SURROGATE MOTHERHOOD AND ASSISTED REPRODUCTION IN SOUTH AFRICA: AN ANALYSIS OF SELECTED CONSTITUTIONAL AND MEDICO-LEGAL ISSUES

by

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I, ELAINE AURET, declare that the above thesis is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the thesis to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

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ACKNOWLEDGMENTS

It is with a grateful heart that I can submit this thesis.

I dedicate this thesis to my grandfather, Dr Auret, who has been a great inspiration to me and who always encouraged me to never stop learning. He believed that you are never too old to learn. He also taught me that there will be hard sacrifices that you would have to make to get you where you want to be.

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ABSTRACT

The advancement in medical technology over the past few decades has brought hope to infertile people and same-sex couples to have their own families in circumstances where it would not have been possible for them otherwise, except through adoption. These medical technological advances have pushed difficult ethical, social and religious issues to the front as society tries to adjust to new formulations of what constitutes a family. The use of assisted reproductive technologies (ART) and assisted reproductive procedures, especially in the context of surrogate motherhood, raises a range of medico-legal and constitutional issues concerning the parties involved in a surrogate motherhood agreement, namely the commissioning parent(s); the surrogate mother (and her partner, where relevant), and the child to be born following the agreement. Chapter 19 of the Children's Act 38 of 2005 was enacted to, not only protect the best interests of the commissioned child, but also to provide legal clarity regarding the rights and responsibilities of all parties involved in a surrogacy arrangement, including the legal status of the child born as a result of surrogacy and artificial fertilisation. Although different High Court judgments provide some guidance on the scope and type of information that should accompany an application for the confirmation of a surrogacy agreement to enable the court to make a decision on this matter, many gaps and uncertainties remain. Some of the provisions in the Children's Act were recently constitutionally challenged because of critical human rights concerns. Urgent legislative intervention is required to address these *lacunae*. This thesis proposes that regulations be enacted to chapter 19 of the Children's Act to close the existing regulatory gaps and to assist persons seeking to conceive a child via a surrogacy agreement to comply with the provisions of chapter 19. The law is notorious for often lagging behind the constant advances in medical technology and changes in society, most evident in present times in the context of surrogate motherhood and artificial fertilisation. This thesis also considers what the proposed regulations to the chapter 19 of the Children's Act should consist of with reference to judgments regarding chapter 19 and the Constitution of the Republic of South Africa, 1996. The best interests of children are of paramount importance in all matters concerning children, entrenched in section 28 of the Constitution. This thesis advances that because High Courts have the responsibility to ensure that surrogacy agreements are in the commissioned child's best interests, this obligation will best be dispensed with

by the enactment of much needed regulations. The thesis also demonstrates that although South Africa has a comprehensive legal framework regulating surrogate motherhood and artificial fertilisation compared to the United Kingdom, Canada and India, some instructive examples may be taken from these jurisdictions in closing the existing regulatory gaps and ambiguities.

KEY TERMS

Infertility; artificial fertilisation; IVF; surrogate mother; surrogacy; surrogate agreement; best interests of the child; epigenetics; confirmation; reproductive health care

ABREVIATIONS AND ACRONYMS USED

NHA	National Health Act
IVF	In vitro fertilisation
WHO	World Health Organisation
UK	United Kingdom
UNCRC	United Nations Convention on the Rights of a Child
ACWRC	African Charter on the Rights and Welfare of the Child
SALC	South African Law Commission
SALRC	South African Law Reform Commission
AID	Artificial insemination-donor
AIH	Artificial insemination-husband
ART	Assisted reproductive technology
PAIA	Promotion of Access to Information Act

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CHAPTER 1

BACKGROUND TO THE STUDY, PROBLEM STATEMENT, OBJECTIVES AND FRAMEWORK

1. INTRODUCTION

Infertility is a very sensitive subject and it is also a reality which is part of so many people's lives, both women and men. Technological advances in the field of assisted reproduction have led to many possibilities for infertile persons to achieve parenthood. One such example is that of surrogate motherhood or surrogacy, which raises unique issues and rights, for example, those of society on the one hand, and those of persons on the other hand, for example the right to procreate, the right of women to make decisions regarding their bodies, and the right of children to establish their biological or genetic origins.[1] The difficulty lies in finding a balance that does justice to the expectations of society, the interests and desires of the infertile and same-sex couples and the best interests of the child.[2]

This thesis will consider, among others, the constitutionality of assisted reproduction and surrogate motherhood. The pertinent medico-legal issues regarding assisted reproduction and surrogacy will also be canvassed, especially with regard to the legal consequences following the artificial fertilisation of the surrogate mother. In order to adequately contextualise the topic of this thesis, selected aspects concerning infertility and the different forms of infertility treatment, including relevant human rights considerations regarding human reproduction, will be explored. Finally, the legality of surrogate motherhood agreements, and legal consequences of these, will also be considered.

The impact of infertility and the promises of surrogacy in resolving the impact of infertility, is aptly summarised by Khampepe J as follows:

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1 South African Law Commission Report, Project 65, Surrogate Motherhood (11 November 1992) at par 7.6.3.

2 SALC Project 65 at par 7.6.3.

> Infertility therefore has the capacity to detrimentally affect the psychological integrity and wellbeing of a person at least partly because it restricts their ability to make reproductive decisions, within the context of strong social expectations. In my view, much of the harm infertility brings has to do with the forced deprivation of choice in an area of life that humans consider particularly significant. Infertility cruelly dispossesses a person of the capacity to decide whether or not to have a child; where making this decision has extensive social implications. Surrogacy meaningfully contributes to ameliorating the harms of infertility because it provides a pathway through which infertile people can exercise their right to make reproductive decisions. Those who use surrogacy are able to elect to join the ranks of parenthood. The great benefit of surrogacy is that it opens reproductive avenues for those who would otherwise be unable to have children of their own. Surrogacy *itself* allows the infertile to ameliorate the psychological harms of infertility.[3] (own emphasis)

Infertility can further be seen as an unenviable and psychologically harmful condition. The harm lies in the fact that it prevents a person from having his or her own children, which may furthermore result in serious social exclusion and stigma:[4]

> The psychological trauma experienced by all infertile people is further heightened by an abiding sense of social shame, leading them to conceal their infertility. The stigma that attaches to infertility is damaging and pervasive, especially in developing countries like our own.[5]

Respect for another person's individual autonomy, if applied to the context of surrogacy, means that despite one's own preferences, the choice of another person to use the advances in medical technology to address infertility, including surrogate motherhood, should be respected as much as the choice of a fertile person to have children or not. These choices are closely related to the rights to dignity, equality, and the right to reproductive freedom, as this thesis will discuss. With the development of new technologies over the past few decades, it has become possible to reproduce by noncoital means and the right to engage in these new technologies is becoming more prevalent.[6] Both artificial fertilisation and surrogacy are forms of noncoital reproduction.[7] Modern surrogacy arrangements are possible today as a result of modern medical technology.[8] Artificial fertilisation of the surrogate would thus not have been possible

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3 *AB and another v Minister of Social Development* 2017 (3) BCLR 267 (CC); 2017 (3) SA 570 (CC) at par 89 and 90.

4 *AB and another v Minister of Social Development* par 86.

5 *AB and another v Minister of Social Development* par 84.

6 Van Niekerk, C "Assisted reproductive technologies and the right to reproduce under South African law" 2017 *Potchefstroom Electronic Law Journal* 20 1 and 2.

7 Van Niekerk 2017 *PELJ* 19.

8 *AB and another v Minister of Social Development* at par 37. Tager, L "Surrogate Motherhood, Legal Dilemma" 1986 *South African Law Journal* 103(3) 381. The writer states that we have been carried forward, willingly or otherwise, into a new era of genetics as a result of advances in biotechnology. The writer refers to the first baby which was conceived outside of the mother's womb and which was born in England in 1978. This was said to have been a revolution in the

without the said technology and it is important to regulate the procedure to protect the different parties and the child born as a result thereof.[9] It is trite that with everchanging technology, the law is limping along and lagging behind technology.[10] This is also the case with surrogate motherhood, as this thesis will attempt to illustrate.

2. BACKGROUND TO THE STUDY

Over the past decades, the idea of what 'a family' entails have changed dramatically with the moral changes brought about in society. Single parents, same-sex couples and commissioning parents can now all have a family through the services of a surrogate. By adopting a child or having a child through *in vitro* fertilisation using donor gametes, a family may be established, although there is no genetic link between the parents and the child. There is clearly no right or wrong form of a family. It is each person's choice of how he or she chooses to have a family. Meyerson makes the following important observation regarding parenthood:

> Many reasonable people subscribe to more pluralistic ideas about good families. These opposing reasonable conceptions of family do not see biological parenthood as inherently superior to social parenthood or blood relationships as the foundation of our humanity. They see value in the social aspects of kinship and the many family forms, both biological and non-biological, that can provide children with love and care and meet their emotional needs.[11]

2.1 Addressing infertility

Assisted reproduction, through artificial fertilisation for example, is a form of medical technology that enables the medical profession, more specifically fertility specialists and embryologists, to assist an infertile or fertile person in conceiving a child. Examples

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human reproduction in that it was feasible to separate conception and gestation. Biko J and Nene Z "Ethics aspects of third-party reproduction" 2017 *Obstetrics & Gynaecology Forum* 3 12.

9 It is important to understand that it is possible for a child conceived by *in vitro* fertilisation to have no less than five (5) parents. Tager 1986 *SALJ* 382. The different parents are the genetic parents (the donors of the sperm and the egg), the woman in whose womb the fertilised embryo was implanted and the commissioning parents (the childless couple who commission the surrogate to bear the child which they intend to rear as their own). It is pointed out by the writer that procreation has been divorced from sexual intercourse and from child-bearing.

10 Denton, JA and Reynolds CS. "Limping along and lagging behind: The law and emerging gene technologies" (2018) 24 *James Cook University Law Review* 61.

11 Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 340.

would be where the husband or partner of the women is infertile, or in the case of lesbian couples, where a sperm donor is necessary for the process of conception, or where a woman needs to undergo insemination or *in vitro* fertilisation as she is unable to conceive naturally. Infertility may be viewed from two different perspectives, namely, where a person is what is referred to as "conception infertile" or "pregnancy infertile". "Conception infertile" refers to the situation where a person is unable to contribute a gamete for the purposes of conception through artificial fertilisation, whereas "pregnancy infertile" applies to a person who is permanently and irreversibly unable to carry a pregnancy to term.[12] No matter the type of infertility that the person may suffer from, the longing to have a child is the same.

"Assisted reproductive technologies" (ART) are defined as all treatments or procedures that include the *in vitro* handling of both human oocytes and sperm, or embryos, for the purpose of establishing a pregnancy.[13] The Centres for Disease Control and Prevention (CDC) describe assisted reproductive technologies (ART) broadly as all fertility treatments in which either eggs or embryos are handled.[14] It is further explained that, in general, the assisted reproductive procedures involve the surgical removal of eggs from a woman's ovaries, combining them with sperm in the laboratory, whereafter they are returned to the woman's body or donated to another woman.[15]

ART's, however, do not include treatments in which only sperm are handled, for example artificial insemination, or procedures in which a woman only takes medicine to stimulate her egg production without the intention of having her eggs retrieved.[16] "Artificial fertilisation" in South African law is defined as the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of a

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12 *AB and another v Minister of Social Development* at par 8, fn 9 and fn 205. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 247. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 318.

13 Van Niekerk 2017 *PELJ* 4.

14 What is assisted reproductive technology? accessed from https://www.cdc.gov/art/whatis.html (accessed 1 July 2022).

15 What is assisted reproductive technology? accessed from https://www.cdc.gov/art/whatis.html (accessed 1 July 2022).

16 What is assisted reproductive technology? accessed from https://www.cdc.gov/art/whatis.html (accessed 1 July 2022).

female person for the purpose of human reproduction.[17] Artificial fertilisation includes artificial insemination (with the use of donor sperm or sperm of the husband or male partner) and *in vitro* fertilisation.[18] Legislative change in South Africa in 1997 made it possible for both married and unmarried women to have legal access to donor sperm and to subject themselves to artificial insemination procedures.[19]

2.2 Fundamental rights considerations

The Bill of Rights, set out in chapter 2 of the Constitution of South Africa, 1996,[20] is the cornerstone of democracy in South Africa. In terms of section 7(1), it enshrines the rights of all people and affirms the democratic values of human dignity, equality and freedom. Section 7(2) provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. Section 7(3) provides that the rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill. Every person has the right to make decisions concerning reproduction in terms of section 12(2)(b), as well as the right to reproductive health care in accordance with section 27(1)(b) of the Constitution. Section 12(2)(a) gives every person the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction (section 12(2)(b)).

The advances in medical technology can assist the infertile or fertile person in more than one way and selecting the type of assistance is a choice that a person is entitled to make regardless of his or her sexual orientation, sex or gender. The recent Constitutional Court judgment of *AB and another v Minister of Social Development*,[21] discussed in detail in this thesis, concerned the constitutionality of section 294 of the Children's Act, and more specifically, the requirement of a genetic link between the commissioning parent or parents and the commissioned child. In this case, the applicants challenged section 294 of the Children's Act which requires the commissioning parents to use their own gametes for the conception of a child, instead

17 Reg 1 of Regulations relating to artificial fertilisation of persons published under GN R175 in *GG* 35099 of 2 March 2012. Sec 1 of the Children's Act 38 of 2005.
18 Reg 1 of Regulations relating to artificial fertilisation of persons 2012.
19 GN R1354 GG 18362 of 17 October 1997. Reg 8(1) of the Human Tissue Act 1983 was deleted and regs 5(d) and 9(e) was amended. Strauss and Maré *Mediese Reg* 164 and 166.
20 Constitution of South Africa ch 2, sec 7.
21 2017 (3) SA 570 CC; (2017 (3) BCLR 267; [2016] ZACC 43).

of donor gametes. The majority of the Constitutional Court rejected the challenge on the ground that a child has the right to know his or her genetic origins, as this is important to a child's development of a positive self-identity. This judgment is also controversial for other reasons. For example, with reference to the different categories of infertility, section 294 prevents "conception infertile" persons from concluding a surrogacy agreement.[22] Meyerson refers to this differentiation as the "no-double-donor requirement"[23] and furthermore argues that, because infertility is generally regarded as a form of disability and whilst disability is a specified ground listed in section 9(3) of the Constitution,[24] section 294 of the Children's Act may be said to unfairly differentiate on the basis of disability.[25] She states that the court should have found that section 294 is discriminatory and presumptively unfair in terms of section 9(5) of the Constitution, thereby infringing section 9(3).[26]

It is clearly the law and not the person's medical condition that prevents the category of conception infertile person(s) from having a child through surrogacy.[27] Moreover, to exclude conception infertile persons from using surrogacy as a form of reproduction has a highly detrimental impact on them and section 294 may be said to impair the dignity of conception infertile people, not to mention that it is unjustifiably unfair to them.[28] Meyerson contends that although section 294 does not impose a burden on a person, it withholds an opportunity, and by withholding an opportunity, it is also indirectly discriminatory.[29]

Discussing section 294 of the Children's Act, Van Niekerk argues with reference to section 12(2)(a) of the Constitution, that whilst the said section protects the right to

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22 Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 318.

23 Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 318.

24 Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 321.

25 Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 321.

26 Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 321 and 341.

27 Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 322.

28 Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 325.

29 Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 325.

noncoital reproduction, it does so only if the parties themselves are physically involved in the reproductive process (presumably by providing gametes) or by carrying the child.[30] Thus, this effectively excludes the persons who cannot meet the criteria in terms of section 294 of the Children's Act.[31] It can then be said to suggest that section 12(2)(a) is not flexible enough to accommodate medical technological advancements and it may thus need to be amended or interpreted more broadly in future.[32] As section 12(2) of the Constitution refers to both bodily and psychological integrity, she regards section 12(2) as protecting both the body and the psyche.[33] Hence, it is possible to inflict harm in a way that infringes both a person's bodily integrity and psychological integrity, however, it is also possible to compromise a person's psychological integrity without an accompanying infringement of the person's bodily integrity.[34]

2.3 Children born as result of assisted reproduction

Assisted reproduction has far-reaching consequences for children born as a result of assisted reproduction, for a number of reasons. One such consequence relates to the situation where legal ties will exist between children born as a result of the assisted procedure and the persons with whom these children will have a legal connection and why. This thesis will explore the different factors that need to be considered to determine the legal consequences of and the legal ties arising between the different parties and the child or children born as a result of artificial fertilisation.

Less considered, however, is the fact that children born as a result of surrogacy arrangements are also influenced by the science of epigenetics, which refers to an understanding of "the way the genome integrates environmental signals and alters the expression of genes as a result". [35] Epigenetic research shows that the genetic makeup of a surrogate has a substantial impact on the child that she carries, irrespective of whether she is an ovum donor or not. Whilst the two biological parents of the child contribute to their child's genetic make-up, the manner in which their child's genes are

30 Van Niekerk 2017 *PELJ* 15.
31 Van Niekerk 2017 *PELJ* 15.
32 Van Niekerk 2017 *PELJ* 16.
33 Van Niekerk 2017 *PELJ* 15.
34 Van Niekerk 2017 *PELJ* 16.
35 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 426.

"switched on" in the womb, is substantially influenced by the surrogate mother's transcription factors. This third-party impact has led Nicholson and Nicholson to argue that where it was previously believed that the sperm and ovum donors were the two biological parents of the child, in the case of surrogacy, the womb of the surrogate mother itself should be considered to make her a "third biological parent" whose input is experienced both *in utero* and after birth.[36] Thus, even where the surrogate mother does not provide the egg for the commissioning parent's child that she carries, Nicholson and Nicholson believe that the surrogate mother's physical contribution obscures to some extent questions regarding in whom parental rights and responsibilities vis-à-vis the child that is born should vest. They recommend that if the prenatal womb environment has this significant impact on the health and welfare of the child after birth, a full medical and environmental history of the surrogate should be required.[37] This new biological discovery adds a further layer of complexity to the legal consequences of surrogacy that justifies consideration and possible reference in regulations to be drafted regarding surrogate motherhood in terms of the Children's Act.

Section 28 of the Constitution of South Africa captures the best interests of the child and provides that the child's best interest is of paramount importance in all matters concerning the care, protection and well-being of the child.[38] It is, however, not easy to identify the best interests of a commissioned child in surrogacy agreements. Such an exercise will require a thorough consideration of several social, ethical, financial and medical issues, including significant choices regarding the future of an unborn child.[39]

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36 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 426.

37 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 434.

38 Constitution of South Africa. *AB and another v Minister of Social Development* 2017 (3) SA 570 (CC) par 294, 253 and 281 for acknowledging the paramountcy of the best interests of the commissioned child in respect of the genetic link-requirement in surrogacy agreements. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 251.

39 Oluwaseyi, O.O. and Oladimeji, O "Surrogacy agreements and the rights of children in Nigeria and South Africa" 2021 *Obiter* 42(1) 21.

The Children's Act provides in section 6(1)(a) guidance on the implementation of legislation relevant to children,[40] complemented by section 6(1)(b) which requires that certain principles guide all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.[41] Section 7 lists some of the factors which must be taken into account when determining the best interests of the child.[42] Moreover, section 9 determines that the best-interests standard concerning a child must be applied *in all matters* concerning the care, protection and well-being of a child.[43] These provisions should be considered in the context of section 28 of the Constitution when a decision has to be made in respect of legal consequences of children born as a result of artificial fertilisation and surrogacy. The best interests of the child principle should thus guide courts not only in confirming surrogacy agreements, but also in respect of disputes arising from surrogacy.

2.4 Factors leading to the regulation of surrogate motherhood

The most common reason for enlisting the services of a surrogate is that the couple want to have children but the woman is either unwilling or unable to become pregnant or carry a pregnancy to term.[44] Further, an increasing number of young women are infertile today and the supply does not meet the demand for children that are available for adoption.[45] More unmarried mothers appear to be raising their own children and thus not giving them up for adoption as used to be the position in the past.[46] It can be said that these changes, together with the greater demands by society, gave rise to the remarkable progress that has been made in the medical field to overcome infertility.[47] Surrogacy can be described as another technique to provide a childless

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40 Sec 6(1)(a) of the Act. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 251.

