problems frequently arise, especially if the rules of the commissioning parents' country of origin<sup>12</sup> differ from those of the foreign country where the child was born. These problems are compounded if the commissioning parents' country of origin does not recognise surrogacy at all,<sup>13</sup> or if it does not recognise surrogacy in the circumstances in which it occurred in the foreign country (for example, if the surrogacy was commercial or if the commissioning parents are of the same sex and their country of origin does not recognise same-sex relationships and/or does not permit same-sex couples to obtain a child via surrogacy).<sup>14</sup>

One of the legal questions which arise most frequently is who the child's legal parents are. The issue of legal parentage has implications for the registration of the child's birth, since the particulars of the child's parents must be indicated when the birth is registered. Further, because a child's citizenship is usually based on place of birth and/or citizenship of the child's parent, recognition of a particular person as a child's legal parent has implications for the child's ability to become a citizen of a particular country. And, as a person's ability to obtain travel documents from a particular country's authorities depends on whether the person is a citizen of that country, recognition of a particular person as a child's legal parent also affects the child's ability to obtain documentation to enable him

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Groenewald 36–40; Permanent Bureau *Preliminary report* 4–5; South African Law Commission *Report on surrogate motherhood* (Project 65) (1993) (hereafter *SALC Report*) 10–29; Meyerson "Surrogacy agreements" in Murray (ed) *Gender and the new South African legal order* (1994) (hereafter *Meyerson Gender*) 123–134; Mortazavi 2012 *Georgetown LJ* 2282–2284; Mohapatra 2012 *Berkeley J of Int L* 437–448; Nicholson 2013 *SAJHR* 497 499 502–508 509–514; Henaghan 2013 *Australian J of Adoption* 12–14 18; Crocchin 2013 *Reproductive BioMedicine Online* 737–739; Nelson 2013 *The J of L, Medicine & Ethics* 245 247–248; Lin 2013 *Cardozo J of Int and Comp L* 551–552; Knoche 2014 *Int J of Gynaecology and Obstetrics* 184–185; Agnafors "The harm argument against surrogacy revisited: Two versions not to forget" 2014 *Medicine, Health Care and Philosophy* 357ff; Margalit "In defense of surrogacy agreements: A modern contract law perspective" 2014 *William and Mary J of Women and the L* 430ff; Bromfield and Rotabi July 2014 *Global Social Welfare* (online).

12 In this article, the term "country of origin" refers to the country where the commissioning parents normally/habitually reside and to which they want to return after the child's birth.

13 These countries include Austria (§§ 2 and 3 of the *Fortpflanzungsmedizingesetz*); Germany (§ 1(1), (2), (6) and (7) of the *Gesetz zum Schutz von Embryonen/Embryonenschutzgesetz*; § 13 of the *Gesetz über die Vermittlung der Annahme als Kind und über das Verbot der Vermittlung von Ersatzmüttern/Adoptionsvermittlungsgesetz*); Switzerland (§ 4 of the *Fortpflanzungsmedizingesetz*); and Turkey (Legislation Concerning Assisted Reproduction Treatment Practices and Centres as set out by Gürtin "Banning reproductive travel: Turkey's ART legislation and third-party assisted reproduction" 2011 *Reproductive Bio-Medicine Online* 555 556).

14 Most countries which permit surrogacy allow only altruistic surrogacy and prohibit and criminalise commercial surrogacy. They include South Africa (see para 2 below); Canada (Assisted Human Reproduction Act, s 6); and Greece (Greek Civil Code a 1458 as amended by the Medically Assisted Human Reproduction Law 3089/2002 (English translation at <http://bit.ly/1rkOZX5>, accessed 6 July 2014). Commercial surrogacy is allowed in, *inter alia*, India and Ukraine. See eg Permanent Bureau *Preliminary report* 16; Mohapatra 2012 *Berkeley J of Int L* 432–433; Henaghan 2013 *Australian J of Adoption* 2; Lin 2013 *Cardozo J of Int and Comp L* 552.

or her to gain entry into the commissioning parents' country of origin after birth in the foreign country.<sup>15</sup> Conflicting rules in the various jurisdictions may, in the worst case scenario, result in the child being parentless and stateless and the commissioning parents being unable to take the child to their country of origin. Even if the commissioning parents succeed in this, they may not be recognised as the child's legal parents in that country.

In South Africa, the Children's Act 38 of 2005 allows altruistic surrogacy and recognises the consequences of a surrogate motherhood agreement that has been confirmed by the High Court. Except to the extent that the Act seeks to limit international surrogacy by requiring that the surrogate motherhood agreement must be signed in South Africa by parties who are domiciled in this country,<sup>16</sup> it is silent on international surrogacy and its consequences. Unfortunately, there is no public or private international law instrument on international surrogacy we can turn to for guidance either.<sup>17</sup>

The main objective of this article is to discuss the legal position which operates if:

- (a) persons who are not domiciled in South Africa obtain a child via surrogacy in this country; and
- (b) South Africans<sup>18</sup> obtain a child via surrogacy in a foreign country.

First, the provisions of the Children's Act which regulate surrogacy are set out. The discussion focuses on those provisions which could be pertinent in the context of international surrogacy because they dictate the consequences of surrogacy, may encourage South Africans to engage in surrogacy abroad or discourage foreigners from engaging in surrogacy in South Africa, and indicate the South African legislature's distaste for commercial surrogacy. Then, the consequences of the two instances of international surrogacy identified above are examined. The discussion focuses on family law issues and, in particular, legal parentage of the child from a private law perspective. Some public law matters that are linked to legal parentage are mentioned in brief. In the second-last part of the article possible methods for regulating the identified instances of international surrogacy are considered briefly. A detailed evaluation of the advantages and disadvantages of each of the methods is impossible due to length restrictions. As is customary, the article ends with a conclusion.

Although the article is not primarily comparative in nature, foreign law is occasionally referred to.

15 See eg Henaghan 2013 *Australian J of Adoption* 4.

16 This requirement is discussed in para 2 below.

17 Although no public international law instrument expressly deals with surrogacy, some instruments (eg the United Nations Convention on the Rights of the Child, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, and Universal Declaration on Bioethics and Human Rights of the United Nations Educational, Scientific and Cultural Organisation (UNESCO)) are relevant in the context of international surrogacy. See further Groenewald 46–48 57–59; Stark "Transnational surrogacy and international human rights law" 2012 *ILSA J of Int and Comp L* 1; Stehr "International surrogacy contract regulation: National governments' and international bodies' misguided quests to prevent exploitation" 2012 *Hastings Int and Comp LR* 280–284; Tobin 2014 *ICLQ* 317; Bromfield and Rotabi July 2014 *Global Social Welfare* (online).

18 In this article, persons who are domiciled or resident in South Africa or are South African citizens are lumped together under the loose term "South Africans".



## 2 SURROGACY IN TERMS OF THE CHILDREN'S ACT<sup>19</sup>

Before the coming into operation of Chapter 19 of the Children's Act on 1 April 2010,<sup>20</sup> surrogacy was not regulated by statute in South Africa. The Act expressly allows altruistic surrogacy and recognises its consequences, provided that the requirements imposed by the Act are met. Commercial surrogacy, in contrast, is prohibited and its consequences are not recognised. Below, the position in respect of altruistic surrogacy is dealt with first. Then, commercial surrogacy is discussed.