41 Sec 6(1)(b) of the Act. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 251.

42 Sec 7 of the Act. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 251.

43 Sec 9 of the Act.

44 SALC Project 65 at par 2.1.1.

45 SALC Project 65 at par 2.1.1.

46 SALC Project 65 at par 2.1.1.

47 SALC Project 65 at par 2.1.1.

couple with a child (who is in most instances biologically related to at least one of the persons) through artificial fertilisation.[48]

As this thesis will discuss in detail, that despite the advances in medical technology facilitating the birth of a child through assisted reproduction procedures, numerous legal consequences associated with assisted reproduction arise, and even more so in the case of surrogacy. It is thus extremely important for each party to the surrogate motherhood agreement to fully understand the attendant legal consequences, including the relevant rights and duties of each of the parties, and finally, the legal status of the commissioned child born as a result of the said agreement.

Because of the complexity of surrogacy, difficult ethical, philosophical and social issues arise.[49] Already in 1993, the SALC pointed out that in a country like South Africa with different population and religious groups, ethical values of one group in the community may not necessarily be acceptable to other groups.[50] This observation foregrounds the importance of legislation and regulations to guide parties to a surrogacy agreement in light of the fact that not everyone will agree with a person's choice to use surrogacy as an arrangement to have his or her or their own child.

3. PROBLEM STATEMENT, AIMS AND OBJECTIVES OF THE RESEARCH

It follows from the discussion above that contextualised the legal problem regarding the regulation of surrogate motherhood and artificial fertilisation, that several gaps and pertinent questions arise in the legal framework governing surrogacy and related consequences in South Africa. These issues not only include medico-legal and legal status concerns, but also complex fundamental rights issues affecting the rights and obligations of each of the parties to surrogacy arrangements, not to mention those of the commissioned children born as a result of these arrangements.

An interrogation of the human rights aspects relating to surrogate motherhood requires a critical review of the constitutionality of chapter 19 of the Children's Act, which

48 SALC Project 65 at par 2.1.1.
49 SALC Project 65 at par 2.1.3.
50 SALC Project 65 at par 2.2.2.

regulates surrogate motherhood in South Africa. This will include an examination of the rights and duties of parties to the surrogate agreement, including the legal consequences following legal and illegal surrogate motherhood agreements. Relevant case law concerning surrogacy will also be considered in the attempt to identify legal lacunae and constitutional inconsistencies within the existing legal framework. Where relevant, recommendations will be suggested that may hopefully assist in closing some of the identified gaps.

The reasons why this study is important, are manifold: firstly, because despite the ostensible clear statutory framework governing surrogate motherhood (which includes artificial fertilisation), the brief contextual background above has alluded to a few areas of concern, which the thesis will explore in detail. Secondly, the legal consequences of the identified legal ambiguities or lacunae are significant, in that they either relate to important human rights considerations, or significantly affect the legal position and status of parties to the surrogacy arrangements. Thirdly, recommendations should be proposed to address these identified gaps and inconsistencies, which this thesis will attempt to do.

How will the thesis approach the research question in this thesis? This study will first canvass the legal historical path leading to the promulgation of chapter 19 of the Children's Act in order to pinpoint the legal considerations prompting this development. This overview will be followed by a close analysis of the existing legal framework regulating surrogacy and artificial fertilisation in order to identify the gaps and inconsistencies in the framework. A consideration of the constitutional framework and relevant rights pertaining to parties in surrogacy arrangements follows next, including an analysis of the constitutionality of controversial provisions in the Children's Act. Where relevant, comparable provisions in the United Kingdom, Canada and India will also be assessed, with the view that these may aid in providing guidance on how some of the regulatory gaps in the South African legal framework may be addressed or closed.

4. RESEARCH APPROACH AND METHODOLOGY

The methodology which I will follow will consist of a desk-top literature study, which includes a legal comparative component which will draw on legal comparisons with India, the United Kingdom (UK) and Canada with the hope that these may clarify or address some of the unresolved or ambiguous issues relating to assisted reproduction and surrogate motherhood in South Africa. The rationale for including the UK, Canada and India is based on the fact that the UK, Canada and India, similar to South Africa, ban any form of commercial surrogacy but allow altruistic surrogacy. The UK, Canada and India observe a human rights agenda, similar to the position in South Africa.
Legal scholarly articles, relevant textbooks, case law and internet sources relevant to the topic will be considered. This will consist of primary sources of law (such as statutes, cases, regulations) and secondary authorities (for example, law reviews, legal dictionaries, legal treaties, scholarly articles and textbooks).

5. LIMITATIONS

This thesis will not include a discussion on commercial surrogacy or the possibility thereof for South Africa in the future. The regulation of surrogacy in international law will only be briefly alluded to. The thesis will also not delve into a discussion on the various options of assisted reproduction but will focus on artificial fertilisation only. The discussion on pertinent human rights will be limited to those most relevant to the regulation of surrogacy and artificial fertilisation only.

6. FRAMEWORK OF THE THESIS

The thesis is structured in a manner that best supports a logical arrangement of the contents to address the research question. Following this chapter, chapter 2 discusses the historical legal position with regards to assisted reproduction, especially surrogacy, as well as the legislative changes that shaped the current regulatory system governing surrogate motherhood. Chapter 3 focuses on the current legal framework in South Africa with specific reference to chapter 19 of the Children's Act and the changes that this Act brought to the regulation of surrogacy. This chapter also examines the legal

status of the commissioned child born of surrogacy or artificial fertilisation, including the issue of access to information about a child's genetic origin and the right to know one's biological origins. Relevant case law pertaining to the confirmation of surrogacy agreements will also be considered, especially those in which the courts provided guidance on the implementation of chapter 19 of the Children's Act. This chapter will also turn to the rights of the child born of assisted reproductive technology. Chapter 4 details the constitutional framework relevant to surrogacy, with reference to case law, and will focus on those rights of parties involved in surrogacy arrangements. Chapter 5 consists of an examination of the medico-legal aspects regarding surrogacy and artificial fertilisation. The ability to reproduce, advances in biotechnology and aspects surrounding assisted reproduction will be discussed with reference to the National Health Act[51] and the Regulations relating to the artificial fertilisation of persons.[52] Chapter 6 consists of a comparative study of relevant provisions of the United Kingdom, Canada and India, with the aim of identifying solutions for gaps identified in the South African legal framework. Chapter 7 concludes with a brief summary of the key issues originating from the thesis, as well as the recommendations made with regard to the identified gaps.

7. DEFINITIONS

In order to promote a clear understanding of terminology employed in this thesis, the key terms relating to surrogate motherhood and assisted reproduction need to be defined at the outset.

7.1 Reproductive health care:

Reproductive health care refers to those health services connected with reproduction and the right to make decisions concerning reproduction.[53]

7.2 Relevant health service:

51 61 of 2003 (Hereinafter referred to as NHA).
52 Government Notice R175 in Government Gazette 35099 of 2 March 2012.
53 Carstens P and Pearmain D *Foundational Principles of South African Medical Law* (LexisNexis 2007) 178.

The description by Carstens and Pearmain below captures the meaning of relevant health service well:

> Relevant health services not only mean medical treatment but also relates to health education and information. Since the decision to reproduce implies the right to decide not to reproduce, reproductive health care must include services concerning contraception and termination of pregnancy as much as it includes services relating to fertility, conception and giving birth.[54]

7.3 Artificial fertilisation and artificial insemination:

Section 1 of the Children's Act defines artificial fertilisation as:

> The introduction, by means other than natural means, of a male gamete into the internal reproductive organs of a female person for the purpose of human reproduction, including-
>
> (a) the bringing together of a male and female gamete outside the human body with a view to placing the product of a union of such gametes in the womb of a female person; or
> (b) the placing of the product of a union of male and female gametes which have been brought together outside the human body, in the womb of a female person.[55]

Artificial fertilisation includes artificial insemination, *in vitro* fertilisation[56], gamete intrafallopian tube transfer, embryo intrafallopian transfer or intracytoplasmic sperm injection.[57] Artificial insemination is more narrowly defined as the placing of male gametes (sperm) into the female reproductive tract by means other than copulation.[58]

7.4 Assisted reproductive technology (ART):

The following two definitions define ART narrowly and broadly:

> [A]RT includes all fertility treatments in which either eggs or embryos are handled. In general, ART procedures involve surgically removing eggs from a woman's ovaries,

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54 Carstens and Pearmain *Foundational Principles* 178.

55 Sec 1 of Children's Act 38 of 2005. Report of the Ad Hoc Committee on Report of South African Law Commission on Surrogate Motherhood (11 February 1999) 6. Dhai, A and McQuoid-Mason D *Bioethics, Human Rights and Health Law, Principles and Practice* (2 ed Juta & Co 2020) 142.

56 Strauss SA *Doctor, Patient and the Law* (3 ed JL Van Schaik 1991) 188 and 189. Strauss, SA "Triplets to a Surrogate Grandmother in South Africa: Legal Issues" 1989 *International Legal Practitioner* 14(3) 70. Heaton, J "The Pitfalls of international surrogacy: A South African family law perspective" 2015 *Journal for Contemporary Roman-Dutch Law* 78(1). Heaton states that artificial fertilisation is defined so broadly that it includes all forms of surrogacy.

57 Reg 1 of Regulations relating to artificial fertilisation of persons 2012. Intracytoplasmic sperm injection is defined as the process of microscopic technology to bring about fertilisation of an ovum with a male sperm outside the body in an authorised institution. Jordaan, DW "A Constitutional critique on the regulations relating to artificial fertilisation of persons" 2017 *South African Journal of Bioethics and Law* 10(1) 29.

58 Reg 1 of Regulations relating to artificial fertilisation of persons 2012. Strauss and Maré *Mediese Reg* 169.

> combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman.[59]
>
> All treatments or procedures that included the in vitro handling of human oocytes and sperm or embryos for the purpose of establishing a pregnancy.[60]

ART does not include intrauterine – or artificial insemination.[61]

7.5 In vitro fertilisation (IVF) and "test-tube babies":

Simply put, IVF refers to fertilisation in a glass.[62] The Regulations relating to artificial fertilisation of persons define IVF as "[t]he process of spontaneous fertilisation of an ovum with a male sperm outside the body in an authorised institution."[63] The skill lies in conceiving a child *in vitro* and then successfully implanting the resulting blastocyst into the uterus of the mother/surrogate mother.[64] IVF thus is the uniting of the male and female gametes outside the woman's body in a test-tube and then transplanting the resulting embryo into the woman's body.[65] An embryo created via *in vitro* fertilisation is loosely described by lay persons as a "test-tube baby".

The Ad Hoc Committee on Surrogate Motherhood defined IVF is as follows:

> The placing of the product of a union of a male and female gamete or gametes, which have been brought together outside the human body, in the womb of a female person for the purpose of human reproduction.[66]

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59 What is assisted reproductive technology? accessed from https://www.cdc.gov/art/whatis.html (accessed 4 January 2023). Biko J and Nene Z "Ethics aspects of third-party reproduction" 2017 *Obstetrics & Gynaecology Forum* 3 12.

60 Van Niekerk 2017 *PELJ* 4.

61 What is assisted reproductive technology? accessed from https://www.cdc.gov/art/whatis.html (accessed 4 January 2023). Van Niekerk 2017 *PELJ* 5.

62 Tager 1986 *SALJ* 381. Tager describes the glass as a petri-disch, which is a shallow, saucer-shaped dish. Strauss and Maré *Mediese Reg* 169.

63 Reg 1 of Regulations relating to artificial fertilisation of persons 2012. Reg 1, of the proposed Regulations relating to assisted conception of persons published under Government Gazette No 44321 on 25 March 2021, defines in vitro fertilisation as "the process of fertilisation of an egg with a sperm outside the body in an authorised institution by a competent person."

64 LexisNexis *Family Law service* at par J115.

65 Strauss *Doctor, Patient and the Law* 188. Strauss further explains that a zygote is defined as the product of the union of a male and female gamete outside the human body. Mason JK, McCall Smith RA and Laurie GT *Law and Medical Ethics* 6th ed (Butterworths 2002) 84. Palm MT and Hirsch HL "Infertility and Sterility: Legal Implications of artificial conception" 1982 *Medicine and Law* 1 48. Tager 1986 *SALJ* 382. South African Research Council: *Guidelines on Ethics for Medical Researc*h 2nd Book (Reproductive Biology and Genetic Research) 2002 2. There is consensus that there is no moral problem inherent in using this technique in circumstances where gametes from the husband and the wife are used. Strauss and Maré *Mediese Reg* 168. "Oorplasing van 'n bevrugte eier (ovum) vanaf "moeder" A na "gasvrou" B".

66 Report of the Ad Hoc Committee 6.

7.6 Embryo transfer:

Embryo transfer refers to the process where an embryo (human offspring in the first eight weeks from conception)[67] is placed into the uterus or fallopian tube of the recipient.[68]

7.7 Oocyte:

An oocyte refers to the female gamete;[69] a developing human egg cell,[70] or more specifically, it is described as a female germ cell involved in reproduction. It is also known as "an immature ovum, or egg cell."[71]

7.8 Sperm:

Sperm refers to the human male gamete.[72] It is however important to distinguish between the terms sperm and semen as they differ although they are used interchangeably.[73]

> Sperm is a motile reproductive cell, not visible with the naked eyes, which is transferred to the female reproductive system during sexual intercourse.
> During the fertilization process, the sperm's nucleus fuses with the egg's nucleus to form an embryo.[74]

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67 Sec 1 of the National Health Act 61 of 2003.

68 Reg 1 of Regulations relating to artificial fertilisation of persons 2012. Mason, McCall Smith and Laurie *Law and Medical Ethics* 84. The authors draw a distinction between IVF and embryo transfer in that he states popular usage equites IVF with standard treatment for childlessness due to blockage of the fallopian tubes and embryo transfer with the implantation of an embryo which has no genetic relationship either to the recipient or to her husband.

69 Reg 1 of Regulations relating to artificial fertilisation of persons 2012. Biko J and Nene Z "Ethics aspects of third-party reproduction" 2017 *Obstetrics & Gynaecology Forum* 3 12.

70 Sec 1 of the National Health Act 61 of 2003.

71 The definition can be accessed from https://fertilitypedia.org/edu/reproductive-cells/oocyte#/Fertilitypedia-description (accessed 4 January 2023). Section 1 of the Human Tissue Act 65 of 1983 defines a gamete as either of the two generative cells essential for human reproduction, which is the male sperm and the female ovum.

72 Reg 1 of Regulations relating to artificial fertilisation of persons 2012. Reg 1, of the proposed Regulations relating to assisted conception of persons published under Government Gazette No 44321 on 25 March 2021, defines sperm as "the male gamete procured for the purpose of assisted conception."

73 Semen vs Sperm http://www.andrologycenter.in/2018/10/24/semen-vs-sperm/ (accessed on 4 January 2023).

74 The definition can be accessed from http://www.andrologycenter.in/2018/10/24/semen-vs-sperm/ (accessed on 4 January 2023).

> Semen is the seminal fluid which contains the sperm cells along with other plasma liquid. Semen is responsible for transmission of the motile sperm cells into the reproductive organ of the female.[75]

7.9 Surrogate mother/surrogate/surrogate motherhood:[76]

Multiple definitions exist for the above terms. A surrogate mother is described as "[a]n adult woman who enters into a surrogate motherhood agreement with the commissioning parent."[77] A surrogate is a voluntary recipient of an embryo who will carry such embryo to birth for contractual parents;[78] one woman who bears a child for another;[79] or the woman delivering the commissioned child.[80] "Surrogate mother" refers to the woman who bears the child rather than to the woman who rears the child."[81] The Ad Hoc Committee on Surrogate Motherhood describes the surrogate mother as:

> [a]ny competent woman who bears a child or children for another person or persons (the commissioning parent or parents), as the result of an agreement to this effect entered into prior to the conception of the child or children.[82]

7.10 Commissioning parents:

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75 The definition can be accessed from http://www.andrologycenter.in/2018/10/24/semen-vs-sperm/ (accessed on 4 January 2023).

76 Throughout the thesis reference will be made to surrogacy although both surrogate motherhood and surrogacy may be used interchangeably.

77 Sec 1 of the Children's Act 38 of 2005.

78 Reg 1 of Regulations 2012. Mason, McCall Smith and Laurie *Law and Medical Ethics* 96. The authors describe surrogate motherhood as "requires the active co-operation of an otherwise uninvolved woman in the process of pregnancy and birth. It thus introduces a third party into marriage." Tager 1986 *SALJ* 383. Canner, S "Navigating surrogacy law in the non-united states: Why all states should adopt a uniform surrogacy statute" 2019 *Journal of Civil Rights and Economic Development* 33(2) 117. SALC Project 65 at par 2.1.1.

79 Nicholson, C "When moral outrage determines a legal response: Surrogacy as labour" 2013 *South African Journal on Human Rights* 29(3) 497. At 499 the author explains that other terms are also being used to describe a surrogate which are 'hostess mother', 'host mother', 'renting a womb' or 'plumbing'. Nene Z "Ethics aspects of third-party reproduction" 2017 *Obstetrics & Gynaecology Forum* 3 13. The authors explain that "third party reproduction or donor assisted reproduction is a form of reproduction in which DNA or gestation is provided by a third party or donor other than the two intended parents who will raise the resulting child." The gestational carrier will be known to the commissioning parents but it is possible that the sperm, egg or embryo donor may be anonymous. Nicholson, C and Bauling, A "Surrogate motherhood agreements and their confirmation: A new challenge for practitioners?" 2013 *De Jure* 46(2) 510. The word surrogate means substitute.

80 Oluwaseyi and Oladimeji 2021 *Obiter* 21.

81 SALC Project 65 at par 2.1.1.

82 Report of the Ad Hoc Committee 6.

The commissioning parents are the persons who enter into a surrogate motherhood agreement with a surrogate mother.[83] They are thus the couple to whom the surrogate will hand over the commissioned child after she has given birth.[84] Spouses, civil union partners, life or permanent partners of the same or the opposite sex and a single person are all eligible to be commissioning parents.[85]

7.11 Children:

A child is a person under the age of 18 years.[86]

7.12 Surrogate motherhood agreement:

The Children's Act defines this as follows:

> An agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.[87]

7.13 Surrogacy:

Broadly, surrogacy refers to an arrangement whereby a woman agrees to become pregnant and deliver a child for a contracted party.[88] This may be done to overcome infertility because it gives couples and single parents a method of conceiving a child with genetic connections to their family.[89] A narrower definition describes it as follows:

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83 Sec 1 of the Children's Act 38 of 2005. Report of the Ad Hoc Committee 6.

84 Oluwaseyi and Oladimeji 2021 *Obiter* 21.

85 Heaton 2015 *THRHR* 29.

86 Bosman-Sadie, H and Corrie, L *Practical approach to the new Children's Act* (Van Schaik 2012) 5.

87 Sec 1 of Children's Act 38 of 2005. Report of the Ad Hoc Committee 6.

88 Oluwaseyi and Oladimeji 2021 *Obiter* 21. Nicholson and Bauling 2013 *De Jure* 510. Dhai and McQuoid-Mason *Bioethics, Human Rights and Health Law* 144.

89 Iannacci,B.R "Why New York should legalize surrogacy: A comparison of surrogacy legislation in other states with current proposed surrogacy legislation in New York" 2018 *Touro Law Review* 34(4) 1239. The author explains that surrogates are commonly used by couples and single women who are unable to conceive their own genetic children (women who have had their uterus removed or have a uterus that cannot bear a child) and male couples who wish to have a child which will have a genetic connection to one or both partners.

> Where a woman other than the husband's wife is impregnated with the husband's semen by way of artificial insemination and the child when born is handed over to the commissioning parents.[90]

7.14 Gestational surrogacy:

Gestational surrogacy is an arrangement that utilises *in vitro* fertilisation to fertilise an egg; which usually belongs to the commissioning woman; outside of the surrogate mother's body whereafter the fertilised egg is then implanted in the surrogate mother's uterus.[91] This type of surrogacy is also known as full surrogacy.[92]

7.15 Traditional surrogacy:

In the case of traditional surrogacy, the surrogate mother provides the egg and carries the baby.[93] This is also known as partial surrogacy.[94] The surrogate is artificially inseminated with the sperm of the commissioning husband or that of a donor.[95]

7.16 Gamete:

Gametes refer to either of two generative cells (male or female) essential for human reproduction.[96]

7.17 Gamete donor:

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90 LexisNexis *Law of South Africa* 30(2) at par 63. LexisNexis *Family Law service* at par J107.

91 Hisano, EY "Gestational surrogacy maternity disputes: Refocusing on the child" 2011 *Lewis & Clark Law Review* 15(2) 520; Strauss *Doctor, Patient and the Law* 188. Strauss explains it as the situation where the genetic material (sperm and ova) is provided by the commissioning couple and the surrogate merely acts as a hostess ("gestational" or "birth mother"). Iannacci,B.R "Why New York should legalize surrogacy: A comparison of surrogacy legislation in other states with current proposed surrogacy legislation in New York" 2018 *Touro Law Review* 34(4) 1247. The gestational mother is not the biological mother of the commissioned child. SALC Project 65 at par 2.1.2. Report of the Ad Hoc Committee 7. The surrogate is only the gestational mother.

92 Tager 1986 *SALJ* 383. Full surrogacy is discussed in detail in par 2.1.2, ch 2 below.

93 *Hisano, EY "Gestational surrogacy maternity disputes: Refocusing on the child" 2011 Lewis & Clark Law Review 15(2)* 520.

94 Strauss *Doctor, Patient and the Law* 188. Partial surrogacy is when the surrogate mother is artificially inseminated with semen from the commissioning husband. Tager 1986 *SALJ* 383. Partial surrogacy is discussed in detail in par 2.9.1 below.

95 SALC Project 65 at par 2.1.2. Report of the Ad Hoc Committee 7. The surrogate is both the genetic and gestational mother.

96 Sec 1 of the Children's Act 38 of 2005; Sec 1 of the National Health Act 61 of 2003; Strauss *Doctor, Patient and the Law* 181.

A gamete donor is the living person from whose body a gamete or gametes are removed or withdrawn, for the purpose of artificial fertilisation.[97]

7.18 Artificial insemination-husband (AIH):

AIH refers to artificial insemination homologous (AIH),[98] which is the artificial insemination of the wife in using the sperm of her husband.[99]

7.19 Artificial insemination-donor (AID):

AID refers to artificial insemination heterologous (AID),[100] which is the artificial fertilisation of a woman in using the sperm donated by a sperm donor.[101]

7.20 Gamete intra-fallopian transfer (GIFT) and peritoneal oocyte and sperm transfer (POST):

The GIFT procedure refers to the process where ova from a woman are collected and, together with sperm from the husband or a donor, are then put into the woman's fallopian tubes (GIFT) or the peritoneam (POST).[102]

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97 Reg 1 of Regulations 2012. Reg 1 of the proposed Regulations relating to assisted conception of persons published under Government Gazette No 44321 on 25 March 2021, defines gamete donor as: "A living person from whose body a gamete or gametes are withdrawn or procured after stimulation, for the purpose of donation for assisted conception."

98 Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 44.

99 Strauss *Doctor, Patient and the Law* 181; Mason, McCall Smith and Laurie *Law and Medical Ethics* 70. South African Research Council: *Guidelines on Ethics for Medical Researc*h 2nd Book (Reproductive Biology and Genetic Research) 2002 3. Mason, McCall Smith and Laurie *Law and Medical Ethics* 71. Micro-manipulative techniques are used and in particular those of intracytoplasmic sperm injection (ICSI) or sub-zonal insemination (SUZI). A single spermatozoon is then injected into an egg.

100 Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 44.

101 Strauss SA *Doctor, Patient and the Law* 181. South African Research Council: *Guidelines on Ethics for Medical Researc*h 2nd Book (Reproductive Biology and Genetic Research) 2002 2. Mason, McCall Smith and Laurie *Law and Medical Ethics* 70. The authors point out that many couples who have recourse to AID are loath to abandon all hope of their own children. In such circumstances, the semen of the apparently infertile male partner is mixed with that of the donor so that the couple can still believe that the ovum may have been fertilised by the male partner's sperm (this form of artificial fertilisation is also known as AIHD).

102 LexisNexis *Law of South Africa* 30(2) par 63. Reg 1 of the proposed Regulations relating to assisted conception of persons published under Government Gazette No 44321 on 25 March 2021, defines intra fallopian tube embryo transfer as "the transfer of zygotes or embryos in the fallopian tube."

7.21 Infertility:

> Infertility is a disease of the male or female reproductive system defined by the failure to achieve a pregnancy after 12 months or more of regular unprotected sexual intercourse.[103]
> Primary infertility is a problem of the production of gametes or of implantation of the embryo.[104]
> Secondary infertility is when at least one prior pregnancy has been achieved.[105]

7.22 Vaginal intro-peritoneal sperm transfer (VISPER):

The VISPER procedure entails the transfer of sperm into the peritoneal cavity of the woman.[106]

7.23 Parent:

A parent generally refers to a father or mother of a person.[107] The legal definition of a parent in the Children's Act includes the adoptive parent of a child, but excludes the biological father of a child where the child is conceived through the rape of or incest with the child's mother, and further excludes any person who is only biologically related to a child as a result of being a gamete donor for purposes of artificial fertilisation. A person's whose parental responsibilities and rights in respect of a child have been terminated is no longer considered as the parent of said child.[108]

7.24 Commercial surrogacy:

Commercial surrogacy refers to the arrangement where a woman is compensated for giving birth to a child whom she hands over to the commissioning parents in return for payment.[109]

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103 Infertility can be accessed from https://www.who.int/news-room/fact-sheets/detail/infertility (accessed on 3 January 2023). Kennedy, I and Grubb, A *Medical Law* (2 ed Butterworths 1994) 758.

104 Mason, McCall Smith and Laurie *Law and Medical Ethics* 69.

105 Infertility can be accessed from https://www.who.int/news-room/fact-sheets/detail/infertility (accessed on 3 January 2023).

106 LexisNexis *Law of South Africa* 30(2) at par 63.

107 The definition can be accessed from https://www.oxfordlearnersdictionaries.com/definition/english/parent_1?q=parent (accessed on 4 January 2023).

108 Sec 1 of Children's Act 38 of 2005.

109 Oluwaseyi and Oladimeji 2021 *Obiter* 29.

7.25 Altruistic surrogacy:

In altruistic surrogacy, the surrogate mother receives no payment for carrying the commissioned child for the commissioning parents and does this as a selfless act.[110]

8. EXPECTED CONTRIBUTIONS AND OUTCOMES OF STUDY

We live in an era where medical technology is constantly changing, providing new options and alternatives for those who were eager to conceive children, but unable to do so a few years ago. Surrogate motherhood now offers such a chance for commissioning mothers who are pregnancy infertile or where a same-sex couple wants to have a child. The commissioning parents, in both examples, will then be able to have their own genetically related child. Law notoriously limps behind technology,[111] and as technological changes keep happening rapidly, the law regulating these new options does not always exist or needs to be amended or put in force to provide regulatory clarity and consistency. Ethical questions also arise through these new developments, as the discussion above has alluded to. There are also further constant changes in moral standards across time in societies.[112] All these have a direct effect on the choices we as individuals make in our lives.

The contribution that this thesis is expected to make, is to provide legal certainty and guidance in areas where the legal framework governing surrogate motherhood and artificial fertilisation is still lacking or ambiguous in South Africa. Surrogacy arrangements are on the increase, as may be gleaned from the increasing number of applications that courts are receiving for the confirmation of surrogacy agreements. Discussed next, is the historical development of laws, including the context, that shaped the development of the legal regulation of surrogate motherhood in South Africa.

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110 Oluwaseyi and Oladimeji 2021 *Obiter* 29.

111 World Economic Forum: The law can't keep up with new tech. Here's how to close the gap (21 June 2018). https://www.weforum.org/agenda/2018/06/law-too-slow-for-new-tech-how-keep-up/ (accessed 4 January 2023).

112 Wheeler MA, McGrath MJ, Haslam N (2019) Twentieth century morality: The rise and fall of moral concepts from 1900 to 2007. PLOS ONE 14(2): e0212267. https://doi.org/10.1371/journal.pone.0212267 (accessed 4 January 2023).

CHAPTER 2

HISTORICAL DEVELOPMENT OF LAWS RELATING TO ASSISTED REPRODUCTION AND SURROGATE MOTHERHOOD

1. INTRODUCTION

> We are fortunate, however, to live in an era where the effects of infertility can be ameliorated to a large extent through assistive reproductive technologies. The technological advances seen over the last half century have greatly expanded the reproductive avenues available to the infertile. These reproductive avenues should be celebrated as they allow our society to flourish in ways previously impossible.[113]

This chapter has many objectives. Firstly, it will explain the different types of surrogacy arrangements that are available, including the important difference between altruistic and commercial surrogacy. The common law position regarding the legal status of the child conceived through donor sperm will also be discussed, as well as the legal position of the child conceived through artificial fertilisation prior to the enactment of the Children's Act (with reference to the statutes that governed artificial fertilisation and surrogate motherhood before the enactment of the Children's Act). It is important to understand the changes that were brought by the enactment of the Children's Act and especially the legal consequences in respect of the child born following artificial fertilisation and surrogacy. In order to contextualise the legal historical development of laws relating to surrogacy, it is necessary to briefly consider the types of surrogacy and how these have developed in the last few decades.

2. TYPES OF SURROGACY

Surrogacy may be described by reference to different types of surrogacy, such as informal surrogacy and formal surrogacy.[114] Formal surrogacy consists of full and partial surrogacy.

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113 *AB and another v Minister of Social Development* 2017 (3) BCLR 267 (CC); 2017 (3) SA 570 (CC) at par 3.

114 Report of the Ad Hoc Committee 13.

2.1 Formal surrogacy

2.1.1 Partial surrogacy

The process of partial surrogacy refers to the case where the surrogate mother's own ovum is fertilised (naturally or through artificial fertilisation) through using the sperm of the commissioning father or that of a donor.[115] It is also known as genetic, traditional or straight surrogacy.[116] Another example is where the surrogate's ovum is extracted, fertilised *in vitro* by using the sperm of the commissioning father or that of a donor and the resultant embryo placed in her womb.[117] In this scenario, the surrogate is both the gestational mother and the genetic mother of the child that she bears.[118] Thus, it is important to note that depending on the technique applied, a child born as a result of a surrogate agreement could have as many as six potential parents, namely the genetic parents (the donors of the sperm and ovum), the commissioning parents, the surrogate who carries the baby to term, and the surrogate's husband.[119] I will now briefly turn to the situation involving a married and unmarried surrogate.

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115 SALC Project 65 at par 2.1.2. Report of the Ad Hoc Committee 8. At 56 the Committee submitted that partial surrogacy should only be available where it is impossible for biological or medical reasons, to use the female gamete of the commissioning parent for the purpose of artificial fertilisation. Chapter 19 Surrogate motherhood (ss 292-303), Terminology. Pretorius, D *Surrogate motherhood: a worldwide view of the issues* (Charles C Thomas, 1994) 15. It is stated that partial surrogacy may be accomplished without medical expertise or specialised hospital facilities. Clarke, B "A "golden thread"? Some aspects of the application of the standard of the best interest of the child in South African family law" 2000 *Stellenbosch Law Review* 2000(11) 12. Strauss *Doctor, Patient and the Law* 188 Dada and McQuoid-Mason *Introduction to Medico-Legal Practice* 66. The surrogate provides genetic and gestational components. *Ex parte KAF and others* 2019 (2) SA 510 (GJ) at par 14. Skosana, T "A donor-conceived child's right to know its genetic origin: A South African perspective*"* 2017 *Obiter* 38(2) 263. Oluwaseyi and Oladimeji 2021 *Obiter* 22. Van Niekerk, C "Section 294 of the Children's Act: Do roots really matter?" 2015 *Potchefstroom Electronic Law Journal* 18(2) 400.

116 Nosarka S, Kruger TF "Surrogate Motherhood" 2005 *South African Medical Journal* 95(12) 942. South African Law Reform Commission Issue paper 32, Project 140, The Right to know one's own biological origins (20 May 2017) 81. Pyrce, C "Surrogacy and Citizenship: A Conjunctive solution to a global problem" 2016 *Indiana Journal of Global Legal Studies* 23(2) 929.

117 LexisNexis *Family Law service* at par J134. Clarke 2000 *Stell LR* 12.

118 SALC Project 65 at par 2.1.2. Tager 1986 *SALJ* 383. Pretorius *Surrogate motherhood* 16. The genetic or biological parents are therefore from two different families. Nosarka and Kruger 2005 *SAMJ* 942. Three women will be involved when an independent egg donor is used, namely the genetic mother, the surrogate mother and the commissioning mother. SALRC Project 140 1. Hisano, EY "Gestational surrogacy maternity disputes: Refocusing on the child" 2011 *Lewis & Clark Law Review* 15(2) 520. Louw, A "Surrogacy in South Africa: Should we reconsider the current approach?" 2013 *Journal for Contemporary Roman-Dutch Law* 76 575. Biko J and Nene Z "Ethics aspects of third-party reproduction" 2017 *Obstetrics & Gynaecology Forum* 3 14. Skosana 2017 *Obiter* 263. Nicholson and Bauling 2013 *De Jure* 512.

119 Clarke 2000 *Stell LR* 12.

2.1.1.1 The unmarried surrogate

In this instance the unmarried surrogate will be both the genetic and the biological mother of the child born as a result of partial surrogacy.[120] The child will be her child that is born out of wedlock (or extra-marital) in the case where the surrogate is unmarried.[121] The surrogate will thus be the child's legal guardian.[122]

2.1.1.2 The married surrogate

The legal maxim, *Pater est quem nuptiae demonstrant* refers to a legal presumption that the father is he to whom the marriage points and it is rebuttable.[123] Until the presumption has been rebutted by the husband of the surrogate, both the surrogate and her husband would have to consent to the adoption of the child as a child conceived by a married woman is presumed to be legitimate.[124]

2.1.2 Full surrogacy

In contrast to partial surrogacy where the ovum of the surrogate is used, the surrogate will not be genetically linked to the child to be born in full surrogacy.[125] The surrogate mother in full surrogacy is only the carrier of the child to be born. This type of surrogacy, however, is fraught with potential conflict relating to maternal rights, as Hisano explains below:

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120 Tager 1986 *SALJ* 384.

121 Tager 1986 *SALJ* 384.

122 Tager 1986 *SALJ* 384 - 385. The surrogate would be entitled to consent to the child's adoption and not the natural genetic farther of the illegitimate child. Tager pointed out that the genetic farther would have little, if any, claim to the child although he would have to support it. An adoption was possible under the Children's Act of 1960. At 386 it is stated that the natural father's interest in respect of the child is only protected if the child is legitimate.

123 Dig. 2.4.5; *Surmon v Surmon* 1926 AD 47 at p.53 Kotzé J.A pointed out that "While the Roman-Dutch writers held the presumption *pater est quem nuptiae demonstrant* to be rebuttable, they on the other hand adhered to the principle that neither the father nor the mother could bastardise their issue. But this latter principle appears to have been confined to cases where the child would be directly prejudiced by the declaration or evidence of the parent. It did not extend to a case of adultery, where such a declaration or evidence merely affects, for instance, the mother, whose confession of adultery would not directly prejudice her child, the latter not being a party to the suit". Tager 1986 *SALJ* 388.

124 Tager 1986 *SALJ* 388.

125 Van Niekerk 2015 *PELJ* 400. The vessel that carries the foetus from conception to birth. Nicholson and Bauling 2013 *De Jure* 512.

> The growing problem of infertility coupled with increasingly sophisticated reproductive technology has produced an unfamiliar problem: the identification of a child's legal mother. This issue of legal motherhood is exacerbated in the situation where an infertile couple uses a gestational surrogate as a means of having a child. Many times, a gestational surrogacy agreement goes smoothly. However, in some cases, the arrangement results in a maternal rights dispute. In a gestational surrogacy arrangement, there are three potential women with maternal rights claims: the gestational surrogate, the genetic donor, and the woman for whom the baby is intended.[126]

This arrangement is also known as gestational or host surrogacy. Here the surrogate merely acts as the gestational mother without being genetically related to the child that she gives birth to.[127] In this instance, the pregnancy of the surrogate is achieved through the implantation of an embryo into her uterus, which has been 'created' through the use of the gametes of the commissioning person(s) or of donors or of a combination of these persons.[128] The surrogate will thus give birth to a child to whom she is not genetically related.[129]

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126 Hisano, EY "Gestational surrogacy maternity disputes: Refocusing on the child" 2011 *Lewis & Clark Law Review* 15(2) 517.

127 Clarke 2000 *Stell LR* 12. SALC Project 65 at par 2.1.2. Report of the Ad Hoc Committee 7. At 56 the Committee submitted that full surrogacy is the preferred option. Tager 1986 *SALJ* 383. Nosarka and Kruger 2005 *SAMJ* 942. SALRC Project 140 16, 81 and 102. Examples of gestational surrogacy are: (a) the intended father's sperm and the intended mother's egg are used to create the embryo. The child will be genetically linked to both parents; (b) the intended father's sperm and a donor egg are used (where the surrogate is not the donor) to create the embryo. The child is genetically linked to the intended father and the biological mother is the donor; (c) the intended mother's egg and donor sperm is used to create the embryo. The child is genetically linked to the mother and the biological father is the donor; (d) a donor embryo where both gametes are donated. The child will not be genetically linked to the intended parents and the biological mother and father are the donors. At 103. Sec 294 make it impossible to use donor embryos as the child must be genetically related to one of the intended parents. Hisano, EY "Gestational surrogacy maternity disputes: Refocusing on the child" 2011 *Lewis & Clark Law Review* 15(2) 520. Dada and McQuoid-Mason *Introduction to Medico-Legal Practice* 66. The surrogate gestates an embryo without providing the oocyte. *Ex parte KAF and others* 2019 (2) SA 510 (GJ) at par 14. Skosana 2017 *Obiter* 263. Oluwaseyi and Oladimeji 2021 *Obiter* 22. Forman, D.L. "Abortion clauses in surrogacy contracts: Insights from a case study" 2015 *Family Law Quarterly* 49(1) 32. Canner, S "Navigating surrogacy law in the non-united states: Why all states should adopt a uniform surrogacy statute" 2019 *Journal of Civil Rights and Economic Development* 33(2) 117. Pyrce, C "Surrogacy and Citizenship: A Conjunctive solution to a global problem" 2016 *Indiana Journal of Global Legal Studies* 23(2) 929. Iannacci,B.R "Why New York should legalize surrogacy: A comparison of surrogacy legislation in other states with current proposed surrogacy legislation in New York" 2018 *Touro Law Review* 34(4) 1247. Van Niekerk 2015 *PELJ* 400.

128 LexisNexis *Family Law service* at par J134. Pretorius *Surrogate motherhood* 15. Nosarka and Kruger 2005 *SAMJ* 942. Clarke 2000 *Stell LR* 12. Van Niekerk 2015 *PELJ* 401. The author gives the following ways of how the gametes are provided in full surrogacy: the permitted ways are (a) husband's sperm and the wife's egg(s); (b) donor sperm and wife's egg(s) and the non-permitted ways in terms of sec 294 of the Children's Act: donor sperm and donor egg(s).