### 2.1 Altruistic surrogacy

The Children's Act permits altruistic surrogacy provided that certain requirements are met. These requirements relate to the commissioning parents, the genetic origins of the child to be conceived, the surrogate mother, the surrogate motherhood agreement, and the artificial fertilisation of the surrogate mother.

#### 2.1.1 *Commissioning parents, the genetic origins of the child, and the surrogate mother*

A single person, spouses, civil union partners, and life/permanent partners of the same or the opposite sex may be commissioning parent(s),<sup>21</sup> but the surrogacy may only take place if the commissioning parent is, or the commissioning parents are, unable to give birth and the condition is permanent and irreversible.<sup>22</sup> If the commissioning parent is single, his or her gamete (sperm or ovum) must be used for the artificial fertilisation of the surrogate mother.<sup>23</sup> In the case of a commissioning couple the gametes of both commissioning parents must be used, unless this is impossible due to biological, medical or other valid reasons.<sup>24</sup>

Other requirements are that the commissioning parent(s) must in all respects be suitable to accept parenthood and the surrogate mother must in all respects be

19 On surrogacy in terms of the Children's Act, see also Boezaart *Law of persons* (2010) (hereafter *Boezaart Persons*) 97–98; Heaton *The South African law of persons* (2012) (hereafter *Heaton Persons*) 50–53; Kruger and Skelton (eds) 89–96; Schäfer ch 10; Louw *Commentary* ch 19; Slabbert and Roodt 325–346; Brunet *et al* 339–350; Groenewald 5–34; Carnelley and Soni “Surrogate motherhood agreements” May 2011 *De Rebus* 30; Nöthling-Slabbert 2012 *SAJBL* 27; Nicholson and Bauling “Surrogate motherhood agreements and their confirmation: A new challenge for practitioners?” 2013 *De Jure* 516–534; Nicholson 2013 *SAJHR* 499–502; Louw 2013 *THRHR* 564; Pillay and Zaal “Surrogate motherhood confirmation hearings: The advent of a fundamentally flawed process” 2013 *SALJ* 465; Mahlobogwane “Surrogate motherhood arrangements in South Africa: Changing societal norms?” 2013(2) *Speculum Juris* 46–47 50–51 53 56.

20 Proc R12 GG 33076 of 1 April 2010.

21 S 1(1) of the Children's Act defines a commissioning parent as “a person” who enters into a surrogate motherhood agreement with a surrogate mother. From ss 292(1)(c), 293(1) and 294, read with s 13 of the Civil Union Act 17 of 2006, one deduces that such “person” may be single, married, a party to a civil union, or a same-sex or opposite sex life partner/partner in a permanent relationship.

22 S 295(a).

23 S 294. A single, divorced South African woman, whose anonymity is protected by a court order, initiated a legal challenge against this requirement in September 2013: Ghevaert “Challenge to South African surrogacy laws” <http://bit.ly/IraqOwY> (accessed 6 July 2014); SAPA “Surrogacy law to be challenged in court” <http://bit.ly/1q9Kbqt> (accessed 6 July 2014). The matter has not yet been heard. On the possible unconstitutionality of s 294, see Slabbert and Roodt 342.

24 S 294.

a suitable person to be a surrogate mother. The commissioning parents and surrogate mother must also understand and accept the legal consequences of the surrogate motherhood agreement and their rights and obligations under the agreement and the Children's Act. The surrogate mother must have a documented history of at least one pregnancy and viable delivery, and she must have a living child of her own.<sup>25</sup>

### 2.1.2 Surrogate motherhood agreement

The parties must enter into a written surrogate motherhood agreement in South Africa.<sup>26</sup> The agreement must be signed by all the parties<sup>27</sup> and confirmed by the division of the High Court within which area of jurisdiction the commissioning parent or parents are domiciled or habitually resident.<sup>28</sup> If the agreement is not confirmed, it is invalid.<sup>29</sup>

The Act lists several requirements which must be satisfied before the court may confirm the agreement. One of them is that, having regard to the personal circumstances and family situations of all the parties, and above all the interests of the child who is to be born, the court must be satisfied that the agreement should be confirmed.<sup>30</sup>

Most importantly for purposes of international surrogacy, the Act requires that the commissioning parents, or at least one of them, as well as the surrogate mother and her spouse, civil union partner or partner in a permanent relationship must be domiciled in South Africa when the parties enter into the agreement. If the commissioning parent is a single person, he or she must be domiciled in South Africa when the parties enter into the agreement.<sup>31</sup> South African citizenship or (permanent) residence in South Africa does not, on its own, enable a person to become a commissioning parent or a surrogate mother in South Africa.<sup>32</sup>

25 S 295(b)(ii), (b)(iii), (c)(ii), (c)(iii), (c)(vi) and (c)(vii).

26 S 292(1)(b).

27 S 292(1)(a). If the commissioning parent or the surrogate mother is married or a party to a civil union or permanent relationship, his or her spouse, civil union partner or partner in the permanent relationship must give written consent to the agreement and become a party to it: s 293(1) and (2). The court may dispense with the latter consent if it is being unreasonably withheld and the husband, civil union partner or permanent partner is not the donor of genetic material that is to be used for the artificial fertilisation of the surrogate mother: s 293(3).

28 S 292(1)(e).

29 Ss 292(1)(e) and 297(2).

30 S 295(e).

31 S 292(1)(c)–(d). The Greek legislation on surrogacy contains similar restrictions as to domicile. S 8 of the Medically Assisted Human Reproduction Law 3089 of 2002 requires that the surrogate mother and the commissioning mother must be domiciled in Greece (English translation at <http://bit.ly/1n1vpjc>, accessed 6 July 2014). For a comparative study on Greek and South African surrogacy laws, see Brunet *et al* 345–350. South Australia also imposes a domicile requirement on commissioning parents: see the definition of “recognised surrogacy agreement” in ss 10HA(2)(b)(iv) and 10HB(2)(b) of the Family Relationships Act 1975 as amended by Statutes Amendment (Surrogacy) Act 2009.

32 Some countries or states restrict surrogacy to commissioning parents and surrogate mothers who are citizens or residents of the particular country or state: see Permanent Bureau *Preliminary Document 3C* para 25.

The domicile requirement is clearly an attempt to discourage international surrogacy and, especially, to avoid South Africa becoming a destination for reproductive tourism.<sup>33</sup> It also precludes the parties from selecting a different legal system or court for the determination of any legal disputes that may arise in connection with the surrogate motherhood agreement.<sup>34</sup> It is important to note that the domicile requirement applies at the time when the surrogate motherhood agreement is entered into. Thus, the agreement may not be concluded before the commissioning parent has established a domicile in South Africa.