129 Clarke 2000 *Stell LR* 12. Louw 2013 *THRHR* 575. Strauss *Doctor, Patient and the Law* 188. The genetic material is provided by the commissioning couple and the surrogate merely acts as a hostess.

Iannacci argues that the lack of biological connection between the surrogate and the child allows for a less complicated legal procedure because the commissioning parent(s)' biological connection to the child is not questioned.[130] It is difficult to state who the real mother of the child is as it can be the genetic mother (who supplied the egg) or the biological mother (who carried the child and gave birth to it).[131] It may be argued that full surrogacy is more beneficial to the child from a psychological point of view in that the child is genetically linked to both parents.[132] Nicholson explains that some view full surrogacy as potentially more exploitative of the surrogate, compared to partial surrogacy, as it is potentially more attractive to wealthy couples who want a genetically related child and who have no real interest in the socio-economic or cultural background of the surrogate.[133] Van Niekerk points out that full surrogacy is more often preferred while partial surrogacy is more commonly used.[134]

2.2 Informal surrogacy

Informal surrogacy (more often practised by private agreement between family members or people known to each other) was and continues to be practised in many societies.[135] Informal surrogacy can be explained as surrogacy regulated by cultural norms and practices within communities.[136] It is often performed privately by the parties without the involvement of a medical doctor or clinic.[137] In this type of surrogacy, the

130 Iannacci,B.R "Why New York should legalize surrogacy: A comparison of surrogacy legislation in other states with current proposed surrogacy legislation in New York" 2018 *Touro Law Review* 34(4) 1247. The author points out that this procedure makes it possible for single parents, infertile couples and members of the LGBT community to expand their families.

131 Tager 1986 *SALJ* 388 - 389. The writer explains that the genetic mother would rely on her genetic link with the child, which affects its physical and other attributes, and also on the fact that the foetus has a separate blood system from that of the surrogate. The surrogate, on the other hand, could claim that her contribution to the child is vital as the growing foetus is dependent on her not only for its nourishment and development but also for the removal of its waste products. It is stated that it seems that neither mother would succeed in proving that the other mother is not the real mother. At 390 "The donation of gametes, that is sperm or ova, cannot be said to be equivalent to the donation of a child, yet life begins as soon as the sperm penetrates the ovum and the resulting zygote or embryo is implanted in a womb."

132 Pretorius *Surrogate motherhood* 15. Iannacci, B.R "Why New York should legalize surrogacy: A comparison of surrogacy legislation in other states with current proposed surrogacy legislation in New York" 2018 *Touro Law Review* 34(4) 1248.

133 Nicholson 2013 *SAJHR* 499.

134 Van Niekerk 2015 *PELJ* 400.

135 *Ex parte WH and others* at par 2. Nicholson 2013 *SAJHR* 497-498.

136 Report of the Ad Hoc Committee 13.

137 Report of the Ad Hoc Committee 8 and 12.

surrogate is both the genetic and the gestational mother.[138] An example of this type of surrogacy will be where a family member (the sister of an infertile woman) agrees to act as surrogate for the infertile woman and her husband and a home insemination kit is used to artificially fertilise the surrogate with the sperm of the husband. A further example will be where a female friend of a same-sex male couple agrees to act as surrogate for them and a home insemination kit is used to artificially fertilise the surrogate with sperm of one of the couple or both.

The South African Law Commission correctly describes surrogacy not as a new technology, but as a phenomenon that was made possible by new medical technology.[139] It is interesting to note that surrogacy was actually not recognised in South African law before the enactment of the Children's Act,[140] although many reported instances of informal surrogacy were reported, sometimes accompanied by surrogate motherhood agreements drafted by legal professionals.[141] Although the former Human Tissue Act 65 of 1983 and the Children's Status Act 82 of 1987 dealt with various aspects contingent upon artificial fertilisation, as will be discussed elsewhere in this thesis in detail, neither of the Acts however dealt specifically with the issue of children born following the conclusion of a surrogacy arrangement.

In 1987, the South African Law Commission initiated an investigation into the scope of surrogate motherhood practices in South Africa, with the objective of legislating the practice. The SALC's Report and the draft legislation on Surrogate Motherhood were tabled in 1993, followed by the establishment of an Ad Hoc Select Parliamentary Committee with the task of further investigating surrogate motherhood and related issues. The report of the Ad Hoc Committee was completed in 1999 and amended draft

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138 Report of the Ad Hoc Committee 8 and 12. The Ad Hoc Committee however recommended that surrogacy should be practiced within families only.

139 SALC Project 65 at par 8.1.2.

140 38 of 2005. Heaton 2015 *THRHR* 29.

141 *Ex parte WH and others* at par.3. *AB and another v Minister of Social Development* at par 246. Informal surrogacy agreements were entered into seemingly because of the perceived advantage over the legally prescribed adoption procedure that was available. Pretorius *Surrogate motherhood* 15. The reasons for the use of surrogate motherhood were explained as being when the woman is unable to produce oocytes or to carry a baby full term. Further, in situations where pregnancy carries an abnormally high risk in the case of severe high blood pressure or diabetes. Report of the Ad Hoc Committee 8 and 54. Informal surrogacy is defined as the insemination of the surrogate with the gametes of the commissioning parent. This is performed privately by the parties and according to accepted customary practices without the intervention of medical doctors or clinics. Thus, the surrogate is both the genetic and the gestational mother.

legislation on surrogacy subsequently referred to the Minister of Justice for final review and drafting. The Ad Hoc Committee proposed that surrogacy could provide a legitimate alternative for permanently infertile people who wish to have children.[142] The full culmination of the Committee's report is best observed in the Children's Act 38 of 2005, which provides a mechanism for many people who desire a child to start a family.[143]

The practice of informal surrogacy is impacted by the regulations to the NHA[144] through the requirement of a competent person as the only person authorised to perform artificial fertilisation.[145] Attempts by a single woman to inseminate herself with sperm donated by a homosexual male couple wishing to have a child, despite the requirements relating to artificial fertilisation, are not criminally punishable. It is clear, though, that failure to comply with chapter 19 of the Children's Act when such woman wishes to act as a surrogate for her male friend, will have serious legal consequences that will also affect parenthood and the legal status of the child that is born, as will be discussed in more detail in chapter 5.

Surrogacy allows a woman to exercise her reproductive rights within prescribed limits as she sees fit; it enables infertile people to have a child who is genetically related to them and it gives childless people the joy of raising a child.[146] The parties to a surrogate agreement are the commissioning parents (the couple who are unable to conceive), the surrogate,[147] and if she is married, her husband.[148] Unfortunately, infertility is real

142 Report of the Ad Hoc Committee 54.

143 *Ex parte WH and others* at par.3 and par 43. The court stated at par.6: "In very much the same way as society's architecture is structured to advance the best interests of the child, so too does it reflect and give response to the desire of many to have children of their own. For some it represents the fulfilment of the agency of their own lives and existence as they seek to continue their lineage and their legacy, while for others the vision of a family living and loving together is rendered complete with the arrival of a child." Report of the Ad Hoc Committee 55. Surrogacy should be regulated in such a way that it minimises the risks inherent to surrogacy and it ensures the best interests of all the parties to the agreement. The interests of the commissioned child is the overriding factor.

144 61 of 2003.

145 This requirement will be discussed in ch 5.

146 Heaton 2015 *THRHR* 26.

147 The word "surrogate" derives from the Latin word *surrogatus* (substituted) and meaning "appointed to act in the place of". SALRC Project 140 80.

148 Pretorius *Surrogate motherhood* 17. It is important to note that the husband of the surrogate was also a party to the agreement as he had to consent to the medical procedures and the termination of the parental power.

and with many suffering from infertility, desperation may set in, prompting them to enter into an informal surrogacy agreement without understanding the consequences of failing to observe the legal requirements set out in chapter 19 of the Children's Act.

2.3 Altruistic surrogacy

The practice of altruistic surrogacy has been around for some time and was not uncommon or explicitly prohibited before the enactment of chapter 19 of the Children's Act.[149] With altruistic surrogacy, the surrogate acts purely with an altruistic motive to be of assistance, without any prospect of making a profit from her decision.[150] Often the surrogate's main objective is to do good for others and to assist without financial benefit to realise an infertile couple's dream to become parents[151] The surrogate therefore does not profit from her gestational services in any manner.[152] Altruistic surrogacy is more socially acceptable as it is seen to display socially accepted virtues such as generosity, selflessness, concern and sacrifice.[153] The only legally recognised surrogacy arrangement in South Africa is altruistic surrogacy, regulated by chapter 19 of the Children's Act.[154]

Before the introduction of chapter 19 of the Children's Act, altruistic surrogacy arrangements in South Africa were subject to the law of contract and legislation and regulations which pertained to artificial fertilisation.[155] In 1985, the South African Law Commission (SALC) commenced with investigating the uncertainties regarding the legal position of illegitimate children (as they were then known) and their parents, considering, among others, the extent to which an illegitimate child's legal position was

149 Slabbert M and Roodt C 'South Africa' in Trimmings K and Beaumont P *International Surrogacy Arrangements Legal Regulation at the International Level* (Hart Publishing 2013) 325. *AB and another v Minister of Social Development* at par 246.

150 Pretorius *Surrogate motherhood* 86.

151 Report of the Ad Hoc Committee 9.

152 Pyrce, C "Surrogacy and citizenship: A conjunctive solution to a global problem" 2016 *Indiana Journal of Global Legal Studies* 23(2) 929.

153 SALC Project 65 at par 2.1.6.

154 Sec 295(c)(iv) and (v). Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 432. Sloth-Nielsen, J "Surrogacy in South Africa" in Scherpe J, Fenton-Glynn C and Kaan T *Eastern and Western perspectives on surrogacy* (*Intersentia* 2019) 186. Sloth-Nielson, J and van Heerden, B "The constitutional family developments in South African child and family law 2003-2013" 2014 *International Journal of Law, Policy and the Family* 28(1) 114.

155 Slabbert and Roodt "South Africa" 325. Mills, L "Certainty about surrogacy" 2010 *Stellenbosch Law Review* 21(3) 429. Oluwaseyi and Oladimeji 2021 *Obiter* 31.

compromised under the law, as well as how this may be eased in the light of norms and prevailing ideas of the time.[156] The main purpose of the investigation was to make recommendations on how to improve the legal status of illegitimate children, including children born as a result of artificial fertilisation.[157] It is significant that the SALC set out to make recommendations that would not only provide the illegitimate child with better legal protection, but also to provide legal certainty for this cohort of children in South African law.[158]

Prior to the promulgation of chapter 19 of the Children's Act, laws governing surrogacy consisted of: (a) the Human Tissue Act[159], (b) the Child Care Act[160], (c) the Children's Status Act[161], and (d) the Births, Marriages and Deaths Registration Act.[162] These acts are discussed in more detail later in paragraph 5 of this chapter.

Briefly, the Human Tissue Act and Regulations regulated artificial fertilisation of persons; the Child Care Act's aim was the protection and welfare of certain children and the adoption of children; the Children's Status Act dealt with children born as a result of artificial fertilisation; and the Births, Marriages and Deaths Registration Act provided for the registration of births, including the registration of the birth of an illegitimate child. Section 10 of this Act provided that no person was required to provide information as to the father of the child and only upon the joint request of the mother and the person who acknowledged himself in writing to be the father of the child, would the registrar enter the name of the father in the birth register of the child. The Children's Status Act determined the status of the child born of such a surrogacy arrangement by providing that the child born as a result of artificial fertilisation will be legitimate in circumstances where donor gametes were utilised and the woman's husband consented to the procedure.[163]

156 SALC Project 65 at par 1.1.1 and par 1.2.1.
157 SALC Project 65 at par 1.1.2.
158 SALC Project 65 at par 1.1.2.
159 65 of 1983. SALC Project 65 at par 4.2.
160 74 of 1983. SALC Project 65 at par 4.3.
161 82 of 1987. SALC Project 65 at par 4.4.
162 81 of 1963. SALC Project 65 at par 4.5.
163 Sec 5 of the Children's Status Act.

The SALC argued that the Children's Status Act reflected the maxims *mater semper certa est* (the mother is always certain) and *pater est quem nuptiae demonstrant* (the father is he whom the marriage points out).[164] Section 17(a) of the Child Care Act stipulated that the commissioning parents could become the legal parents of a child in a surrogacy arrangement but only if they followed the route of legal adoption.[165]

The regulations to the Human Tissue Act, namely the Regulations regarding the artificial insemination of persons, and related matters[166] governed the artificial fertilisation and *in vitro* insemination in South Africa. The Regulations provided that the procedures of removal or withdrawal of a gamete and the artificial insemination had to be carried out by a medical practitioner or persons under his or her supervision (a competent person);[167] the competent person was only allowed to effect artificial insemination of a married woman where her husband had provided written consent for the procedure.[168] Under these Regulations, requirements were set regarding: detailed records of donors[169] and recipients;[170] the personal details of the donor, including the donor's family history, had to be placed at the disposal of the medical practitioner intending to effect the artificial insemination;[171] the medical practitioner, intending to remove or withdraw gametes, had to ascertain that the donor had been tested for sexually transmitted diseases and that his sperm had been subjected to analysis.[172] Furthermore, if a medical practitioner knew or suspected that two or more artificially conceived pregnancies existed or that the donations of one donor had led to at least five pregnancies, no further donations by that donor were allowed;[173] recipients had to be screened to ensure their medical, social, and mental fitness for artificial insemination;[174] the medical practitioner had to ensure that patients received advice

164 SALC Project 65 at par 4.4.2.
165 Slabbert and Roodt "South Africa" 326. *AB and another v Minister of Social Development* at par 247. Clarke 2000 *Stell LR* 13. Nicholson 2013 *SAJHR* 498.
166 Regulations regarding the artificial insemination of persons and related matters, published in GG No R 1182 of 20 June 1986 (GG 10283).
167 Reg 3 of Regulations regarding the artificial insemination of persons 1986.
168 Reg 8(1) of the Regulations regarding artificial insemination of persons 1986.
169 Reg 4 and 5 of the Regulations regarding artificial insemination of persons 1986.
170 Reg 9 and 10 of the Regulations regarding artificial insemination of persons 1986.
171 Reg 4(d)(iv) of the Regulations regarding artificial insemination of persons 1986.
172 Reg 5(a) of the Regulations regarding artificial insemination of persons 1986.
173 Reg 8(a) and Reg 4(e).
174 Reg 9(e)(ii).

and information from experts on the implications of artificial insemination;[175] and finally, that confidentiality had to be maintained.[176]

Thus, as can be seen from the above, until the promulgation of the Children's Act, surrogacy was not explicitly and comprehensively regulated by legislation per se.[177] The Human Tissue Act and the Children's Status Act, however, governed a range of legal issues relating to artificial fertilisation and the status of children conceived as a result of artificial fertilisation.[178] Chapter 8 of the NHA replaced the Human Tissue Act and the Children's Act repealed the Children's Status Act, as well as the Child Care Act. The Human Tissue Act and regulations were the first attempt in South Africa's legal history to regulate human artificial fertilisation.[179]

For those who wished to pursue surrogacy at the time, these statutes referred to regulated surrogacy indirectly and inadequately, in a very artificial and piecemeal manner. For example, the child was considered illegitimate if the woman's husband did not consent to her being artificially fertilised with donor sperm or illegitimate in the event that his consent to the procedure had been obtained. In circumstances where a surrogate gave birth to a commissioned child, the commissioning parents had to adopt the child as the child was seen as the child of the surrogate. All the different provisions caused anxiety and confusion regarding the status of the commissioned child and made the regulation of surrogacy difficult, if not almost impossible, as there was no "one set" of provisions in one place that could guide parties who desired to enter into a surrogacy arrangement.

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175 Reg 9(e)(bb).

176 Reg 6(e) and Reg 10(2)(b).

177 SALC Project 65 at par 7.1. The SALC pointed out that there were strong arguments that the effect of surrogacy on the child, the parties and society is covered in uncertainty. It was therefore risky to recognise surrogacy locally at that stage.

178 There was no reference to artificial insemination in South African statutes prior to The Human Tissue Act. The only other possible reference could have been sec 7 of the Anatomical and Donations and Post Mortem Examinations Act 24 of 1970 which provision prohibited artificial fertilisation by a donor. *V v R* 1979(3) SA 1006 (T) at p1009. *AB and another v Minister of Social Development* at par 246. Pretorius *Surrogate motherhood* 88. Skosana 2017 *Obiter* 262. Oluwaseyi and Oladimeji 2021 *Obiter* 31. SALC Project 65 at par 4.2.1. The SALC submitted that the definition of artificial fertilisation did not stipulate in whose womb the embryo (*in vitro* or *in vivo*) must be placed and therefore, it can be lawfully transferred to the womb of the surrogate. Further, the regulations neither excluded surrogacy as the definition of *in vitro* insemination did not preclude the placing of the embryo in a surrogate's womb.

179 LexisNexis *Law of South Africa* 30(2) at par 63. Strauss *Doctor, Patient and the Law* 184-185. Slabbert, M.N "Are the human embryo and the foetus *extra uterum* sufficiently protected in terms of South African law?" 2001 *Journal of South African Law* 2001(3) 496.

2.4 Commercial surrogacy

The practice of commercial surrogacy, in contrast to altruistic surrogacy, was (and still is) seen as *contra bones mores* and is explicitly prohibited in South Africa.[180]

> Commercial surrogacy refers to a situation where a woman is compensated for giving birth to a child whom she hands over to the commissioning parents in return for payment.[181]

Commercial surrogacy, as defined in chapter 1, refers to surrogacy where the surrogate's motivation is financial. The SALC argues that payment of the surrogate amounts to the buying of the commissioned baby.[182] Commercial surrogacy is undertaken in exchange for payment in that the commissioning person or couple undertake to pay the surrogate a fee for conceiving and bearing the child (which is greater than the actual costs incurred).[183] In terms of the commercial agreement, the surrogate enters into the agreement with the prospect of compensation or a source of income.[184] The commissioning parent(s) undertake(s) to pay the surrogate any compensation *of any nature other* than those specifically provided for in section 301 of the Children's Act, such as the medical expenses relating to the birth.[185] Commercial surrogacy points to a rent-a-womb scenario.[186] The risk for exploitation in this kind of arrangement is greater and that is also why it is regarded as unacceptable in many jurisdictions.[187] Over the years, ethical, legal and policy issues have been considered to determine if commercial surrogacy in effect treats children as commodities and

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180 *AB and another v Minister of Social Development* at par 246. *Ex parte HPP and others; Ex parte DME and others and others* 2017 (4) SA 528 (GP) at par 24. Pretorius *Surrogate motherhood* 17. At 86 where large amounts of money are involved. SALRC Project 140 8. Gamete donation and surrogate motherhood should be altruistic in the South African legal scheme and not for commercial purposes. Bonthuys, E and Broeders, N "Guidelines for the approval of surrogate motherhood agreements: Ex parte WH" 2013 *South African Law Journal* 130(3) 490. Mills 2010 *Stell LR* 429. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 247. Heaton 2015 *THRHR* 29 and 34. The consequences of commercial surrogacy are not recognised. Commercial surrogacy is illegal, against public policy and in some respects a crime.

181 The term is defined in par 7.24, ch 1 above Oluwaseyi and Oladimeji 2021 *Obiter* 29.

182 SALC Project 65 at par 2.5.

183 Report of the Ad Hoc Committee 9. Cascão, R "The challenges of international commercial surrogacy: from paternalism towards realism?" 2016 *Medicine and Law* 35(2) 152.

184 Sec 295(iv) specifically makes reference to the words 'source of income'.

185 *Ex parte WH and others* at par 65. Sec 301 will be discussed in detail below.

186 Lupton, M.L "Artificial wombs: medical miracle, legal nightmare" 1997 *Medicine and Law* 16 624.

187 Pyrce, C "Surrogacy and citizenship: A conjunctive solution to a global problem" 2016 *Indiana Journal of Global Legal Studies* 23(2) 930.

violates their rights.[188] Commercial surrogacy has also been linked to human trafficking in circumstances where the parties live in different countries and the transfer of the commissioned child is from one country to another.[189]

With commercial surrogacy regarded as illegal in South Africa, surrogacy agreements that contain financial incentives beyond the allowed pregnancy -and birth related expenses are hence unenforceable.[190] Cascão rightly states that it is a deep-rooted principle in bioethics that "the human body and its parts shall not give rise to financial gain".[191] Commercial surrogacy has the potential to lead to a serious infringement of the human rights and dignity of surrogate mothers, and ultimately to the rise of an exploited "breeding caste" of underprivileged women and large scale transnational "baby selling" to wealthier families from developed countries.[192]

The United Nations Convention on the Rights of a Child (UNCRC) determines in section 3 that all actions concerning a child shall take full account of the child's best interests. Section 35 of the UNCRC determines that the state has an obligation to make every effort to prevent the sale, trafficking and abduction of children. Commercial surrogacy is fraught with many risks, for example, the surrogate can continuously extract more money from the commissioning parents by manipulating them and using the commissioned child as the reason. The commercialisation of surrogacy makes the practice a business, which may negate the best interests of the commissioned child, as profit will become the main driving factor. For lower- and middle income countries such as South Africa, a further risk is that with high unemployment surrogacy may become a viable option for desperate women to generate an income. The danger exists that some women introduced into prostitution and slavery through promises of a better life, may be convinced to enter into a commercial surrogacy arrangement and to sell

188 Oluwaseyi and Oladimeji 2021 *Obiter* 29.

189 Oluwaseyi and Oladimeji 2021 *Obiter* 30.

190 *Ex parte HPP and others; Ex parte DME and others* at par 24, 27 and 67. *AB and another v Minister of Social Development* at par 134. Nicholson 2013 *SAJHR* 496. Sloth-Nielsen "Surrogacy in South Africa" 187. Sloth-Nielson, J and van Heerden, B "The constitutional family developments in South African child and family law 2003-2013" 2014 *International Journal of Law, Policy and the Family* 28(1) 114.

191 Cascão, R "The challenges of international commercial surrogacy: from paternalism towards realism?" 2016 *Medicine and Law* 35(2) 152.

192 Cascão, R "The challenges of international commercial surrogacy: from paternalism towards realism?" 2016 *Medicine and Law* 35(2) 154.

their babies.[193] It is thus in the best interests of the commissioned children that commercial surrogacy never forms part of South African law and that the state observes the obligations under the UNCRC and section 28 of the Constitution.

2.5 International surrogacy

Two possible scenarios of international surrogacy are where the commissioning parent(s) are not domiciled in South Africa and they obtain a child through surrogacy and a surrogate mother in South Africa, or, where South African commissioning parent(s) obtain a commissioned child through surrogacy in a foreign country.[194]

International surrogacy causes a lot of confusion and various complexities regarding the legal position of the child born as a result of surrogacy.[195] Heaton refers to various cultural, moral, ethical and religious differences in perspectives on surrogacy and, importantly, the parent-child relationship.[196] For example, where the rules of the commissioning parents' country of origin are different from the foreign country where the commissioned child is born, conflicting legal outcomes may follow.[197] The possibility exists that either the commissioning couple's country of origin does not recognise surrogacy, or the country does not recognise the surrogacy in the circumstances in which it occurred in the surrogate's country.[198] The country where the commissioned child is born may perhaps not recognise the commissioning couple as the parents of the commissioned child, which means that the commissioned child will not be able to obtain travel documents to travel with the commissioning parents to their country of origin.[199]

Currently, due to jurisdictional limitations, chapter 19 of the Children's Act does not contain any provisions relating to international surrogacy and its consequences.[200]

193 Oluwaseyi and Oladimeji 2021 *Obiter* 30.
194 Heaton 2015 *THRHR* 34.
195 Heaton 2015 *THRHR* 28.
196 Heaton 2015 *THRHR* 27.
197 Heaton 2015 *THRHR* 27.
198 Heaton 2015 *THRHR* 27. Cascão, R "The challenges of international commercial surrogacy: from paternalism towards realism?" 2016 *Medicine and Law* 35(2) 157.
199 Heaton 2015 *THRHR* 27-28.
200 Heaton 2015 *THRHR* 28. At 46 the author states that greater predictability and legal certainty regarding legal parentage of children in international surrogacy situations must be ensured and

Heaton argues that the Children's Act seeks to limit international surrogacy by the requirement that a surrogacy agreement has to be entered into in South Africa and the parties to the agreement must be domiciled in the country.[201]

There is, however, no public or private international law instrument on international surrogacy that may direct parties on the legal consequences of the various scenarios that may arise.[202] Conflicting legal rules in the various jurisdictions may (looking at the worst-case scenario) result in the commissioned child being parentless or stateless and the commissioning parents being unable to take the child to their country of origin.[203] Although the commissioning parents may succeed in taking the child to their country, they may not be recognised as their child's legal parents in their jurisdiction.[204] This result creates an untenable situation for commissioning parents who already have to contend with a range of uncertainties and legal risks, not to mention additional financial and emotional issues. Regarding the emotional issues—in the 2017 Constitutional Court judgment of *AB and another v Minister of Social Development*,[205] which dealt with the constitutionality of section 294 of the Children's Act, Khampepe J observes that the psychological trauma that all infertile people experience may further be heightened by an abiding sense of social shame, which may prompt them to conceal their infertility.[206] She further observes that the stigma that attaches to infertility is damaging and pervasive, especially in developing countries like South Africa.[207] Infertility is an unenviable and psychologically harmful condition because of its potential of preventing people from having children of their own, and because it may result in serious social exclusion and stigma:[208]

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the legislature should expressly regulate the consequences of the identified instances of international surrogacy. The best interests of the children born as a result of surrogacy are not served by shying away from the task.

201 Heaton 2015 *THRHR* 28. Sec 292(1)(b), sec 292(1)(c) and sec 292(1)(d) of the Children's Act.

202 Heaton 2015 *THRHR* 28.

203 Heaton 2015 *THRHR* 28. At 41 Heaton explains that there are three criteria which is commonly used to assign legal parentage to a person: (a) a genetic link between the person and the child, (b) the person's intention to become a parent (commissioning parent commissioning a child through a surrogate) and (c) giving birth to the child. Importantly, different jurisdictions apply different criteria which has the result that a person may qualify as the child's legal parent in one country but not in another. Cascão, R "The challenges of international commercial surrogacy: from paternalism towards realism?" 2016 *Medicine and Law* 35(2) 157. The writer referred to international commercial surrogacy.

204 Heaton 2015 *THRHR* 28 and 41.

205 2017 (3) SA 570 (CC).

206 *AB and another v Minister of Social Development* at par 84.

207 *AB and another v Minister of Social Development* at par 84.

208 *AB and another v Minister of Social Development* at par 86.

> Infertility cruelly dispossesses a person of the capacity to decide whether or not to have a child; where making this decision has extensive social implications.[209]

2.6 Concluding observations

It is apparent from the preceding discussion that prior to the enactment of chapter 19 of the Children's Act, South Africa needed proper legislation in respect of surrogacy especially taking into account the advancements in medical technology. The uncertainty created by the combined effect of the Children's Status Act and the Child Care Act further demanded the urgent attention of the legislature of South Africa. Before the enactment of the Children's Act, some uncertainties remained regarding the status of the child conceived by artificial fertilisation or *in vitro* fertilisation of an unmarried woman. Although the Human Tissue Act limited artificial fertilisation and *in vitro* fertilisation to a married woman with the consent of her husband,[210] the limitations did not provide certainty regarding the relationship between the child and its genetic father in the event of an unmarried woman being artificially fertilised. The law, shaped by social policy, needs to define the relationship between the parties involved in medically assisted reproduction and their children and what their respective rights and duties are.[211] For Dada and McQuoid-Mason, the right to procreate, which extends to coital and noncoital choices, should be characterised as the right to parent, rather than the right to achieve and maintain a biological tie with a child.[212]

The lacunae in South African law relating to surrogacy and artificial fertilisation prior to the enactment of chapter 19 of the Children's Act led to a legal vacuum requiring urgent legal intervention. The promulgation of chapter 19 of the Children's Act which regulates surrogacy specifically, addressed some of the legal gaps regarding surrogate motherhood. Artificial fertilisation remained regulated in terms of the Human Tissue Act prior to the enactment of the Children's Act and the National Health Act 61 of 2003.

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209 *AB and another v Minister of Social Development* at par 89.
210 Reg 8(1) of the Regulations regarding the artificial insemination of persons 1986.
211 Dada, MA and McQuoid-Mason, DJ *Introduction to Medico-Legal Practice* (Butterworths 2001) 66.
212 Dada and McQuoid-Mason *Introduction to Medico-Legal Practice* 66.

3. THE COMMON LAW POSITION REGARDING THE LEGAL STATUS OF THE CHILD CONCEIVED AS A RESULT OF ARTIFICIAL FERTILISATION WITH DONOR SPERM

3.1 Introduction

The relevant laws and regulations governing surrogacy prior the Children's Act, discussed above, did not specifically prohibit surrogacy agreements.[213] The general opinion was that a surrogacy agreement was likely to be unenforceable as it was seen to be *contra bones mores*.[214] The SALC admitted that public policy naturally differs from one community to another without remaining static within a community.[215] Public policy grows and changes as the community changes and technology develops.[216]

3.2 The maxims *mater semper certa est* and *pater is est quem nuptiae demonstrant*

The common law saying (maxim) of *mater semper certa est* is based on the assertion that the mother of a child is always certain.[217] This maxim is informed by the fact that historically, the possibility did not exist that anyone other than the gestational (birth) mother, who is also the genetic mother, could be the legal mother of the child.[218] The maxim regarding the assumption of paternity, e.g *pater is est quem nuptiae demonstrant*, is different. This maxim means that "the father is he to whom the marriage point".[219] This meant that a child born to, or conceived by a married woman, was considered legitimate and there was a presumption that the woman's husband was the father of the child.[220]

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213 SALC Project 65 at par 4.7.2.
214 SALC Project 65 at par 4.7.3.
215 SALC Project 65 at par 4.7.3.
216 SALC Project 65 at par 4.7.3.
217 Pretorius *Surrogate motherhood* 17.
218 Pretorius *Surrogate motherhood* 134. This maxim has always been irrebuttable.
219 Pretorius *Surrogate motherhood* 139. The presumption was rebuttable at any stage on a balance of probabilities. SALC Project 65 at par 4.8.3.
220 Pretorius *Surrogate motherhood* 139-140. It was not necessary for conception to have taken place during the subsistence of the marriage and neither was it necessary that the children were conceived from the husband of the mother. The prerequisite was the subsistence of a marriage. SALC Project 65 at par 4.8.3.

The criterion for determining legal parenthood has always been consanguinity.[221] The statutory provisions did allow for exceptions in certain circumstances, for instance in the case of adoption, as the courts were empowered to terminate the parental rights of the genetic parents. Consanguinity, however, does not always provide satisfactory results.[222] The advances in modern reproductive technology made it possible that as many as three women could claim some form of maternal rights to a child, causing the basic beliefs of family law to become uncertain.[223] The possibility of numerous persons claiming parental rights to a child has questioned conventional notions of what a mother and a father are or should be.[224] Modern technology has the potential to wreak havoc with the common law *maxim mater semper certa est*.[225]

The Children's Act of 1960,[226] which preceded the Child Care Act, provided in terms of section 71(2) that a child born as a result of artificial fertilisation using the sperm of an unknown donor was regarded as illegitimate even though both the husband and wife had provided their consent to the procedure.[227] This seems to have endorsed and confirmed the common law position.[228] Thus, in terms of the common law, a child conceived by means of artificial fertilisation with the use of donor sperm (AID) would be illegitimate.[229] This is also because of the weight attached to kinship in the late Middle Ages, the 17th and 18th centuries.[230] This is attached to the privileges of kinship, nobility and inheritance privileges, which exclusively depended on the specific blood bond between father and child.[231]

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221 Pretorius *Surrogate motherhood* 138.
222 Pretorius *Surrogate motherhood* 138.
223 Pretorius *Surrogate motherhood* 134. There was an uncertainty of legal motherhood. Who should be regarded legally as the mother of the child? Should it be the ova donor who is genetically linked to the child, or the commissioning mother, who is socially linked to the child or is it the surrogate mother who has a gestational link to the child? Thus, the *mater semper certa est* could no longer provide certainty in this regard. SALC Project 65 at par 4.8.2.
224 Pretorius *Surrogate motherhood* 17.
225 SALC Project 65 at par 4.8.2.
226 33 of 1960.
227 *V v R* 1979(3) SA 1006 (T) at p 1015. Pretorius *Surrogate motherhood* 91.
228 *V v R* at p 1015.
229 *V v R* at p 1014 Lupton, M.L "Artificial wombs: medical miracle, legal nightmare" 1997 *Medicine and Law* 16 628. This was the position prior to 14 October 1987 when the Children's Status Act 82 of 1987 was enacted.
230 *V v R* at p 1014.
231 *V v R* at p 1014.

It is clear that the legal opinion, as it was in South Africa in 1979, followed the basic principles laid down in our common law by the old Roman-Dutch law writers.[232] At the time, artificial fertilisation did not exist, but has become a reality in modern times as a result of the development of medical technology.[233] Public policy in South Africa at the time also undeniably favoured the restriction of surrogate motherhood to married couples who were in a stable relationship.[234] Public opinion regarding surrogacy has shown to shift gradually. After the birth of the Tzaneen triplets in South Africa in 1987,[235] the pre-dominant view was that full surrogacy in a family arrangement without any commercial gain for any of the parties was generally acceptable.[236]

In the judgment of *V v R*[237], the court refers to three legal scholars who confirmed the common law position regarding artificial fertilisation, ranging from the 1950's to the 1970s:

(a) Mentioned first is Professor Hahlo who observed that:[238]

> The second major issue in connection with heterologous artificial insemination is the legal status of the children. There can be little doubt that in our law, irrespective of whether or not AID is adultery and irrespective of whether or not the husband has consented to it, the children born of this procedure would be illegitimate.

(b) A similar sentiment was expressed by N.C Masters who asserted that:[239]

> Where the child is born as a result of AID then it seems equally clear that the child is illegitimate: the fact that the legal father had consented to the operation would not in any way affect its status.

(c) Professor Spiro came to the same conclusion:[240]

> If a child is born as the result of its mother having been artificially inseminated with the semen of a person other than her husband, the child must be ordinarily illegitimate, and this is so even if the husband consented.

It is evident from the above references, which affirmed the common law position, that a child conceived by means of artificial fertilisation from the sperm of a donor (AID)

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232 *V v R* at p 1015.
233 *V v R* at p 1014 – 1015.
234 Pretorius *Surrogate motherhood* 137.
235 This matter will be discussed in par 4.2 below.
236 Pretorius *Surrogate motherhood* 137.
237 1979 (3) SA 1006 (T). This judgment will be discussed in detail in par 4.3 below.
238 Hahlo, H.R "Some Legal Aspects of Human Artificial Insemination" 1957 *SALJ* 167 at 174; *V v R* at p 1015.
239 Masters, N.C "Artificial insemination" 1953 *SALJ* 375 at 379; *V v R* at p 1016
240 Spiro, E "Artificial insemination and the law" 1972 *Acta Juridica* 213 at 214; *V v R* at p 1016.

was, for quite some time, considered to be illegitimate (Afrikaans: "buite-egtelik").[241] The effect of this, for example, in the context of intestate succession in South African law was that illegitimate children who had not been legitimated or adopted were deemed to be related to their mother but not to their father.[242] This is in accordance with the principle "*een wijf maakt geen bastaard*."[243] Thus, illegitimate children did not succeed upon intestacy to their father and the father's relations but did succeed to their mother and the mother's relations.[244] Conversely, the mother and her relations inherited *ab intestato* from the mother's illegitimate child, but not the father and the father's relations.[245]

The Intestate Succession Act[246] commenced on 18 March 1988 and was later amended by the Law of Succession Amendment Act.[247] The purpose of the Act was to regulate intestate succession and to provide for matters connected therewith. Section 1(2) of the Intestate Succession Act provided that notwithstanding the provisions of any law or the common law, but subject to section 5(2) of the Children's Status Act of 1987, illegitimacy will not affect the capacity of one blood relation to inherit the intestate estate of another blood relation. Section 8 of the Reform of Customary Law of Succession and Regulation of Related Matters Act[248], which commenced on 20 September 2010, substituted section 1(2) of the Intestate Succession Act by providing that:

> (2) Notwithstanding the provisions of any law or the common or customary law, but subject to the provisions of this Act and [section 5(2) of the Children's Status Act, 1987, illegitimacy] sections 40(3) and 297(1)(f) of the Children's Act, 2005 (Act No. 38 of 2005), having been born out of wedlock shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation.

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241 Judge Steyn also referred to the writings of Hugo de Groot and Van Leeuwen at 1012 - 1013. Van Leeuwen wrote that "these persons are legitimate who are procreated by their parents in lawful wedlock. Steyn stated: "In hierdie vertaalde vorm is die toetssteen van die kind se wettigheid duidelik die moment en omstandighede van die verwekking van die kind. Waar die kind verwek word ingevolge die instemming van die gewaande vader, is beide die wil en oogmerk van die wettig getroude man en vrou gerig op die verwekking van 'n kind uit hulle huwelik. Die tegniek van bevrugting is nie natuurlik nie, maar is dieselfde as by die nie-natuurlike bevrugting met die eggenoot se saad. Die enigste grondslag waarop so 'n kind as buite-egtelik beskou kan word is op grond daarvan dat die moeder owerspel sou gepleeg het deur die ontvangs van 'n onbekende skenker se saad in 'n nie-natuurlike proses van bevrugting."

242 Grotius Inleidinge 2 27 28, *Green v Fitzgerald, Fitzgerald v Green* 1914 AD 88.

243 Grotius Inleidinge 2 27 28, *Green v Fitzgerald, Fitzgerald v Green* 1914 AD 88.

244 Grotius Inleidinge 2 27 28, *Green v Fitzgerald, Fitzgerald v Green* 1914 AD 88.

245 Grotius Inleidinge 2 27 28, *Green v Fitzgerald, Fitzgerald v Green* 1914 AD 88.

246 81 of 1987.

247 43 of 1992.

248 11 of 2009.

The situation is different where a child is conceived by the use of donor gametes. Section 5(2) of the Children Status Act[249] provided that no right, duty or obligation shall arise between the child and the donor of the gametes. Section 40(3) of the current Children's Act which determines the rights of a child conceived through artificial fertilisation, provides similarly that (subject to section 296 of the Act) 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(s) were used for the artificial fertilisation (gamete donor), and neither the blood relations of the gamete donor. Two exceptions to this legal position exist, namely: (a) when the gamete donor is the woman who gave birth to the child; or (b) when the gamete donor was the husband of such woman at the time of her artificial fertilisation.[250]

Section 297(1)(f) of the Children's Act (which determines the effect of a surrogacy agreement on the status of the child) provides that the child born as a result of a surrogacy arrangement will not have a claim for maintenance or of succession against the surrogate, her husband or partner or any of their relatives.

The legal-historical position of a child conceived through artificial fertilisation will be discussed in the next part with reference to legislation and case law.

4. LEGAL POSITION OF THE CHILD CONCEIVED BY ARTIFICIAL FERTILISATION PRIOR TO THE ENACTMENT OF THE CHILDREN'S ACT

Parenthood has traditionally been determined on the basis of a biological connection.[251] Already in 1991, Pretorius, who wrote the first legal thesis on surrogate motherhood in South Africa, argued that in the absence of legislation, the psychological intent of the parents in a surrogacy agreement should transcend the notion that biological ties should be the only criterion for parenthood.[252] The psychological and legal intent of the parties as the commissioning couple entering into a surrogacy

249 82 of 1987.
250 Sec 40(3)(a) and (b) of the Act.
251 Pretorius *Surrogate motherhood* 17.
252 Pretorius *Surrogate motherhood* 17.

arrangement should be the primary consideration in determining their legal status (as parents) to the commissioned child.[253]

I will next discuss a few key judgments relating to the legal position of the child conceived by artificial fertilisation preceding the implementation of the Children's Act. Where relevant, the legal position regarding the parents of such child will also be highlighted.