South African law recognises three types of domicile: domicile of origin; domicile of choice; and domicile by operation of the law (or assigned domicile). Only domicile of choice is at issue in respect of foreigners who come to South Africa for purposes of obtaining a child via surrogacy.<sup>35</sup> The requirements for acquiring a domicile of choice are that the person must have reached the age of majority or have the status of a major;<sup>36</sup> have the mental capacity to make a rational choice; be lawfully present at the place where he or she has settled; and must intend to settle at that place for an indefinite period.<sup>37</sup> It is doubted whether a prospective commissioning parent (whether single or part of a couple) could satisfy the requirement of having the intention to settle in South Africa for an

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33 Reproductive tourism is sometimes, more euphemistically, called “reproductive travel” or “cross-border reproductive care”: see eg Permanent Bureau *Preliminary Document 3B* para 17; Storrow 2011 *Reproductive BioMedicine Online* 539; Görtin 2011 *Reproductive BioMedicine Online* 555; Van Beers 2014 *Medical LR* 2. It might also be described as “circumvention tourism”. The latter term was coined by Cohen “Circumvention tourism” 2012 *Cornell LR* 1309 to refer to travelling abroad for the purpose of circumventing domestic prohibitions, especially as to medical services. At the other extreme, people who engage in international surrogacy call it “reproductive exile” because they consider it to be forced travel to escape the restrictive regimes of their home countries: Inhorn and Patrizio 2009 *Fertility and Sterility* 904.

34 Slabbert and Roodt 343. These authors characterise the domicile requirement as a unilateral conflicts rule that determines “when South African law applies to a surrogate motherhood agreement, instead of identifying a single connecting factor for the category of validity of a surrogate motherhood agreement that would point in the direction of the applicable law”, such as that the agreement is governed by the law chosen by the parties. See also Oppong 233–234.

35 A person’s domicile of origin is the domicile the law confers on the person at birth. This type of domicile would not be relevant in the present context, for a foreigner who might have acquired a domicile of origin in South Africa because he or she was born in this country would have lost this domicile when he or she established a domicile in the foreign country, and s 3(2) of the Domicile Act 3 of 1992 expressly provides that a person’s domicile of origin never revives. Thus, the person’s return to South Africa and/or the loss of his or her foreign domicile would not re-instate his or her South African domicile of origin. Domicile by operation of the law is the domicile the law assigns to a person who does not have the mental capacity to acquire a domicile of choice. As a person who does not have the mental capacity to make a rational choice would not be allowed to be a commissioning parent, this type of domicile would also not come into play. On the different types of domicile, see Boezaart *Persons* 36–43; Forsyth *Private international law* (2012) 137–166; Heaton *Persons* 42–46; Kruger and Skelton (eds) 72–79.

36 The age of majority is 18 years (s 17 of the Children’s Act). A minor acquires the status of majority through marriage. Although s 13(1) of the Civil Union Act confers all the consequences of a marriage on a civil union, a minor cannot obtain the status of a major by entering into a civil union, because the definition of a civil union in s 1 of the Civil Union Act restricts civil unions to persons who are 18 years or older.

37 S§ 1(1) and (2) of the Domicile Act.



indefinite period if the main objective of his or her sojourn here is to obtain a child via surrogacy. Human nature being what it is, a prospective commissioning parent might, of course, hide the fact that the main reason for his or her moving to South Africa was to obtain a child via surrogacy and may, in this manner, dishonestly “comply” with the domicile requirement.

If good cause is shown, the court may dispense with the domicile requirement in respect of the surrogate mother and her spouse, civil union partner or permanent partner, but not in respect of the commissioning parent.<sup>38</sup> For example, if the commissioning parent is domiciled in South Africa and a foreign relative of the commissioning parent is willing to act as altruistic surrogate mother, the court might be willing to dispense with the requirement that the surrogate mother must be domiciled in South Africa.<sup>39</sup>

Unfortunately, it seems that courts sometimes accept commissioning parents’ mere assertion as sufficient in so far as the domicile requirement is concerned. In *Ex parte WH*,<sup>40</sup> the commissioning parents, who were of Danish and Dutch origin, had been living in South Africa for only a year when the court confirmed their surrogate motherhood agreement. This confirmation application was the second the commissioning parents had made in their year of residence in South Africa. The first application had also been granted, but the surrogacy it related to had failed because the surrogate mother had fallen ill. The commissioning parents stated that they were domiciled in South Africa and that they “intend[ed] to stay here permanently”.<sup>41</sup> However, as Bonthuys and Broeders point out:<sup>42</sup>

“To enter into two surrogacy agreements and have them both confirmed by the extremely busy courts within a year of arriving in the country appears remarkable and should have sounded alarm bells to the court. It raises questions about how the commissioning parents established domicile so rapidly and whether, given the existence of two surrogacy agreements in this time, the purpose of their residence was not reproductive tourism.”<sup>43</sup>

It also seems that the domicile requirement has not completely discouraged agencies from offering international surrogacy in South Africa. Although the website of one agency sets out the requirements for surrogacy in South Africa and specifically states that commissioning parents “must domicile [*sic*] in South Africa”,<sup>44</sup> it also states, under the heading “Surrogacy in South Africa with non-South African citizen intended parents”, that the particular agency “does manage international surrogacies from certain countries”, and advises persons who are “interested in an international surrogacy with a South African surrogate” to contact the agency.<sup>45</sup>

38 S 292(2). Schäfer 269 welcomes the absolute nature of the domicile requirement in respect of commissioning parents and warns that the court should “take extreme care” to avoid finding that there is good cause to dispense with the domicile requirement in respect of surrogate mothers in destinations where unregulated commercial surrogacy occurs. His view is strongly supported.

39 Louw *Commentary* 19–8; Louw 2013 *THRHR* 587.

40 *Supra*.

41 Para 15.

42 2013 *SALJ* 494.

43 The judgment does not indicate that the court considered this possibility. “If these issues were indeed addressed in the papers or canvassed with the legal representatives, the judgment would, or at any rate should, have mentioned them” – Bonthuys and Broeders 2013 *SALJ* 494.

44 <http://bit.ly/1ygiVGX> (accessed 6 July 2014).

45 <http://bit.ly/W36ssx> (accessed 6 July 2014).

### 2 1 3 *Artificial fertilisation of the surrogate mother*

Another important restriction the Children's Act imposes is that the surrogate mother may not be artificially fertilised until the surrogate motherhood agreement has been confirmed.<sup>46</sup> Thus, for example, a foreign commissioning parent may not engage the services of a surrogate mother in South Africa and have her artificially fertilised before the commissioning parent has satisfied the requirements for acquiring a domicile in this country.

### 2 1 4 *Consequences of a valid surrogate motherhood agreement*

If the surrogate motherhood agreement is valid, it is enforceable, and the surrogate mother must hand the child over to the commissioning parent(s) as soon as is reasonably possible after the child's birth.<sup>47</sup> The child is deemed to be the child of the commissioning parent(s) for all purposes as from the moment of his or her birth.<sup>48</sup> The surrogate mother, her husband, civil union partner, or partner in a permanent relationship and her relations have no parental responsibilities and rights in respect of the child.<sup>49</sup>

However, if the surrogate mother is genetically related to the child because her ovum was used,<sup>50</sup> she may terminate the agreement by filing a written notice with the court up to sixty days after the child's birth.<sup>51</sup> If the court finds that the termination is voluntary and that the surrogate mother understands the effects of the termination, the confirmation of the surrogate motherhood agreement is terminated and the surrogate mother becomes the child's parent. If she has a spouse, civil union partner or partner in a permanent relationship, that person also becomes the child's parent. If the surrogate mother does not have a spouse, civil union partner or permanent partner, the commissioning father becomes the child's parent along with the surrogate mother.<sup>52</sup>

The surrogate mother may also terminate the surrogate motherhood agreement by terminating her pregnancy in terms of the Choice on Termination of Pregnancy Act 92 of 1996.<sup>53</sup> Furthermore, she can escape enforcement of a valid surrogate motherhood agreement by leaving South Africa and going to a country where surrogacy is not recognised, and where the rules of private international

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46 S 296(1)(a). But see *Ex parte MS* 2014 3 SA 415 (GP), where Keightley AJ held that the High Court may, in exceptional circumstances, confirm a surrogacy agreement after the surrogate mother has fallen pregnant if confirmation is in the best interests of the child who is to be born.