4.1 *L v J*[254]

In this 1985 case, the defendant, unable to father a child, was left with three options: to remain childless; to adopt a child or to have the plaintiff artificially fertilised with donor sperm (AID).[255] The plaintiff underwent artificial fertilisation and she fell pregnant as a result thereof.[256] The plaintiff instituted divorce proceedings in 1983 after a son was born.[257] It emerged that the defendant never gave his consent to the plaintiff to undergo the AID procedure at the time it was performed.[258] The plaintiff claimed sole guardianship and sole custody of the child, as well as maintenance for the child.[259] The court concluded that the child is illegitimate, since the husband did not provide his consent for the wife to conceive a child via artificial fertilisation with donor sperm.[260] The court made it clear that there is no duty on the husband to provide maintenance for the child of his wife if he is not that child's natural father.[261] For the court, the sole difference between the case where a child is born by AID or alternatively, out of an adulterous relationship, is that in the first-mentioned instance no accusation of adultery can be levelled against the wife.[262] The child's illegitimacy in *L v J* remains unaffected whether or not the child's mother underwent an artificial fertilisation procedure or enjoyed the thrills of illicit passion.[263] The court explained that the obligation to provide

253 Pretorius *Surrogate motherhood* 17.
254 1985 (4) All SA 20 (C).
255 *L v J* at p 21. Definition of AID in par 8.19 of ch 1.
256 *L v J* at p 21.
257 *L v J* at p 21.
258 *L v J* at p 25.
259 *L v J* at p 21.
260 *L v J* at p 26.
261 *L v J* at p 26.
262 *L v J* at p 26.
263 *L v J* at p 26.

maintenance is based on consanguinity and inasmuch as the husband is not obliged in law to support a step-child, he can certainly not be obliged to support a child born to his wife by AID without his consent.[264] Berman J concluded that considerations of public policy do not dictate that a man in the defendant's position bears any obligation to maintain, upon divorce, the child of his wife, born *stante matrimonio* to her by AID undertaken without his consent.[265] No legal obligation hence rests on the defendant to support the child.[266]

4.2 The Tzaneen triplets (1987)[267]

The first case of its kind in the world took place in 1987 in South Africa when a married grandmother gave birth to triplets as their surrogate mother.[268] The genetic parents were her own daughter and the daughter's husband (son-in-law).[269] As the children were born thirteen days before the Children's Status Act[270] was promulgated, the children had to be registered as the children of their genetic parents and not that of the grandmother (who gave birth) and her husband.[271] It was stated that it would appear that the decision was in line with the traditional view that consanguinity determines legal parenthood and the genetic mother was therefore considered the legal mother of the children.[272] The Children's Status Act,[273] enacted shortly after the birth of the triplets, aimed to provide legitimacy to children who had previously been considered

264 *L v J* at p 26.
265 *L v J* at p 28.
266 *L v J* at p 28.
267 Strauss, SA "Triplets to a Surrogate Grandmother in South Africa: Legal Issues" 1989 *International Legal Practitioner* 14(3) 71. Pretorius *Surrogate motherhood* 85. This case sparked a controversy amongst church leaders, medical practitioners and other interested parties. It is mentioned that the Federal Council of the Medical Association of South Africa concluded in 1986 that surrogate motherhood was undesirable.
268 Slabbert and Roodt "South Africa" 326. Strauss *Doctor, Patient and the Law* 190. Oluwaseyi and Oladimeji 2021 *Obiter* 31.
269 Pretorius *Surrogate motherhood* 135.
270 82 of 1987.
271 Pretorius *Surrogate motherhood* 135. The legal questions were: (a) who the legal parents of the triplets are, and (b) in whose name should the triplets be registered. Strauss *Doctor, Patient and the Law* 190.
272 Pretorius *Surrogate motherhood* 135.
273 82 of 1987.

illegitimate.[274] Interestingly, had the triplets been born two weeks later, they would have been considered the legal children of their grandmother.[275]

4.3 *V v R*[276]

This was the first known decision in South Africa regarding the legal status of a child conceived by means of artificial fertilisation with sperm obtained from an unknown donor (AID).[277] The wife (applicant) and the respondent were married on 31 December 1965.[278] The parties divorced on 12 November 1974 after a child (son) was born on 16 September 1971.[279] The applicant conceived by means of artificial fertilisation with sperm obtained from an unknown donor.[280] Both the husband and wife agreed to the procedure.[281] After the divorce, the applicant brought an application wherein she asked the court to declare that the respondent is not the natural and/or legal father of the minor child and that only her (as applicant's) consent will be necessary to enable her new husband to adopt the child.[282]

The court stated that a child conceived by means of artificial fertilisation with the semen of an unknown donor (AID) that took place on request of the wife, with the consent of the husband, is regarded as an illegitimate child for the purposes of section 71 of the Children's Act 33 of 1960.[283] The court further observed that a child born through artificial fertilisation with consent of the putative father would be considered illegitimate in terms of the old writers' literal judgments, since:[284]

(1) the child is born to a putative father during a lawful marriage;

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274 Pretorius *Surrogate motherhood* 135.
275 Pretorius *Surrogate motherhood* 136. Strauss *Doctor, Patient and the Law* 190. SALC Project 65 at par 4.6.2.
276 1979 (3) SA 1006 (T).
277 Strauss, SA "Triplets to a Surrogate Grandmother in South Africa: Legal Issues" 1989 *International Legal Practitioner* 14(3) 70. Strauss *Doctor, Patient and the Law* 183.
278 *V v R* at p 1008.
279 *V v R* at p 1008.
280 *V v R* at p 1008.
281 *V v R* at p 1008.
282 *V v R* at p 1008. Strauss *Doctor, Patient and the Law* 183.
283 V v R at p 1015. Strauss *Doctor, Patient and the Law* 183.
284 *V v R* at p 1015.

(2) the mother of the child at its conception had committed no act contrary to the marriage contract but an act in execution of the marriage contract where she had acted in consultation with and with the consent of the putative father;

(3) no man other than the putative father has maintenance obligations in respect of the child;

(4) the married mother had not committed adultery in the conception of the child by means of artificial fertilisation as the result of the absence of "all wrongful sensuality at its conception" and as the result of the consent obtained from her husband to be regarded as the father of her child.

Moreover, the court held that there is no authority in our law which prevents the consenting husband of the wife who brings a child into the world by means of such artificial fertilisation being placed in a special relationship to the child born as a result thereof.[285] The term "putative father" is an appropriate description of such a spouse, who, as a putative father, has obligations in respect of the maintenance, including rights of guardianship in respect of such a child.[286] The mother of such a child has a right, which the court cannot limit, to consent to the adoption of her child.[287] The consent of the respondent was thus not required for the adoption of the parties' child.[288]

4.4 *J and Another v Director General, Department of Home Affairs and others*[289]

This matter, heard by the Constitutional Court, deals with same-sex partners who had twins that were conceived through artificial fertilisation.[290] Both applicants wanted to be registered and recognised as the parents of the twins.[291] Unfortunately, section 5 of the Children's Status Act did not permit the first applicant to become a legitimate parent

285 *V v R* at p 1016.
286 *V v R* at p 1016. Strauss *Doctor, Patient and the Law* 183.
287 *V v R* at p 1017.
288 *V v R* at p 1017.
289 2003 (5) BCLR 463; 2003 (5) SA 621 (CC).
290 *J and Another v Director General, Department of Home Affairs and others* at par 2. The ova of the first applicant were used together with donor sperm.
291 *J and Another v Director General, Department of Home Affairs and others* at par 3.

of the twins.[292] The court found the provisions of section 5 to be in conflict with the provisions of section 9(3) of the Constitution.[293] Section 5 referred to "married" and "husband", which excluded some permanent same-sex life partners.[294] The Constitutional Court declared section 5 of the Children's Status Act to be inconsistent with the Constitution to the extent that the word "married", in conjunction with "husband" did not make provision for permanent same-sex life partners.[295] The court further struck the word "married" from the section and inserted the words "or permanent same-sex life partner" after the word "husband".[296] The court thus found that the twins born to the applicants, through artificial fertilisation of the second applicant, is deemed for all purposes to be the legitimate children of the applicants.

5. STATUTES GOVERNING ARTIFICIAL FERTILISATION AND SURROGATE MOTHERHOOD PRIOR TO THE ENACTMENT OF THE CHILDREN'S ACT

5.1 Introduction

The preceding discussion described the legal historical development that influenced the way artificial fertilisation and surrogate motherhood were regulated prior to the implementation of the current Children's Act. The following section seeks to contextualise these developments, which need to be read in conjunction with certain provisions from other statutes to get a clear grasp of the exact legal position at the time. The regulation of artificial fertilisation and surrogate motherhood at the time may rightly be characterised as ambiguous and unsatisfactory. Those who had wanted to conceive a child via artificial fertilisation or surrogate motherhood had to patch the legal position together having regard to a patchwork framework characterised by piecemeal and haphazard amendments and revisions.

5.2 Child Care Act[297]

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292 *J and Another v Director General, Department of Home Affairs and others* at par 13. The section unfairly discriminated between married persons and persons in a permanent same-sex life partnership.

293 *J and Another v Director General, Department of Home Affairs and others* at par 14.

294 *J and Another v Director General, Department of Home Affairs and others* at par 7.

295 *J and Another v Director General, Department of Home Affairs and others* at par 28.

296 *J and Another v Director General, Department of Home Affairs and others* at par 28.

297 74 of 1983.

The aim of the Child Care Act was primarily the protection and welfare of certain children and the regulation of adoption procedures.[298] The Child Care Act was repealed by section 313 of the Children's Act 38 of 2005, with effect from 1 April 2010. Under the Child Care Act's dispensation, the commissioning parents in a surrogate relationship could only become the legal parents of the child if they followed the adoption procedure in terms of chapter 4 of the Child Care Act.[299] Thus, the adoption procedure as set out in section 18 of the said Act would be relevant if the surrogate mother consented to the adoption of the child.[300]

Section 17 of the Child Care Act, however, prevented a biological parent from adopting his or her own child, as section 17(a) of the Act prevented the adoption of a child if the child was born of one of the parents.[301] Those eligible to adopt were: a husband and his wife jointly; a widower or widow or unmarried or divorced person; a married person whose spouse was the parent of the child; or the natural father of a child born out of wedlock.[302] Section 18(4) provided for the requirements that had to be met in an application for an order of adoption (in terms of subsection 18(2)) to the Children's Court before such an order may be granted. For instance, the applicant(s) had to be qualified to adopt the child in terms of section 17 and he/she/they had to have adequate means to maintain and educate the child;[303] the applicant(s) had to be or must have been of good repute and person(s) fit and proper to be assigned with the custody of the child;[304] and, importantly, that the planned adoption would serve the interests and conduce to the welfare of the child.[305] Sections 24(1) and (2) prohibited any compensation for adoption.[306] The ostensible object of this provision was to protect young and inexperienced women from financial coercion (by third parties) to give up their children for adoption. This section was never intended to regulate surrogacy.[307]

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298 SALC Project 65 at par 4.3.1.

299 *AB and another v Minister of Social Development* at par 247. *Ex parte WH and others* at par 35. Slabbert and Roodt "South Africa" 326.

300 *AB and another v Minister of Social Development* at par 247. *Ex parte WH and others* at par 57.

301 Pretorius *Surrogate motherhood* 141. It was however possible for a married person to adopt a child that was born from the spouse (stepchild scenario).

302 Sec 17 of Child Care Act.

303 Sec 18(4)(a).

304 Sec 18(4)(b).

305 Sec 18(4)(c).

306 Sec 24. Pretorius *Surrogate motherhood* 90.

307 Pretorius *Surrogate motherhood* 93.

Although surrogacy was not expressly regulated by the Child Care Act *per se*, the Act did provide guidance as to the legal situation should a child have been born following a surrogacy agreement. Such a child could only be considered the child of the commissioning parents after the legal adoption of the child. The possibility existed that the surrogate mother could refuse to consent to the adoption of the child by the commission parents, which would have left the latter without a legal remedy or recourse.

5.3 Children's Status Act[308]

The *mater semper certa est* maxim was codified in this Act in respect of children conceived by means of artificial fertilisation or *in vitro* fertilisation.[309] Section 5 of the Children's Status Act determined the legal consequences of artificial fertilisation regarding the status of children born as a result of artificial fertilisation.[310] Section 5(1)(a) provided that children born as a result of artificial fertilisation with donor sperm and ova are considered the legitimate children of the women giving birth to the child and her husband, provided that the husband gave his consent to the artificial fertilisation.[311] Section 5(2) determined that no right, duty or obligation would arise between the child and the donor of the gametes.[312] Such right, duty or obligation would only arise where (a) a person is the woman who gave birth to that child; or (b) a person is the husband of such a woman at the time of the said artificial fertilisation.[313] Thus,

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308 82 of 1987. (Die Wet op Status van Kinders) The act was repealed by Act 38 of 2005.

309 Lupton, M.L "Artificial wombs: medical miracle, legal nightmare" 1997 *Medicine and Law* 16 628. Slabbert and Roodt "South Africa" 326.

310 Carstens and Pearmain *Foundational Principles* 181. SALC Project 65 at par 4.4.1.

311 Sec 5(1) of the Children's Status Act 82 of 1987. Lupton, M.L "Artificial wombs: medical miracle, legal nightmare" 1997 *Medicine and Law* 16 628. Pretorius *Surrogate motherhood* 135. It is stated that surrogate motherhood falls within the ambit of this section. Slabbert and Roodt "South Africa" 326. South African Law Commission, project 110, Review of the Child Care Act (December 2002), to be accessed from https://www.justice.gov.za/salrc/reports/r_pr110_01_2002dec.pdf. Mills 2010 *Stell LR* 430. Strauss *Doctor, Patient and the Law* 184 and 189.

312 Sec 5(2) of the Children's Status Act 82 of 1987. Lupton, M.L "Artificial wombs: medical miracle, legal nightmare" 1997 *Medicine and Law* 16 628. Pretorius *Surrogate motherhood* 91. It will thus not be possible for a donor to claim any parental rights to the child and the child will not be able to claim maintenance from the donor Mills 2010 *Stell LR* 430. The writer explained that this meant that in circumstances where a surrogate had changed her mind in not wishing to give her consent to the adoption of the child by the commissioning parent(s), that she was entitled to do so in light of the fact that the surrogate agreement would in all probability have been considered as *contra bones mores.*

313 Sec 5(2) of the Children's Status Act 82 of 1987. Sec 3 determined that artificial insemination of a woman meant introduction by other than natural means of a male gamete(s) into the internal

section 5(2) provided no guidance as to the implementation of a surrogacy agreement.[314]

The Children's Status Act aimed to provide legitimacy to children who were previously considered illegitimate in South African law[315] by statutorily codifying both the common law maxims of *mater sempter certa est* and *pater is est quem numptiae demonstrant* (presumption of paternity) regarding artificial fertilisation with donor sperm and/or embryo transfer.[316] A child born as a result of artificial fertilisation with donor sperm had to be registered as the child of the woman giving birth and her husband, and both were considered to be the legal parents of the child.[317]

The codification of the presumption of the paternity maxim (*pater is est quem numptiae demonstrant*) in the Children's Status Act, however, provided an additional obstacle to a surrogacy agreement in the sense that the surrogate and her husband were considered the legal parents of the child, which is contrary to the expectations and the intention of all the parties to the surrogate motherhood agreement.[318] Motherhood was hence attributed to a mother who never had the intention to keep the child, and fatherhood to a father whose involvement was minimal at best.[319]

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reproductive organs of the woman or the placing of the product of a union of a male and a female gamete(s) which have been brought together outside the human body in the womb of that woman for the purpose of human reproduction. Pretorius *Surrogate motherhood* 141. It was possible for a commissioning father to rebut the presumption of paternity before the enactment of the Act. After the enactment of the Act, his position was equated with that of a sperm donor and his rights towards the child (his natural offspring) were terminated by sec 5(2)(a). Although it was seen to be in the child's best interest that the rights of a sperm donor be terminated, the effect was unreasonable for a commissioning father in a surrogate agreement. He was in danger of losing his child as he was no longer in a position to rebut the presumption of paternity. The only available option for the commissioning parents was to adopt the child, provided that the surrogate and her husband gave the requisite consent. Strauss *Doctor, Patient and the Law* 184.

314 SALC Project 65 at par 4.4.2.

315 Pretorius *Surrogate motherhood* 93 and 152. To afford the children protection against the detrimental effects of illegitimacy in general.

316 Pretorius *Surrogate motherhood* 91. SALC Project 65 at par 4.4.2.

317 Pretorius *Surrogate motherhood* 91.

318 Pretorius *Surrogate motherhood* 140-141. The child's best interests was clearly not served in the circumstances where parental rights were awarded to a man who does not want a child and who played a minor role in the agreement. Should the surrogate mother have handed the child over to the commissioning parents after the birth, her husband's consent was a prerequisite for adoption by the commissioning parents. Slabbert and Roodt "South Africa" 326. Mills 2010 *Stell LR* 430. Strauss *Doctor, Patient and the Law* 189.

319 Nicholson and Bauling 2013 *De Jure* 513.

Both married and unmarried women had legal access to donor sperm since 1997 and would thus have been able to opt for and participate in artificial fertilisation procedures.[320] Clark argues that although the issue of surrogacy was not addressed directly by the Children's Status Act or its Regulations, the Act had far-reaching implications for many surrogacy cases, as the definition of artificial fertilisation in the Children's Status Act was broad enough to cover many of the procedures used to implement surrogacy agreements.[321] Although Clark does not clarify this conclusion, one would assume that the reference to "a woman" in the definition of artificial fertilisation was wide enough to include the artificial fertilisation of the surrogate mother. Section 5(3) defined artificial fertilisation in respect of a woman as the introduction by other than natural means of a male gamete(s) into the internal reproductive organs of the woman;[322] or placing of the product of a union of a male and female gamete(s) which have been brought together outside the human body in the womb of that woman for the purpose of human reproduction.[323] Thus, this definition included both artificial insemination and *in vitro* fertilisation.[324]

Thus, in terms of the Children's Status Act, a woman, if she was married and gave birth to a child, and her husband (if he consented to her artificial fertilisation), were regarded as the legal parents of the child that was born.[325] On the other hand, in circumstances where the husband did not give his consent to the artificial fertilisation and a child was born, the child would have been deemed born out of wedlock and only the woman would acquire automatic parental rights and responsibilities.[326] It followed that the commissioning parents in a surrogate relationship could only become the legal parents of such a child by following the legal route of adoption in terms of the Child Care Act or to approach the High Court for guardianship or custody of or access to the child.[327]

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320 GN R1354 GG 18362 of 17 October 1997 deleting regulation 8(1) of the Human Tissue Act 1983 and amending reg 5(d) and reg 9(e). LexisNexis *Family Law service* at par J103.

321 Clarke 2000 *Stell LR* 13.

322 Sec 5(3)(a) of the Children's Status Act.

323 Sec 5(3)(b) of the Children's Status Act.

324 The definitions of artificial insemination and *in vitro* fertilisation is discussed in par 8.3 and 8.5 in ch 1.

325 Slabbert and Roodt "South Africa" 326. *AB and another v Minister of Social Development* at par 247.

326 Strauss, SA and Maré, MC *Mediese Reg* (Study Guide, LCR404-U, University of South Africa) 166.

327 Ch 4, sec 20 of the Child Care Act. Clarke 2000 *Stell LR* 13. Mills 2010 *Stell LR* 431. Nicholson 2013 *SAJHR* 498.