47 S 297(1)(b).

48 S 297(1)(a).

49 S 297(1)(c). However, they may have contact with the child if the surrogate motherhood agreement permits this: s 297(1)(d).

50 That is, in the case of traditional surrogacy: see fn 8 above.

51 S 298(1).

52 The stage at which the surrogate mother and her spouse, civil union partner or partner in a permanent relationship or the commissioning father become the child's parents depends on whether the agreement is terminated before or after the child's birth: s 299(a) and (b). On the problems arising from application of s 299(a) and (b) if the commissioning parents are same-sex civil union partners, see Heaton "The right to same-sex marriage in South Africa" in Gerber and Sifris (eds) *Current trends in the regulation of same-sex relationships* (2010) 115.

53 S 300(1) of the Children's Act.

law will not permit the recognition and enforcement of the South African court order confirming the surrogate motherhood agreement.<sup>54</sup>

## 2.2 Commercial surrogacy

In terms of the Children's Act, the court which is requested to confirm a surrogate motherhood agreement may not do so if the surrogate mother is using surrogacy as a source of income or if she entered into the agreement for commercial purposes.<sup>55</sup> Because the court may not confirm an agreement which provides for commercial surrogacy, the agreement is inevitably invalid.<sup>56</sup> Furthermore, anyone who gives or promises to give to, or receive from, any person any compensation or reward in respect of a surrogate motherhood agreement commits an offence<sup>57</sup> unless the compensation is for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the birth of the child, or confirmation of the agreement; loss of earnings suffered by the surrogate mother as a result of the agreement; and insurance to cover the surrogate mother for anything that may lead to her death or disability as a result of the pregnancy.<sup>58</sup> Finally, a person who artificially fertilises a surrogate mother or renders assistance in artificial fertilisation in the absence of a court-confirmed surrogate motherhood agreement, commits a crime.<sup>59</sup> It is therefore abundantly clear that South African law considers commercial surrogacy to be illegal, against public policy and, in some respects, a crime.

## 3 CONSEQUENCES OF INTERNATIONAL SURROGACY

Because different rules apply to the two instances of international surrogacy this article deals with, the discussion below considers the consequences of the two instances under two different subheadings. The position if persons who are not domiciled in South Africa obtain a child via surrogacy here is discussed first. Then, the position of South Africans who obtain a child via surrogacy in a foreign country is set out.

### 3.1 Persons who are not domiciled in South Africa who obtain a child via surrogacy here

If persons who do not comply with the domicile requirement in the Children's Act seek to obtain a child in South Africa via surrogacy, any surrogate motherhood agreement they enter into is invalid and unenforceable regardless of whether the surrogacy is altruistic or commercial.<sup>60</sup>

54 Louw *Commentary* 19–8. See also Schäfer 280, who submits, correctly, that the surrogate mother's right to freedom of movement would win the day if the commissioning parent(s) tried to interdict the surrogate mother from leaving the country.

55 S 295(c)(iv) and (v). It can be very difficult to determine whether surrogacy is altruistic or commercial. Commercial payments can easily be included under the guise of compensation for expenses, loss of earnings, and so forth. This risk seems to increase if an agency is involved: see eg *Ex parte WH supra* para 64.

56 S 292(1)(e) read with s 295(c)(iv) and (v); see also s 297(2). The consequences of invalidity are discussed in para 3.1.

57 Ss 292(1)(a), 295(c)(iv) and (v), 297(2) and 301(1).

58 S 301(2). Anyone who renders a *bona fide* professional legal or medical service with a view to the confirmation of a surrogate motherhood agreement or in the execution of such an agreement is entitled to reasonable compensation for such service: s 301(3).

59 S 303(1).

60 Ss 292(1) and 297(2).

In terms of section 297(2) of the Act, the surrogate mother is deemed to be the child's mother "for all purposes". The section does not expressly provide that the child has no legal relationship with the commissioning parent(s), but this result follows from section 40(3) of the Act, read with section 296 and the definition of "artificial fertilisation" in section 1. Artificial fertilisation is defined so broadly that it includes all forms of surrogacy.<sup>61</sup> Section 40(3) states that the consequences of artificial fertilisation are as follows:

- "(2) Subject to section 296, whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.
- (3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when—
  - (a) that person is the woman who gave birth to that child; or
  - (b) that person was the husband of such woman at the time of such artificial fertilisation."

Consequently, unless section 296 applies, the woman who was artificially fertilised (the surrogate mother) and her husband or civil union partner<sup>62</sup> (if any) acquire parental responsibilities and rights to the exclusion of the gamete donors. Section 296 specifically deals with the artificial fertilisation of a surrogate mother. It provides that she may not be artificially fertilised until the court has confirmed the surrogate motherhood agreement, and that the artificial fertilisation must take place within eighteen months after confirmation of the agreement.<sup>63</sup> The wording of section 296 suggests that the legislature envisaged that the section would apply only to confirmed (valid) surrogate motherhood agreements. As an invalid surrogate motherhood agreement falls outside the ambit of section 296, the proviso in section 40(3) does not apply to it. Consequently, the commissioning parents acquire no rights, responsibilities, duties or obligations in respect of the child, regardless of whether either or both of them donated gametes for the artificial fertilisation of the surrogate mother. In short, they are not the child's legal parents.

They could become the child's legal parents by adopting the child. However, they are likely to experience problems in getting an adoption order. If they want to adopt the child in South Africa, the provisions of the Children's Act on inter-country adoption come into play. The Act draws a distinction between cases where the adoption applicants are habitually resident in a country in which the Hague Convention on Protection of Children and Co-operation in respect of

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61 The definition of artificial fertilisation encompasses the introduction, by artificial means, of a male gamete into the internal reproductive organs of a woman for the purpose of human reproduction, the joining of a male and female gamete outside the human body with a view to placing the product in a woman's womb, and the actual placing of such product in a woman's womb.

62 S 13(2)(b) of the Civil Union Act provides that, with the exception of the Marriage Act 25 of 1961 and the Recognition of Customary Marriages Act 120 of 1998, any reference to "husband" includes a civil union partner.

63 S 296(1)(a) and (b).

Inter-country Adoption (“Convention on Inter-country Adoption”)<sup>64</sup> has entered into force (“Convention country”),<sup>65</sup> and those in which it has not.<sup>66</sup>

If applicants who are habitually resident in a Convention country want to adopt a child who is habitually resident in South Africa,<sup>67</sup> they must comply with the requirements of the Children’s Act and the Convention on Inter-country Adoption.<sup>68</sup> They might not be able to do so.<sup>69</sup>

First, the subsidiarity principle must be satisfied.<sup>70</sup> The subsidiarity principle does not exclude adoption of a South African child<sup>71</sup> by foreigners, but requires

64 Generally on the Convention on Inter-country Adoption, see Boezaart (ed) *Child law in South Africa* 378–388; Heaton *South African family law* (2010) 296–298; Schäfer 515–540; Skelton and Carnelley (eds) *Family law in South Africa* (2010) 307–315.