Section 5(1)(b) of the Children's Status Act created the presumption that if a surrogate mother was married, both she and her husband consented to the artificial fertilisation and thus, the child born of such fertilisation was deemed to be their legitimate child.[328] Thus, a right, duty or obligation did not arise between a child born as a result of the artificial fertilisation of a woman and a person whose gamete or gametes has/have been used for the artificial fertilisation and the blood relations of that person, unless that person is the woman who gave birth to the child or is the husband of the woman at the time of the artificial fertilisation.[329]

It was therefore possible, however, that the commissioning parents would have faced legal uncertainty in the circumstances where the surrogate refused to hand over the child to them for adoption.[330] Clarke argues that where the surrogate backed out of a surrogate agreement, the commissioning couple would probably not have been able to enforce the said agreement, since the agreement would in all likelihood have been considered *contra bones mores* on the grounds that it constituted a possible devaluation or alteration of the concept of the family and the marriage relationship.[331] The SALC pointed out that section 5 of the Children's Status Act did not make provision for the implementation of the intention of the parties to a surrogacy agreement.[332] It would appear that the legislature had recognised that creating a process that allowed for the separation of so-called 'genetic' parentage from 'social' parentage, is a process best dealt with via legal recognition of the social parentage in the context of pre-existing legal obligations to children.[333]

A consideration of the provisions considered above, as well as a reading together of the Children's Status Act and the Child Care Act, points to a regime that obstructed and complicated contractual surrogacy agreements in South Africa. Chapter 19 of the Children's Act, discussed in detail elsewhere in this thesis, was based on some of the recommendations contained in the report of the South African Law Commission (as it

328 Slabbert and Roodt "South Africa" 326 Strauss, SA "Triplets to a Surrogate Grandmother in South Africa: Legal Issues" 1989 *International Legal Practitioner* 14(3) 70. Lupton, M.L "Artificial wombs: medical miracle, legal nightmare" 1997 *Medicine and Law* 16 628.
329 Sec 5(2).
330 Slabbert and Roodt "South Africa" 326.
331 Clarke 2000 *Stell LR* 13.
332 SALC Project 65 at par 1.1.3.
333 Lupton, M.L "Artificial wombs: medical miracle, legal nightmare" 1997 *Medicine and Law* 16 628.

was known at the time). Many of these recommendations were the direct result of the challenges observed and outlined in the discussion above.

5.4 Human Tissue Act[334]

The period between 12 July 1985[335] and 2 May 2005[336] marked the time during which the Human Tissue Act and Regulations[337] governed artificial fertilisation procedure in South Africa. The Human Tissue Act was repealed and replaced by the NHA and the Regulations, discussed elsewhere in this thesis. It is important to note that the Human Tissue Act required that consent (by the husband) to artificial fertilisation had to be in writing.[338] If the consent requirement was disregarded, the child was deemed illegitimate.[339] Only married women could be artificially fertilised in terms of regulation 8(1) of the Regulations to the Human Tissue Act.[340] These Regulations (regarding the artificial insemination of persons, and related matters promulgated in terms of the Human Tissue Act), made no reference to surrogate motherhood within their ambit and they only referred to artificial insemination by a donor (AID).[341]

Section 22 of the Human Tissue Act dealt with artificial fertilisation and determined that in the event that a gamete is removed from the body of a living person, that gamete shall not be used for the artificial fertilisation of another person unless the person affecting the artificial fertilisation acts in accordance with a code of practice for artificial fertilisation, published by the then Department of Health and Welfare, specified in the regulations.[342] Section 23 regulated the control of the removal and use of tissue and blood, and of artificial fertilisation. The removal of tissue from the body of a living person or the use thereof or to transplant tissue so removed in the body of another living

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334 65 of 1983. This act was repealed by Act 61 of 2003.
335 Human Tissue Act. The commencement date of the Human Tissue Act 65 of 1983.
336 National Health Act. The commencement date of the National Health Act 61 of 2003.
337 Regulations regarding artificial insemination and related matters, published in GG R 1182 of 20 June 1986.
338 Reg 8(1) of Regulations regarding artificial insemination, 1986.
339 Strauss, SA "Triplets to a Surrogate Grandmother in South Africa: Legal Issues" 1989 *International Legal Practitioner* 14(3) 70.
340 Reg 8(1) of Regulations regarding artificial insemination, 1986. SALC Project 65 at par 4.2.6.
341 Strauss *Doctor, Patient and the Law* 181 and 188. The provisions of the Human Tissue Act and the Regulations affected certain important aspects of surrogacy.
342 Sec 22. This section was repealed by section 15 of Act 51 of 1989. Strauss *Doctor, Patient and the Law* 181.

person was only allowed by a medical practitioner or dentist or a person acting under a medical practitioner's or dentist's supervision.[343] The withdrawal of any blood from the body of a living person or the administration of blood or a blood product to a living person was also only allowed by a medical practitioner or dentist or a person acting under their supervision.[344] Importantly, no person was allowed to affect the artificial fertilisation of a person except a medical practitioner or a person acting under his supervision.[345]

Regulations 6 and 10 contained specific provisions concerning the donor and recipient files respectively, and provided that strict confidentiality applied relating to the content of the files whose content may not have been made available to any other person for inspection.[346] It is important to note that the only information that the medical practitioner was allowed to disclose or make available to the recipient and her husband, was set out in regulation 6(1)(a)(ii), and these were the prospective donor's age, height, mass, eye colour, hair colour, complexion, population group, nationality, sex, religion, occupation, highest educational qualification, and fields of interest.

The above reference to the disclosure of information relating to the gamete donor raises the important issue regarding the rights of children to know their genetic heritage, considering, for example, that article 7 of the United Nations Convention on the Rights of the Child (1989) provides that children have a fundamental right to know the truth about their genetic origin. One may argue that denying a child born as a result of artificial fertilisation access to information about his or her genetic parent may possibly be contrary to the child's rights in this regard. This issue will be discussed in more detail elsewhere in the thesis.

343 Sec 23(1)(a).
344 Sec 23(1)(b).
345 Sec 23(2). This section was substituted by section 16 of Act 51 of 1989. Strauss *Doctor, Patient and the Law* 181-182.
346 Reg 6(2)(e) and reg 10(2)(b) of Regulations regarding the artificial insemination of persons, 1986. Except where any other law otherwise provides or any court so orders.

6. CONCLUSION

This chapter has shown that the legal historical development regarding the legal status of children born as a result of artificial fertilisation was in a regulatory flux, compounded by the confusion regarding the legal consequences for the parties to a surrogacy agreement, including the surrogate mother who was artificially fertilised. As surrogate motherhood was not directly regulated, some of the legal consequences following the implementation of certain statutory legal amendments were outright unjust or bizarre.

The current legal position in South Africa will next be discussed, with specific reference to chapter 19 of the Children's Act[347] and how this Act improved legal certainty to those who wish to conceive a child via artificial fertilisation and surrogate motherhood.

347 38 of 2005.

CHAPTER 3

THE SOUTH AFRICAN LEGAL FRAMEWORK GOVERNING SURROGATE MOTHERHOOD

1. INTRODUCTION

The common law position regarding artificial fertilisation in South Africa prior to the promulgation of the Children's Act,[348] discussed in chapter two, provided that a child born to a married couple where the child conceived by means of artificial fertilisation from the sperm of a donor (AID) was considered illegitimate. The need for legal reform to address the regulation of surrogacy and artificial fertilisation to protect the interests and rights of the different parties, and especially the child born as a result thereof, was self-evident. The SALC rightly pointed out that the statutory position and the common law raised more questions than it could provide answers in the implementation of surrogacy agreements[349] and that the legal position at the time was clearly not intended to regulate surrogate motherhood.[350] The introduction of the Children's Act consisting of a separate section on surrogate motherhood was indeed welcomed by legal practitioners and those considering conceiving a child via a surrogacy arrangement.[351] This chapter will explore chapter 19 of the Children's Act in detail, in addition to recent case law regarding surrogacy agreements that served before the courts in recent times.[352] The NHA and some of the Regulations promulgated in terms of chapter 8 of the NHA that are indirectly relevant to issues regarding artificial fertilisation will also briefly be referred to, where relevant. Chapter 5 of this thesis will canvass the role and impact of the NHA and regulations in more detail.

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348 38 of 2005.

349 SALC Project 65 at par 4.10.

350 SALC Project 65 at par 7.1.

351 Nicholson and Bauling 2013 *De Jure* 516. Nöthling Slabbert, M "Legal issues relating to the use of surrogate mothers in the practice of assisted conception" 2012 *South African Journal of Bioethics and Law* 5(1) 34. There are however still some practical legal and ethical issues that remain although there has been some guidance in recent judgments. Tager 1986 *SALJ* 386. There was no expressive reference to surrogate mother in both the Children's Act of 1960 and the Child Care Act of 1983. Baase M "The ratification of inadequate surrogate motherhood agreements and the best interest of the child" 2019 *Potchefstroom Electronic Law Journal* 22 1. South Africa has developed domestic legislation that governs surrogacy matters within the country. SALRC Project 140 82. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 247.

352 Jordaan DW "Surrogate Motherhood in illness that does not cause infertility" 2016 *SAMJ* 684.

This chapter will first turn to the rights of the child conceived by artificial fertilisation with reference to the Children's Act.

2. THE RIGHTS OF THE CHILD CONCEIVED BY ARTIFICIAL FERTILISATION

The Children's Act expressly regulates the rights of children born from a surrogacy agreement. The Children's Act was passed to give effect to the provisions of section 28 of the Constitution of South Africa.[353] Further, this Act enforces South Africa's obligations regarding the well-being of children in terms of the international standards and Conventions, which promotes children's rights.[354]

The pertinent sections of the Children's Act relating to artificial fertilisation are sections 40 and 296 of the Act. In analysing these sections, reference is made to some of the recommendations of the SALC and the Ad Hoc Committee to compare to what extent these suggestions for reform have been incorporated into the Children's Act.[355]

2.1 Legal status and related matters

Section 40(1)(a) of the Children's Act determines the rights of the child conceived by artificial fertilisation and states the following:

> Whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses as if the gamete or gametes of those spouses had been used for such artificial fertilisation.[356]

A child born from artificial fertilisation to a woman will be seen as legitimate, provided that both spouses gave their consent to the artificial fertilisation process.

The surrogacy process legally starts when the surrogate agreement is concluded, followed by the fertilisation of the surrogate mother. Not only must the surrogate mother consent to the procedure, but it is also presumed that both spouses have consented

353 Sec 2(a) and (b) of Children's Act.

354 Sec 2(d) of the Children's Act.

355 The SALC report on surrogate motherhood in terms of project 65 and the report of the Ad Hoc Committee on the report of the SA Law Commission on surrogate motherhood, dated 11 February 1999.

356 Sec 40 (1)(a) of the Act. Dhai and McQuoid-Mason *Bioethics, Human Rights and Health Law* 142.

to the procedure until the contrary is proved.[357] The same applies to partners in a same-sex life partnership.[358]

Section 40(2) furthermore provides, subject to section 296 of the Act, that a child born of a woman who has been artificially fertilised, by the gamete(s) of any person, must be regarded to be the child of that woman for all purposes.[359] Moreover, section 40(3) determines (also subject to section 296 of the Act), that no right, responsibility, duty or obligation in law arises between a child born of a woman as a result of artificial fertilisation and any person whose gametes were used for the fertilisation, and neither his or her blood relations.[360] Two exceptions to this rule is: (a) when that person is the woman who gave birth to the child; or (b) when that person was the husband of such woman at the time of her artificial fertilisation.[361] Importantly, the result of an invalid surrogate agreement is that the commissioning parents are not considered the legal parents of the child regardless of whether either or both of them have donated gametes for the artificial fertilisation of the surrogate.[362] Section 26(2)(b) of the Children's Act furthermore prevents a person who is biologically related to a child as a result of being a gamete donor for purposes of artificial fertilisation, to make application as a biological father claiming paternity of the child.[363]

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357 Sec 1(b) of the Act. Bosman-Sadie and Corrie *Practical approach to the new Children's Act* 60. It is stated that it is accepted until disputed that both spouses gave permission for the artificial fertilisation and that both parties will, after the birth of the child, obtain full parental rights and responsibilities. Dhai and McQuoid-Mason *Bioethics, Human Rights and Health Law* 142. The authors recommend that the practitioner must ensure that there is proper informed consent from both the parties if the husband is going to be held responsible for the expenses of the procedure and the maintenance of the child before proceeding with the artificial fertilisation procedure.

358 Sec 40(1)(a). Both the partners to a same-sex life partnership are deemed to be the parents of a child born to either one of the partners as a result of artificial fertilisation where the gamete or gametes of any person other than that woman was used. Thus, the child is deemed to be their legitimate child providing both partners consented to the use of artificial fertilisation. LexisNexis *Family Law service* at par R18.

359 Sec 40(2) of the Act. Dhai and McQuoid-Mason *Bioethics, Human Rights and Health Law* 143.

360 Sec 40(2) of the Act. Heaton 2015 *THRHR* 35. Thus, if sec 296 does not apply, the woman who was artificially fertilised and her husband or partner (if any) acquire parental responsibilities and rights to the exclusion of the gamete donors. An invalid surrogate agreement falls outside the ambit of sec 296 and thus, the provision in sec 40(3) does not apply to it.

361 Sec 40(3) of the Act. Bosman-Sadie and Corrie *Practical approach to the new Children's Act* 60. It would appear that where the husband has failed to consent to the artificial fertilisation of his wife with gametes of a donor, the child born will be regarded as extra-marital. Sec 40(3)(a) and (b). The current rule is defensible on the basis that the burdens of fatherhood should not be forced upon a person who is not the child's biological father in the absence of some act indicating a voluntary assumption of those obligations. Dhai and McQuoid-Mason *Bioethics, Human Rights and Health Law* 143.

362 Heaton 2015 *THRHR* 35.

363 Sec 26(2)(b) of the Act. SALRC Project 140 147.

Palm and Hirsh rightly observe that the most thorny issues arising from the use of artificial fertilisation are those in respect of the legal status of the child and the parental rights and obligations at divorce.[364] Depending on the type of artificial insemination method that is employed, it is possible for a commissioned child to have up to six parents.[365] This explains why it is important that the rights and obligations of each party to the surrogacy agreement be well defined, as it is possible that parentage, custody and guardianship of the child may become contested issues in the event of a disagreement between the parties.[366] The evolving world of multi-parenting is increasingly challenging the traditional notions of a parent's rights and responsibilities with regard to a child.[367] Regardless of the consequences following surrogacy agreements, children born as a result of a surrogate agreement should enjoy the same rights as children born through natural means.[368]

A recent High Court case, discussed next, provides guidance on parental rights and responsibilities of same-sex couples in respect of a child born as a result of assisted reproduction to them.

2.1.1 *EJ and others v Haupt NO*[369]

The applicants brought an application for the acquisition of responsibilities and rights regarding their child, born on 10 March 2021 and conceived through artificial fertilisation using a home insemination kit.[370] The first and second applicant ("the applicants") were married on 16 November 2019 in terms of the Civil Union Act.[371]

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364 Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 47. It is stated that courts have alluded to the notion that AIH (artificial insemination husband) does not create legal problems as the child is the natural offspring of both the husband and wife.

365 Report of the Ad Hoc Committee 29. The genetic parents, the surrogate and her husband or partner and the commissioning parents.

366 Report of the Ad Hoc Committee 29.

367 Quinn, CM "Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting" 2018 *Journal of the American Academy of Matrimonial Lawyers* 31(1) 177.

368 Oluwaseyi and Oladimeji 2021 *Obiter* 23.

369 2022 (1) SA 514 (GP).

370 *EJ and others v Haupt NO* at par 1.

371 *EJ and others v Haupt NO* at par 15.

The applicants requested a good friend (DHR) to become a gamete donor for them.[372] The first applicant became pregnant through the use of a home insemination kit.[373] The applicants entered into a donor agreement with DHR.[374] The question before the court was whether section 40 of the Children's Act makes provision for a spouse in a civil union marriage to automatically obtain parental rights and responsibilities of a child born to the other spouse during the course of their marriage where there is no genetic link between the said spouse and the child.[375] The applicants argued that section 40 does not properly deal with the issue of same-sex female couples obtaining parental rights and responsibilities by operation of law.[376] They further argued that the wording of sections 40(1) and 40(3) relate to a married heterosexual couple and not to a same-sex female couple.[377] Section 292 to section 303 make provision for the acquisition of parental rights and responsibilities in respect of surrogacy, and although these refer to a single person, husband, wife or partner, they do not apply to the partner or spouse of a child that is born as a result of artificial fertilisation.[378] Another issue for the court to consider was whether the interests of the parties and the child are adequately protected and provided for by the current prevailing legislation and specifically section 40.[379]

Section 40(1) clearly relates to spouses only.[380] Section 40(3)(b) makes reference to the word "husband", which means that only a man will be able to provide the second gamete for fertilisation of the ovum.[381] This is aligned with the provision that no right, responsibility, duty or obligation arise between the sperm donor (unless he is the husband of the woman who is artificially fertilised) and the child (born from artificial fertilisation) to prevent any common law obligation that arise between the sperm donor and the child.[382] *In casu*, Neukircher J rightly observes that because the word "marriage" includes a Civil Union, the word "spouse" as referred to in section 40(1),

372 *EJ and others v Haupt NO* at par 18.
373 *EJ and others v Haupt NO* at par 20.
374 *EJ and others v Haupt NO* at par 21.
375 *EJ and others v Haupt NO* at par 4. The court also had to answer the question of whether sec 40 is unconstitutional. This aspect will be dealt with in ch 4.
376 *EJ and others v Haupt NO* at par 28.2.
377 *EJ and others v Haupt NO* at par 28.3.
378 *EJ and others v Haupt NO* at par 28.4.
379 *EJ and others v Haupt NO* at par 40.
380 *EJ and others v Haupt NO* at par 59.
381 *EJ and others v Haupt NO* at par 60.
382 *EJ and others v Haupt NO* at par 60.

should include a person married in terms of the Civil Union Act.[383] Section 40(1) should thus apply to a same-sex couple too.[384]

The court explains that the purpose of section 40 is to create legal certainty in respect of acquiring parental rights and responsibilities where the child is born as a result of artificial fertilisation.[385] The use of the word "spouse" in section 40(1) furthermore does not contradict the use of the word "husband" in section 40(3)(b), as each provision clearly has its own separate legal focus.[386] In view of the conclusion that section 40(1) includes same-sex female couples, it automatically confers rights and responsibilities on the spouses of a child that is born as a result of artificial fertilisation.[387] Both the applicants thus have the same rights and responsibilities in respect of the child from the moment of the child's birth and no adoption application has to be brought by the second applicant in respect of the said child.[388]

2.2 Access to information regarding a child's genetic parents

Where a child is born because of a surrogacy agreement, it is possible that the child may be genetically related to only one of the commissioning parents. There is a chance that the child may want to know more about his or her genetic parents, especially the genetic "donor" parent, at some stage.

In South African law, different laws apply to a child's right to access information relating to his or her gamete donor "parent", which include the Constitution (chapter 2); the Promotion of Access to Information Act,[389] (hereafter PAIA), as well as the Children's Act. Section 32 of the Constitution provides that every person has the right of access to any information held by the state and any information that is held by another person, which is essential for the exercise or protection of any rights of such person.[390] Section

383 *EJ and others v Haupt NO* at par 63.
384 *EJ and others v Haupt NO* at par 64 and 73.
385 *EJ and others v Haupt NO* at par 65.
386 *EJ and others v Haupt NO* at par 71.
387 *EJ and others v Haupt NO* at par 74. The limited application of sec 40(3)(b) does not have a bearing on the present factual matrix.
388 *EJ and others v Haupt NO* at par 74.
389 2 of 2002.
390 Sec 32(1) of the Constitution of South Africa.