65 The definition of “convention country” in s 1 of the Children’s Act excludes “a country against whose accession the Republic has raised an objection under Article 44 of the Convention”. Such a country is treated as a non-Convention country.

66 Ss 261 and 262.

67 Neither the Convention on Inter-country Adoption nor the Children’s Act defines “habitual residence”, and no South African court has made a pronouncement on the term in so far as the Convention on Inter-country Adoption is concerned. In the context of a different Convention – the Hague Convention on the Civil Aspects of International Child Abduction – our courts have held that a child’s habitual residence is determined with reference to his or her parents’ shared intention as to habitual residence, and that where the parents have a common habitual residence, their habitual residence is also the child’s habitual residence: *Senior Family Advocate, Cape Town v Houtman* 2004 6 SA 274 (C); *Central Authority (South Africa) v A* 2007 5 SA 501 (W); *Central Authority v MR (LS Intervening)* 2011 2 SA 428 (GNP). It is not unlikely that our courts will adopt a similar approach to the meaning of “habitual residence” in respect of the Convention on Inter-country Adoption. As the surrogate mother is the child’s legal parent in the case of invalid surrogacy (s 297(2) of the Children’s Act), it is – for purposes of this article – assumed that the child shares her habitual residence and, because the surrogacy occurred in South Africa, it is assumed that the mother’s habitual residence is South Africa. Consequently, the child is assumed to be habitually resident in South Africa for purposes of the inter-country adoption application.

68 S 261 of the Children’s Act. S 261(8) creates an exception if the applicant is a family member of the child or will become an adoptive parent jointly with the child’s biological parent. In such event, the adoption is governed by the rules that apply to an in-country adoption (ie Ch 15 of the Children’s Act). As s 40(3) of the Children’s Act excludes gamete donors from acquiring legal parentage of a child born as a result of an invalid surrogate motherhood agreement (see above), it is unlikely that a South African court would find that the exception is applicable even if the gametes of one or both of the commissioning parents were used in the surrogacy.

69 See also Slabbert and Roodt 344.

70 A 4(b); see also a 21(b) of the United Nations Convention on the Rights of the Child and a 24(b) of the African Charter on the Rights and Welfare of the Child.

71 Because the surrogate motherhood agreement is invalid, the surrogate mother is the child’s mother for all purposes: s 297(2) of the Children’s Act. If the surrogate mother is a South African citizen, the child has South African citizenship by birth: s 2(1)(b) of the South African Citizenship Act 88 of 1995. Therefore the child qualifies as “a South African child” as envisaged in the text above. This is also the position if the child was born in South Africa and he or she does not have, or is not entitled to, citizenship or nationality of any other country, and his or her birth has been registered in South Africa in accordance with the Births and Deaths Registration Act 51 of 1992: s 2(2) of the South African Citizenship Act. A more detailed discussion of acquisition of citizenship by the child falls outside the scope of this article as citizenship is primarily a public law matter.

that the possibilities for placing the child in South Africa must first be considered.<sup>72</sup> The Children's Act furthermore requires that the name of the child must have been in the Register on Adoptable Children and Prospective Adoptive Parents for at least sixty days and no fit and proper adoptive parent must be available for the child in South Africa.<sup>73</sup> It is unlikely that these requirements would have been met if the child was procreated for specific commissioning parents.

Secondly, the Convention on Inter-country Adoption stipulates that there should be no contact between the prospective adoptive parents and the child's parents (here, the surrogate mother and her spouse or civil union partner, if any) until it has been determined that the prospective adoptive parents are eligible and suitable adoptive parents; that the child is adoptable; that the subsidiarity principle has been applied; that an inter-country adoption is in the child's best interests; and that the necessary consent has been given freely and without having been induced by payment or compensation of any kind.<sup>74</sup> In the case of surrogacy, contact might have occurred when the surrogate motherhood agreement was entered into, when the assisted reproduction treatment took place, when the child was born, and/or after the child's birth. Furthermore, even in the case of altruistic surrogacy, the surrogate mother's consent might be said to have been induced by payment or compensation, albeit compensation for expenses she incurred.

Thirdly, the central authorities of both countries must agree to the adoption.<sup>75</sup> Whether the central authority of either South Africa or the foreign country will agree to an inter-country adoption of a child who was procreated as a result of an invalid surrogate motherhood agreement – particularly an invalid commercial surrogate motherhood agreement – is a matter of speculation. If the central authorities do agree and the adoption application comes before the Children's Court in South Africa, the court might be willing to grant an inter-country adoption if this is in the best interests of the child, since section 28(2) of the Constitution of the Republic of South Africa, 1996 and section 9 of the Children's Act afford paramountcy to the child's best interests. Then again, the Children's Court might not be eager to deviate from the express requirements of the Children's Act and the Convention on Inter-country Adoption. It might hold that the requirements set by the Act and the Convention on Inter-country Adoption specifically have the objective of protecting the best interests of children<sup>76</sup> and that deviation from the requirements would run counter to the child's best interests.

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72 *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 3 SA 183 (CC).

73 S 261(5)(g) of the Children's Act.

74 A 29, read with aa 4(a)–(c) and 5(a). An exception is allowed in the case of adoption by a family member.

75 A 17(c); s 261(5)(e) and (f) of the Children's Act.

76 The objects of the Convention on Inter-country Adoption expressly include establishing safeguards "to ensure that inter-country adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law": a 1(a).



If the commissioning parents are habitually resident in a non-Convention country, the provisions of the Convention on Inter-country Adoption obviously do not operate. However, in terms of the Children's Act, the subsidiarity principle must still be applied,<sup>77</sup> the name of the child must have been in the Register on Adoptable Children and Prospective Adoptive Parents for at least sixty days, and no fit and proper adoptive parent must be available for the child in South Africa.<sup>78</sup> In this case, too, it is unlikely that these requirements would have been met. Secondly, the competent authority in the country of habitual residence of the applicants would have to be satisfied that the applicants are fit and proper to adopt.<sup>79</sup> Whether the competent authority will find persons who participated in invalid surrogacy fit and proper to adopt will depend on local legal rules and public policy regarding surrogacy. Further, the foreign competent authority and the South African central authority must agree to the adoption.<sup>80</sup> It is unclear whether they would be willing to do so, especially if the child was conceived as a result of commercial surrogacy. If they do agree, the same considerations regarding the best interests of the child and deviation from the provisions of the Children's Act that apply to applicants who are habitually resident in a Convention country will come into play.

If the commissioning parents want to remove the child from South Africa to their country of origin to obtain an adoption there, they will probably encounter their first hurdle when they attempt to obtain a passport for the child from the South African authorities.<sup>81</sup> The application for the passport must be accompanied by the child's birth certificate<sup>82</sup> and the personal particulars of the parents or legal guardian of the child who applied for the passport must be verified from the South African population register.<sup>83</sup> As a child who is born of invalid surrogacy has no legal relationship with the commissioning parents, their names would not appear on the birth certificate. The certificate would identify the surrogate mother as the child's mother. If the surrogate mother is a party to a marriage or civil union, her husband or civil union partner would be registered as the child's

77 *AD v DW supra*.

78 S 262(5)(g) of the Children's Act. S 262(8) creates an exception if the applicant is a family member of the child or will become an adoptive parent jointly with the child's biological parent. As in the case of the exception in s 261(8) (see fn 68 above), it is doubted whether a South African court would find that the exception is applicable even if the gametes of one or both of the commissioning parents were used in the surrogacy.

79 S 262(2) of the Children's Act.

80 S 262(4) and 262(5)(e) and (f) of the Children's Act.

81 Every South African citizen is entitled to a South African passport: s 21(4) of the Constitution; s 3 of the South African Passports and Travel Documents Act 4 of 1994. Therefore, the applicants would approach the South African authorities for a passport for the child if the child is a South African citizen. Because the surrogate motherhood agreement is invalid, the surrogate mother is the child's mother for all purposes, and if she is a South African citizen, the child has South African citizenship by birth. The child also has South African citizenship if he or she was born in South Africa and he or she does not have, or is not entitled to, citizenship or nationality of any other country, and his or her birth has been registered in South Africa in accordance with the Births and Deaths Registration Act: see fn 71 above.

82 Reg 3(2)(b)(ii) of the South African Passports and Travel Documents Regulations issued under the South African Passports and Travel Documents Act.

83 Regs 3(2)(b)(ii) and 3(3)(e) of the South African Passports and Travel Documents Regulations issued under the South African Passports and Travel Documents Act.

father.<sup>84</sup> The information set out on the birth certificate would alert the authorities to the fact that persons who are not the legal parents or guardians of the child are applying for a passport for a child. This would, in all probability, result in an investigation into the circumstances surrounding the child's birth, which would alert the authorities to the invalid surrogacy. For this reason the parties might be tempted to keep the fact of the surrogacy secret and to fraudulently indicate the commissioning father as the child's father, or even to indicate both commissioning parents as the child's parents when the child's birth is registered. By doing so they would be committing a crime.<sup>85</sup> Nevertheless, if such fraud is committed, the "father" or "parents" might be able to obtain a passport for the child from the authorities of their country of origin and be allowed to take the child with them when they leave South Africa.<sup>86</sup> However, when the commissioning parents make the adoption application in their country of origin, their application might be scuppered by the fact that the authorities in their country of origin are likely to question the need for an adoption because the "father" or "parents" are indicated as the child's parent(s) on the child's birth certificate.<sup>87</sup> The commissioning parents might then have to apply to have the details in the notice of the child's birth in South Africa set aside, in which event they and the surrogate mother could be criminally charged in South Africa.

It must also be borne in mind that if the commissioning father was fraudulently registered as the child's parent along with the surrogate mother, the commissioning mother would have no legal parental status in respect of the child even if the fraud was never challenged. She would have to seek an adoption order or a parental order<sup>88</sup> in her country of origin in order to become the child's legal parent. When she does so, the true facts about the international surrogacy might come to the fore and the recognition of the parental status of the commissioning father might also become an issue.

Of course, even though the Births and Deaths Registration Act 51 of 1992 prescribes that all births which occur in South Africa must be registered in terms of the Act,<sup>89</sup> that the registration must occur within thirty days of the birth,<sup>90</sup> and that failing "without reasonable cause" to notify the Director-general of Home

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84 S 9(2) read with s 1(1) of the Births and Deaths Registration Act; s 13 of the Civil Union Act.

85 S 31(1)(b) of the Births and Deaths Registration Act.

86 If the surrogate mother and the commissioning father were fraudulently indicated as the child's parents, the surrogate mother – being the child's legal mother and guardian – would have to consent to the child's departure from South Africa and would have to give her written consent to the application for the child's passport: Children's Act, s 18(3)(c)(iii) and (iv), read with reg 3(3)(j) of the South African Passports and Travel Documents Regulations issued under the South African Passports and Travel Documents Act.

87 It should be noted that some countries do not automatically recognise a foreign birth certificate (in this case, a birth certificate issued in South Africa). Some countries insist on legalisation or apostillisation of the document before its authenticity is accepted: see eg Permanent Bureau *Preliminary Document 3C* paras 85–87.

88 Parental orders are made in eg England in order to terminate the surrogate mother's parental responsibilities and rights and confer them on the commissioning parents: ss 30 and 54 of the Human Fertilisation and Embryology Act 2008.

89 S 2 of the Act provides that the provisions of the Act apply not only to South African citizens but also to non-citizens "who sojourn permanently or temporarily in the Republic, for whatever purpose".

90 S 9(1).

Affairs of a birth is a crime,<sup>91</sup> the parties might decide not to have the child's birth registered in South Africa at all and instead to seek registration of the child's birth in their country of origin. Whether they would be able to obtain such registration would depend on the provisions of the law of the foreign country. In many instances they might have to resort to the same fraud mentioned above. Depending on the course of action taken by the commissioning parents and the provisions of the law of the foreign country, the commissioning parents might succeed in obtaining a passport from the authorities in their country of origin and might be able to take the child with them when they leave South Africa.

If the child's birth is registered in South Africa and the commissioning father or both commissioning parents are not entered as the child's parents, the commissioning parents might decide to obtain an order from the High Court granting them sole guardianship and sole care on the ground of the best interests of the child, before they seek to take the child to their country of origin. However, the Constitutional Court has held that orders granting sole guardianship and sole care of South African children<sup>92</sup> to foreigners who intend to obtain an inter-country adoption abroad will be made only in exceptional circumstances.<sup>93</sup> Furthermore, the Children's Act provides that if a non-South African citizen applies to the High Court for an order granting him or her guardianship, the application must be regarded as an inter-country adoption for the purposes of the Convention on Inter-country Adoption.<sup>94</sup> Thus, the commissioning parents will be faced with the problems relating to an inter-country adoption set out above.

### 3 2 South Africans<sup>95</sup> obtain a child via surrogacy in a foreign country

South African law does not prohibit South African citizens or persons who are domiciled or resident in this country from participating in surrogacy in a foreign country.<sup>96</sup> However, as altruistic surrogacy is legal in South Africa, there is little need for such persons to resort to international surrogacy. This is true of heterosexual and same-sex couples and single persons.<sup>97</sup> South African prospective commissioning parents are only likely to engage in international surrogacy if they do not want their gametes to be used for the artificial fertilisation of the surrogate mother (for instance, because they suffer from genetic disorders they do not want to transfer to a child); the commissioning mother can give birth but chooses not to do so; medical facilities are better or surrogacy is cheaper in the foreign country; the commissioning parents want to access a bigger pool of

91 S 31(1)(a).

92 On the issue of when a child is "a South African child", see fn 71 above.

93 *AD v DW supra*.

94 S 25.

95 On the term "South Africans", see fn 18 above.

96 Turkish law expressly criminalises travelling abroad for purposes of any type of surrogacy: Items 18.4–18.7 of the Legislation Concerning Assisted Reproduction Treatment Practices as set out by Grtin 2011 *Reproductive BioMedicine Online* 556 557–558. See also s 11(2) read with s 8 of the New South Wales Surrogacy Act 2010, which criminalises any commercial surrogacy arrangement made by anyone who is ordinarily resident or domiciled in New South Wales. S 54 read with s 56 of the Queensland Surrogacy Act 2010 criminalises any commercial surrogacy arrangement made by anyone who is ordinarily resident in Queensland.

97 See para 2.

potential surrogate mothers; or they are set on “ordering” a child who has specific physical or racial characteristics.

If South Africans obtain a child via surrogacy in a foreign country, they are bound to encounter many of the problems which persons who are not domiciled in South Africa encounter when they obtain a child via surrogacy in South Africa.<sup>98</sup> For instance, they might not be recognised as the legal parents of the child either in South Africa or in the foreign country.

Three criteria are commonly used to assign legal parentage to a person: a genetic link between the person and the child (that is, the person’s sperm or ovum was used to conceive the child); the person’s intention to become a parent (that is, the person intended to become the child’s parent by “commissioning” the surrogate mother to carry the child for him or her); and giving birth to the child.<sup>99</sup> Different jurisdictions apply different criteria, with the result that a person may qualify as the child’s legal parent in one country but not in another.<sup>100</sup>

Even if the foreign country were to confer legal parentage on one or both of the commissioning parents, their parentage might not be recognised in South Africa. Recognition in one country of parental status that was afforded to a person by the law of another country is a matter that is governed by the rules of private international law. If commissioning parents participated in altruistic surrogacy which was valid in terms of the law of the foreign country and the law of the foreign country automatically conferred legal parentage on them, their parental status is likely to be recognised in South Africa since altruistic surrogacy is permitted in this country too.<sup>101</sup> If the foreign surrogacy was commercial, the matter would become more complicated. As there is widespread international distaste for commercial surrogacy and commercial surrogacy is illegal and against public policy<sup>102</sup> in South Africa, a South African court might withhold recognition from the commissioning parents’ legal parentage even if the commercial surrogacy was valid in terms of the law of the foreign country. Then again, the court might argue that if the commissioning parents were excluded as the child’s legal parents and the child’s unwilling surrogate mother was compelled to be the child’s parent, the child would probably end up in alternative care. Such a state of affairs would not be in the best interests of the child as it

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98 Cf para 3 1.

99 See eg Groenewald 43; Brunet *et al* 23; Henaghan 2013 *Australian J of Adoption* 3–4.

100 Different jurisdictions also have different rules on the grounds for challenging a person’s status as a parent and on who may bring such an action: see *Preliminary Document 3C* paras 11–14 31–37.

101 But see Oppong 234, who states that it is unlikely that a South African court would recognise surrogacy that is valid in terms of the law of the foreign jurisdiction but does not comply with the requirements of the Children’s Act. The implication of his view is that foreign surrogacy would never be recognised as the surrogate motherhood agreement would not have been entered into in South Africa, as is required by s 292(1)(b) of the Children’s Act. Such blanket non-recognition of foreign surrogate motherhood agreements would have very negative consequences for the commissioning parents and for the child.

102 It must be borne in mind that, because the recognition issue is decided by applying the rules of private international law, it is not just national (ie internal) public policy which is at issue. Public policy in the international sense (ie public policy which might require exclusion of foreign law because application of the foreign law would be repugnant) also comes into play. On public policy generally as a ground for exclusion of foreign law, see Forsyth 120–123. For a brief overview of public policy as a ground for non-recognition of legal parentage, see Permanent Bureau *Preliminary Document 3C* paras 98–102.

would amount to punishing the child for the actions of the commissioning parents and the surrogate mother. The court might hold that denying recognition to the legal parentage of the commissioning parents would unjustifiably violate the paramountcy of the child's best interests.<sup>103</sup> It might also hold that denying the child parental care by commissioning parents who want to provide parental care to him or her, unjustifiably violates his or her constitutional right to parental care.<sup>104</sup> Consequently, recognition might be afforded to the commissioning parents' status as legal parents of the child even in the case of foreign commercial surrogacy.

If the South African commissioning parents, or one of them, did not automatically become the child's legal parents as a result of the foreign surrogacy, but the court in the foreign country made an inter-country adoption order in favour of the commissioning parent(s), the South African central authority (Director-general of Social Development)<sup>105</sup> has the power to refuse to recognise the adoption if it is manifestly contrary to South African public policy.<sup>106</sup> As commercial surrogacy is against South African public policy, the Director-general might withhold recognition from an adoption of a child who was born as a result of commercial surrogacy. However, in exercising his or her power, the Director-general must also take into account the child's best interests.<sup>107</sup> Depending on the Director-general's stance in this regard, he or she might conclude that withholding recognition to the adoption simply because the child was born as a result of commercial surrogacy would not be in the child's best interests. If the Director-general refuses to recognise the foreign inter-country adoption order, the Children's Court may be approached for an adoption order under the Children's Act.<sup>108</sup>

If a court in the foreign country made a different type of order relating to the parental status of the commissioning parents or one of them, such as a parental order,<sup>109</sup> public policy may be invoked to justify non-recognition of the order, while the best interests of the child and the child's right to parental care may be invoked to justify its recognition. In the event of non-recognition, the South African commissioning parents would have to seek an order from the South African High Court appointing them sole guardians and sole caregivers of the child in the best interests of the child.<sup>110</sup> Otherwise, they would have to seek a local adoption order in terms of the Children's Act.<sup>111</sup>

If the commissioning parents wanted to return to South Africa with the child, they would most probably face similar problems to those encountered by foreigners who obtain a child via surrogacy in South Africa. If the child is a

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103 S 28(2) read with s 36 of the Constitution; see also s 9 of the Children's Act.

104 S 28(1)(b) read with s 36 of the Constitution.

105 S 257(1)(a) of the Children's Act.

106 S 270(1) of the Children's Act; a 24 of the Convention on Inter-country Adoption.

107 *Ibid.*

108 S 271 of the Children's Act.

109 On such orders, see fn 88 above.

110 They could seek such an order from the High Court in its capacity as upper guardian of all minors or in terms of s 23 or s 24 of the Children's Act.

111 Ch 15 of the Children's Act governs local adoptions, ie adoptions that are not inter-country adoptions.

South African citizen,<sup>112</sup> he or she is entitled to a South African passport,<sup>113</sup> which will enable him or her to enter South Africa. However, the application for the child's passport must be accompanied by a copy of the child's birth certificate and the personal particulars of the parents or legal guardian of the child who applied for the passport must be verified from the South African population register.<sup>114</sup> The information set out in the birth certificate might alert the South African authorities to the fact that the child was born as a result of international surrogacy and that the commissioning parents might not be the child's legal parents (and that the child might not be entitled to a South African passport as he or she is not a citizen of this country). If the commissioning parents – or the surrogate mother and the commissioning father – attempted to have the child's birth registered under the Births and Deaths Registration Act, the South African authorities might be alerted to the international surrogacy even before an application is made for a passport for the child. The Births and Deaths Registration Act provides that if a child's parent is a South African citizen, the head of a South African diplomatic or consular mission or a regional representative in South Africa may be notified of the foreign birth of the child to enable the child to obtain a South African birth certificate.<sup>115</sup> The person who wants to have the child's birth registered in terms of the Births and Deaths Registration Act must "submit a birth certificate or other similar document issued by the authority concerned in the country in which the birth occurred".<sup>116</sup> This certificate or document might alert the South African authorities to the fact that the persons who are indicated as the child's parents might not qualify as the child's legal parents in terms of South African law. In such event, the commissioning parents would first have to obtain a court order clarifying their parental status.

If the law of the country where the child was born does not recognise the commissioning parents as the child's legal parents, the South African commissioning parents and the child's surrogate mother might conspire to indicate the commissioning parents or the surrogate mother and the commissioning father as the child's parents – just like persons who obtain a child via international surrogacy in South Africa might do. Such a false registration is likely to violate some or another provision of the law of the foreign country. And, as is the position if foreigners fraudulently register the commissioning father as the child's parent along with the surrogate mother if the child is born via surrogacy in South Africa, the commissioning mother would have no legal parental status in respect of the child if her name does not appear as the child's parent on the birth register. She would have to seek an adoption order (inter-country or local) or another order conferring parental status on her. In those proceedings, the true facts about the international surrogacy might come to the fore and recognition of the parental status of the commissioning father might also become an issue.

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112 Regardless of where the child was born, he or she has South African citizenship by birth if one of his or her parents is a South African citizen: s 2(1)(b) of the South African Citizenship Act. See further fn 71 above.

113 See fn 81 above.

114 See the authority cited in fn 83 above.

115 S 13.

116 Reg 10 of the Regulations on the Registration of Births and Deaths issued under the Births and Deaths Registration Act.



#### 4 SOUTH AFRICA'S OPTIONS FOR DEALING WITH INTERNATIONAL SURROGACY

The discussion above illustrates some of the legal problems which may arise if persons who are not domiciled in South Africa obtain a child via surrogacy in this country and if South Africans obtain a child via surrogacy in a foreign country. Of course, these types of legal problems arise from international surrogacy throughout the world. For this reason, an international instrument on surrogacy would probably be the ideal method to address these problems. The feasibility of a private international law instrument on international surrogacy is currently being investigated by the Permanent Bureau of the Hague Conference on Private International Law.<sup>117</sup> If it is decided that such an instrument is indeed feasible, it will be some time before the instrument comes to fruition.<sup>118</sup> Then, of course, its effectiveness will depend on the enforcement mechanisms it provides for and the number of state parties that ratify and implement it.

While the feasibility and content of an international instrument are being investigated and debated, South Africa can employ various means to deal specifically with the problems arising from the two instances of international surrogacy identified in this article.

First, legislation which compels all South African organs of state to withhold recognition from surrogacy by non-domiciled foreigners in South Africa and by South Africans in a foreign country, including denying the commissioning parents the status of legal parents of the child in all circumstances, can be enacted. Such blanket non-recognition is not supported as its rigidity is bound to increase the risk of harm to all parties and particularly to the child, who might end up parentless and stateless.

A more pragmatic (or, some might say, a more defeatist) option would be to enact legislation which, for purposes of South African law,<sup>119</sup> recognises the identified instances of international surrogacy and confers parental status on the commissioning parents. If this approach were followed, the legislature might decide to differentiate between altruistic and commercial international surrogacy, and it might withhold recognition from commercial international surrogacy.<sup>120</sup>

Another option, which relates only to South Africans who go abroad for surrogacy, is to enact legislation which prohibits any person who is a domiciled or resident in South Africa from engaging in surrogacy abroad. Such legislation would be similar to Turkey's ban on foreign surrogacy by Turks, and the New South Wales and Queensland ban on commercial surrogacy by persons who are domiciled or habitually resident in these states.<sup>121</sup> Effective enforcement of such

117 See fn 4 above.

118 On the possible content of a convention on international surrogacy, see Trimmings and Beaumont (eds) 635–646; Groenewald 50–67; Permanent Bureau *Preliminary report* 29–30; Mohapatra 2012 *Berkeley J of Int L* 449; Mortazavi 2012 *Georgetown LJ* 2287–2289; Lin 2013 *Cardozo J of Int and Comp L* 567–568.

119 Clearly, South African law cannot dictate whether foreign countries must recognise such instances of international surrogacy.

120 For recent local support for recognition of commercial surrogacy, see Louw 2013 *THRHR* 580–582; Nicholson 2013 *SAJHR* 496. For earlier support, see Meyerson *Gender* 123–134; Lupton “The right to be born: Surrogacy and the legal control of human fertility” 1988 *De Jure* 36 40.

121 See fn 96 above.

legislation could be problematic. Committing commissioning parents to prison for breach of the prohibition would probably not be the answer, for the child who was born as a result of the surrogacy might end up in alternative care despite having parents who want to provide and care for him or her, which could surely not be in the child's best interests. If the penalty was only a fine, some participants in international surrogacy might view the fine as little more than yet another expense to add to the cost of obtaining a child.

Yet another option, which also relates only to South Africans who go abroad for surrogacy, is to send letters to foreign fertilisation clinics South Africans are known to use, warning them that they should not engage in any surrogacy arrangements with South Africans until the South Africans have consulted the South African Consul-General or High Commissioner in the particular country with a view to establishing whether they would be recognised as the child's legal parents in South Africa. In 2010, eight European countries issued similar warnings to fertility clinics in India.<sup>122</sup> The laws of these European countries either completely prohibit surrogacy or prohibit commercial surrogacy (which is legal in India).<sup>123</sup> Problems are bound to arise when enforcement of such warnings is attempted. It should be noted that such warnings specifically to fertility clinics in India have in any event become redundant, because India has revised its visa requirements to compel all foreigners who want to visit the country for the purposes of surrogacy to apply for a medical visa instead of a tourist visa. The application for a medical visa must be accompanied by a letter from the embassy or foreign ministry of the country of origin of the commissioning parents in India, stating that the country of origin recognises surrogacy and that the child will be allowed to enter the country of origin of the commissioning parents as the commissioning parents' child. The commissioning parents must also produce the duly notarised surrogate motherhood agreement they concluded with the surrogate mother.<sup>124</sup>

The final option is to retain the current position of leaving individual cases to be decided by the courts. Conflicting decisions and legal uncertainty are bound to be the outcome.

## 5 CONCLUSION

The legal problems created by international surrogacy do not lend themselves to easy solutions. By prohibiting and criminalising commercial surrogacy, setting strict requirements for altruistic surrogacy and, particularly, by enacting the domicile requirement, the South African legislature has attempted to limit the instances in which these problems may arise as a result of reproductive tourism in South Africa. Unfortunately, it seems that the domicile requirement is not always applied strictly. This problem should be addressed by amending the

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122 Davis "The rise of gestational surrogacy and the pressing need for international regulation" 2012 *Minnesota J of Int L* 129 132; Henaghan 2013 *Australian J of Adoption* 4-5; "Friday legal updates – India surrogacy & the European Union" <http://bit.ly/1mASEiR> (accessed 8 July 2014); Roy "Bar our nationals, European countries tell surrogacy clinics" <http://bit.ly/1wl2feK> (accessed 8 July 2014).

123 Davis 2012 *Minnesota J of Int L* 129.

124 The medical visa requirements came into operation on 15 November 2012. On the visa requirements, see Malhotra and Malhotra *International Survey* 172; Crockin 2013 *Reproductive BioMedicine Online* 738; Lin 2013 *Cardozo J of Int and Comp L* 563.

Children's Act to insert a provision which expressly requires a thorough investigation into whether foreign commissioning parents really do meet the domicile requirement. Detailed information in this regard should accompany the application for confirmation of the surrogate motherhood agreement. However, even if the above amendment were to be introduced and strictly applied, the possibility of foreigners engaging in surrogacy in South Africa would not be excluded completely.

Nor will South Africans who do not qualify for surrogacy in South Africa or do not want to engage in surrogacy here be deterred from going abroad to obtain a child via surrogacy. To ensure greater predictability and legal certainty regarding the legal parentage of children in international surrogacy situations, the legislature should take the bull by the horns and expressly regulate the consequences of the identified instances of international surrogacy. Shying away from this daunting task does not serve the best interests of children born from such surrogacy.