3 of the PAIA[391] applies to a record of a private body and a public body irrespective of when it came into existence.[392] Section 9 sets out the objects of the Act[393] and provides in section 9(a) that the Act's purpose, among others, is to give effect to the constitutional right of access in terms of section 32 of the Constitution,[394] subject to justifiable limitations,[395] aimed at the reasonable protection of privacy.[396] The manner in which the Act should give effect to the constitutional right should balance this right with any other rights, including those rights as set out in the Bill of Rights in chapter 2 of the Constitution.[397]

Section 30 of PAIA provides for the regulation of access to health and other records. In the event that the disclosure of the record (held by a medical practitioner), requested by the relevant person may cause serious harm to the person's mental- or physical health or well-being in the opinion of the information officer, he or she may consult with a medical practitioner before providing the record or information so requested.[398] A person with parental responsibilities may make a request for a record on behalf of a child younger than sixteen years old.[399] In the event that the medical practitioner—with who was consulted—is of the opinion that the disclosure of the record would be likely to cause serious harm to the relevant person's physical or mental health or well-being, the information officer may only provide access to the record if the relevant person proves that adequate provision is made for such counselling or other arrangements as are reasonably practicable before, during or after the disclosure of the record.[400] The person responsible for such counselling or arrangements must be given access to the record before access is provided to the relevant person requesting the access.[401] Section 50 determines the right to access any record held by a private body[402] by providing that access to any record of a private body must be given to the requester if

391 2 of 2002.
392 Sec 3 of PAIA.
393 Sec 9 of PAIA.
394 Sec 9(a) of PAIA.
395 Sec 9(b) of PAIA.
396 Sec 9(b)(i) of PAIA.
397 Sec 9(b)(ii) of PAIA.
398 Sec 30(1) of PAIA. Sec 30(1)(a) and 30(1)(b). The relevant person is the requester or a person making a request on behalf of a person to whom the information relates to. The medical practitioner is nominated by the relevant person.
399 Sec 30(2)(a) of PAIA.
400 Sec 30(3)(a) of PAIA.
401 Sec 30(3)(b) of PAIA.
402 Sec 50 of PAIA.

the record requested is required for the exercise or protection of any rights (section 50(1)(a)), subject to the proviso that the relevant person has complied with the relevant procedural requirements set out in the Act.[403] Section 50(3) determines that a request for a record from a private body includes a request for access to a record containing personal information about the relevant person.[404]

The reason why these sections are relevant for this chapter is that they may apply to records kept in hospitals where children are born because of a surrogacy agreement or artificial fertilisation. These children may justifiably want to have access to information necessary for the protection of their rights. They may request access to hospital files themselves (if older than sixteen years old) or other persons with parental rights, may request the information on their behalf.

Against the background of PAIA, it is also necessary to consider section 41(1) of the Children's Act, titled "Access to biographical and medical information concerning genetic parents". This provision directs that a child born because of artificial fertilisation in general and surrogacy, including the guardian of such child, is entitled to have access to any medical information regarding such child's genetic parents (section 41(1)(a)). Section 41(1)(b) furthermore provides that such child (or his or her guardian) is entitled to access *any other information* concerning the child's genetic parents, provided that the child is eighteen years old or older (section 41(1)(b)). Section 41 must be read together with sections 292 to 302 of the Children's Act.[405] Section 41 makes it clear that the information that may be provided to the child is limited to medical information relating to his or her genetic parents.[406] Only after the child turns eighteen years old is he or she allowed access to any other information relating to his or her genetic parents.[407] The child is not allowed to have access to information that will reveal the identity of the gamete donors or that of the surrogate mother.[408]

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403 Sec 50(1)(b) of PAIA.

404 Sec 50(3) of PAIA.

405 Children's Act 38 of 2005. Davel, CJ and Skelton, AM Commentary on the Children's Act (Jutastat e-publications, revision service 9, 2018 chapter 19) 36. Sloth-Nielsen "Surrogacy in South Africa" 196.

406 Sec 41(1) of the Act. Dhai and McQuoid-Mason *Bioethics, Human Rights and Health Law* 143.

407 Sec 41(1) of the Act.

408 Sec 41(2) of the Act. SALRC Project 140 103 – 104 and 147. It is unclear whether the child will be able to access medical information only regarding the surrogate mother and if it is any other non-identifying information. Davel and Skelton *Commentary* 36. It is important to note that where

It is commendable that section 41(3) determines that the relevant authorities providing the information may require a person to undergo counselling prior to the disclosure as a result of the potential sensitive nature of the information being revealed.[409] Contrary to section 41, the SALC was of the view that because the commissioned child is from the moment of birth regarded as the commissioning parents' own legitimate child, the question of the child's origins should be left in the hands of the commissioning parents.[410] The right to know one's biological or genetic origins will be discussed next, so as to better understand the challenges and limitations imposed on this right.

2.3 The right to know one's biological or genetic origins

The Constitution does not expressly provide for the right to know one's origins,[411] despite the observation by the SALRC in the Issue Paper on the right to know one's

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the child is genetically linked to only one of the commissioning parents, the child will not be allowed to know the identity of his or her other genetic parent. Further, the child will not be allowed to find out who gave birth to him or her. Thaldar D "Surrogate Motherhood and scaremongering: Is South Africa entering an age of post-truth jurisprudence?" 2018 *De Rebus* 29. The issue of knowing the identity of one's egg or sperm donor is ethically controversial and since the AB judgment, the South African Law Reform Commission has commenced with an investigation into whether a donor-conceived child should be given a right to find out the identity of his or her donor. Sloth-Nielsen "Surrogacy in South Africa" 196. The writer pointed out that sec 41 is consistent with the object of sec 294 to ensure that the child becomes aware of its genetic origin and this is so even if the provision does not allow access to information regarding the identity of the surrogate mother in terms of sec 41(2). Skosana 2017 *Obiter* 265 and 266. The author states that the parties can voluntarily provide for such disclosure. He explains that it is however obvious that a child who is not aware of the fact that his social parent(s) is or are not his or her genetic parents cannot ask for information about his or her genetic parent. An obvious situation where a child may have questions about his or her origin is where his or her parents are same-sex partners. At p.267. Thus, the decision to inform the child of his or her genetic origin lies with the persons who has parental rights and responsibilities of the child Oluwaseyi and Oladimeji 2021 *Obiter* 34. The authors stated that this is however contrary to section 7 of the UNCRC which provides that a child has the right to know his or her origins. *AB and another v Minister of Social Development* at par 30. At par 155 the court stated that the effects of sec 41 is that a child born as a result of surrogacy is, as of birth, barred by law from finding out the identity of a gamete donor who contributed to his or her conception Dhai and McQuoid-Mason *Bioethics, Human Rights and Health Law* 143.

409 Sec 41(3) of the Children's Act. Davel and Skelton *Commentary* 37. *AB and another v Minister of Social Development* at par 254.

410 SALC Project 65 at par 8.4.3. Report of the Ad Hoc Committee 75. The Committee recommended that if the child is younger than ten years, the parents should have the discretion as to whether or not to inform him or her about his or her birth as a result of a surrogacy agreement. If the child is older than ten years, he or she should be informed about his or her genetic background. In all instances emphasis should be placed on the best interests of the child.

411 Rosenberg, W "Does the right to know one's origins exist and can it be limited?" 2020 *Journal of South African Law* 2020(4) 724 and 726.

own biological origins that the well-being of a child is clearly linked to his or her right to identity.[412]

Disclosure of the identities of tissue and gamete donors is prohibited in terms of the NHA and the Regulations in respect of artificial fertilisation.[413] This means that the commissioning parent(s) has(have) no right to learn the identity of the donor or solicit donor-identifying information from any other source.[414] Biko and Nene state that a child born as a result of artificial fertilisation has a right to non-identifying medical and genetic information about his or her biological parents that is relevant to their own health status and risks.[415] The authors point out that a failure to protect the anonymity of gamete donors may have the result of a collapsing third-party reproductive program.[416]

The right to know one's biological or genetic origins should also be considered with reference to Article 7 of the United Nations Convention on the Rights of the Child,[417]

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412 SALRC Project 140 12 and 104. At 31 it is stated "It is precisely because genetic information is thought to be of particular relevance that one might believe that access to this information is of fundamental value. A defence of a right to know one's genetic parentage thus presupposes the particular significance of genetic information for people's lives. Given the increasing emphasis on the idea that genetics can explain all kinds of things about human beings, stressing the importance of genetic information might well promote problematic beliefs about genetic essentialism." Importantly, at 33 the SALRC stated: "Anonymous donations prevent donor-conceived individuals from gaining access to identifying information about their donors. This constraint does not thwart a vital interest in forming a healthy identity; it might threaten an interest in developing a particular identity, but the moral weightiness of an interest in forging a particular identity is questionable. Because of the privileging of genetic relationships presupposed by a defence of a right to know one's genetic origins, the defence could have negative effects on the well-being of donor-conceived people and their families." It was also pointed out that there is a lack of robust empirical evidence that donor-conceived people suffer certain harms and that even if such harms are present, they do not provide strong enough justification to ground the right to know one's own biological origins. It is further explained that some donor-conceived individuals who are unable to know their genetic origins may suffer great harms where others may suffer no harm at all. At 45 it is pointed out that once it is shown that no harm, no foul does not apply in a child's right to disclosure, the child's right to know their genetic parents is comprised of two distinct claims, namely: (a) the right to access identifying information regarding one's donor based on one's claim to be free from psychological harm arising from lack of access to identifying information; and (b) the right to be told about the nature of one's conception based on one's claim to respect as an identity-holding individual. Van Niekerk 2015 *PELJ* 421. A right to know one's genetic origins plays an important role in forming one's identity.

413 SALRC Project 140 16. The relevant regulations will be discussed in ch 5. Skosana 2017 *Obiter* 268. The regulations will be discussed in detail in ch 5.

414 SALRC Project 140 12.

415 Biko J and Nene Z "Ethics aspects of third-party reproduction" 2017 *Obstetrics & Gynaecology Forum* 3 15.

416 Biko J and Nene Z "Ethics aspects of third-party reproduction" 2017 *Obstetrics & Gynaecology Forum* 3 15.

417 Reference to the CRC is important as it became the first legally binding international convention to confirm human rights for all children. The Convention was signed by South Africa in 1993 and ratified it on 16 June 1995. The CRC was the first international treaty that the incoming South

which provides not only that a child should be registered immediately after birth, but also that he or she shall have the right to a name (from birth), the right to acquire a nationality and, importantly, the right to know and be cared for by his or her parents as far as possible.[418] The UNCRC's recognition of the right to know one's origins[419] is justified by psychological studies that emphasise that a child who is denied information regarding his or her genetic or biological origins may experience feelings of sorrow, emptiness or isolation, including an incomplete self-image.[420] Although the psychological impact of not knowing one's origins is a subjective question,[421] it is generally agreed that the right to knowledge of one's origins may assist in fostering a child's sense of emotional security and to develop a healthy identity and self-image.[422] Further, giving effect to this right may strengthen the child's sense of completeness and belonging; self-respect; a sense of security and the ability to cope with life situations.[423] The right to knowledge of one's origins also protects a person's right to know.[424]

Since the psychological impact of not knowing your origins is ultimately a subjective question, each child's individual circumstances will determine the effect of these on the child's or person's sense of emotional security or development of a healthy identity. Not every child or person born from artificial fertilisation or surrogacy may necessarily have the need or the longing to find out who his or her biological parent is.

African democratic government ratified. "The United Nations Convention on the Rights of the Child (commonly abbreviated as the CRC or UNCRC) is a human rights treaty which sets out the civil, political, economic, social, health and cultural rights of children. The CRC consists of 54 articles that set out children's rights and how governments should work together to make them available to all children." Fast facts UNCRC to be accessed from https://www.parliament.gov.za/storage/app/media/Pages/2019/november/19-11-2019_30_Year_Commemoration_of_the_United_Nations_Convention_on_the_Rights_of_the_Child/docs/FAST_FACTS_UNCRC_draft_2_19_November_2019final.pdf (accessed on 10 August 2021).

418 A copy of the United Nations Convention on the Rights of a child is to be accessed from https://www.ohchr.org/en/professionalinterest/pages/crc.aspx (accessed on 10 August 2021).

419 Rosenberg 2020 *TSAR* 734. Oluwaseyi and Oladimeji 2021 *Obiter* 24. The authors stated that the right to know one's parents in article 7 has been interpreted to mean providing a child with information concerning his or her biological origins and the circumstances surrounding his or her birth. Further, failure to avail children of this information affects their ability to develop a sense of identity and identity is a person's unique profile of which genetic origin is a key feature. Thus, a child's right to identity cannot be achieved if the child is not aware of his or her biological origins as this is one of the determining factors that make a child understand who they are.

420 Rosenberg 2020 *TSAR* 724.

421 Rosenberg 2020 *TSAR* 728.

422 Rosenberg 2020 *TSAR* 740.

423 Rosenberg 2020 *TSAR* 740.

424 Rosenberg 2020 *TSAR* 745.

The next section will comprehensively discuss the salient legal issues in chapter 19 of the Children's Act.

3. SALIENT ISSUES RELATING TO CHAPTER 19 OF THE CHILDREN'S ACT

3.1 Introduction

The rationale behind the promulgation of chapter 19 of the Children's Act has been set out in chapter one of this thesis. It should be borne in mind that the inclusion of chapter 19 into the Children's Act pertains to surrogacy specifically, which, as this chapter will illustrate, applies to couples who are infertile only and not for those who are fertile and able to procreate without assistance.[425]

Chapter 19 of the Children's Act, and more specifically sections 293 to 303, were enacted to regulate the practice of surrogacy in South Africa and to give legal certainty regarding the rights of the children born as a result of surrogacy and that of the different parties involved.[426] Chapter 19 thus regulates the legal consequences of human reproduction by artificial fertilisation of women acting as surrogate mothers.[427] In an attempt to regulate surrogate motherhood instead of to outlaw it, the Act contains a number of restrictions on surrogacy agreements.[428]

Since artificial fertilisation plays an important role in surrogate motherhood, two aspects relevant to artificial fertilisation are worth mentioning.[429] Previously, in terms of the Human Tissue Act and attendant Regulations published in 1986, artificial

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425 Van Niekerk 2015 *PELJ* 416. The author states that the only slight on ch 19 is the existence of sec 294. This section effectively distinguishes between persons suffering from infertility which prevents them from providing genetic material to produce a child and those who are infertile but able to provide genetic material. In both these cases the parties are infertile and it is only the origin of their infertility which distinguishes them.

426 Ch 19 came into operation on 1 April 2010. Nöthling Slabbert 2012 *SAJBL* 27. Slabbert and Roodt "South Africa" 325. Louw 2013 *THRHR* 564. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 246.

427 Nöthling Slabbert 2012 *SAJBL* 27.

428 Bonthuys and Broeders 2013 *SALJ* 490.

429 LexisNexis *Bill of Rights Compendium* at par 3E27.

fertilisation could only be performed by a competent person upon a married woman.[430] The exclusion of unmarried women from receiving artificial fertilisation would probably have been held to constitute a violation of the constitutional right to equality in terms of section 9(3) of the Constitution of South Africa, had this still been the case today.[431] Fortunately and rightly so, the Children's Act has since removed the restriction that artificial fertilisation may only be performed upon married women.[432]

3.2 Nature of surrogate motherhood agreements

In the judgment of *Ex Parte MS and Others; In Re: Confirmation of surrogate motherhood agreement*,[433] Keightley AJ observes that surrogate motherhood agreements, or surrogacy arrangements as they are known in short, are multifaceted and that they require a consideration of many interconnected concerns, ranging from those that are deeply personal to the parties' involvement, to those that deal with the necessary practical aspects of the arrangement.[434] The judgment emphasises that the legal complexities of surrogacy arrangements are of overriding concern, as these arrangements involve an intricate relationship of interests, rights and obligations on the part of all parties concerned.[435]

The first and second applicants in this case, and the third applicant, the surrogate mother, sought confirmation of their surrogate motherhood agreement in terms of sections 292 and 295 of the Children's Act. An issue raised before the court was whether it is competent for the high court to confirm a surrogate motherhood agreement where the written agreement between the parties was only entered into (and confirmation sought) *after* the artificial fertilisation and pregnancy of the surrogate mother. The Children's Act requires that surrogate motherhood agreements must be

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430 Reg 8(1) of the regulations issued in terms of sec 37 of the Human Tissue Act 65 of 1983 and which was published in the Government Gazette 10238 GN R1182 20 June 1986. Nicholson and Bauling 2013 *De Jure* 513.

431 108 of 1996. The state may not discriminate unfairly against anyone on the grounds of his or her marital status. LexisNexis *Bill of Rights Compendium* at par 3E27.

432 Sec 292 and 293 of the Children's Act only makes reference to the surrogate mother's husband and partner should there be one. Sec 40(2) makes reference to a 'woman'. There is no provision that states that the surrogate mother (sec 292 and 293) or the woman (sec 40) must be married. LexisNexis *Bill of Rights Compendium* at par 3E27.

433 This case will be discussed in par 3.7.8.

434 2014 (2) All SA 312 (GNP) at par 7.

435 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 7.

formally constructed, vetted and confirmed by the High Court before any steps are taken that might lead to the conception of a child. Since the artificial fertilisation of a surrogate is expressly prohibited until a surrogate motherhood agreement has been confirmed by the court, the parties in this case were therefore in breach of the Act. So, the question whether, despite the breach, the court could confirm the surrogate motherhood agreement, had to be answered. The granting of such relief would depend on the best interests of the child. The court confirmed the surrogacy agreement after finding that the best interests of the child would be best served by confirming the agreement.

The judgment echoes the legal position that artificial fertilisation of a surrogate mother is specifically prohibited unless and until a surrogate agreement has been confirmed by the court.[436] In the above case, the reason for the confirmation of the surrogacy agreement is obvious: the best interests of a child are of paramount importance in every matter regarding the child as in terms of our Constitution.[437] It can be said that, in essence, surrogacy agreements are primarily concerned with the child to be born, explained by Keightly AJ as follows:

> […] although the hoped-for-child is not a party to the surrogate motherhood agreement, his or her future rights and interests are the most important of all the rights and interests involved. To ensure that they are adequately protected, the law requires certainty and judicial scrutiny of the proposed surrogacy arrangements before there is even any prospect of a child coming into being.[438]

The two important questions which arose in the matter of MS, in which the court was asked to confirm a surrogacy agreement, were the following:

> First, is it competent under the Act for a court to confirm the surrogacy agreement notwithstanding this breach? The Act does not deal with this question in any express terms, and I must derive the answer from interpretation of all the relevant provisions. Second, if, on a proper interpretation of these provisions I find that a court is so competent, what is the correct approach to be adopted in cases like the present? In other words, what is required of the applicants, and on what basis should courts exercise their discretion regarding confirmation of surrogacy agreements in such cases?[439]

The discussion that follows next will explore some pertinent provisions in chapter 19 of the Children's Act, notably the requirements for a valid surrogacy agreement (sections 292 - 296), including the relevant consent requirements; the controversial and

436 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 8.
437 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 9.
438 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 9.
439 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 10.

contested genetic link requirement; the High Court's confirmation of the surrogacy agreement and the artificial fertilisation of the surrogate.

The consequences of a valid surrogate agreement on the status of the child born because of the agreement will be discussed, as well as the termination of the surrogate agreement (section 298) and the consequences thereof (section 299). A discussion on the termination of the pregnancy by the surrogate mother is canvassed next (section 300), as well as the prohibitions relating to surrogacy (sections 301 – 302). Relevant judgments on these components will also be discussed.

3.3 Section 292: Requirements for a valid surrogate agreement[440]

Parties who intend to exercise their reproductive rights by using surrogacy are required to conclude a written agreement that results in the complete transfer of parental rights and responsibilities from the surrogate to the commissioning parents when the commissioned child is born.[441] Section 292 of the Children's Act sets out the requirements for a validly concluded and confirmed surrogate agreement.[442] It provides that the agreement between the parties must be in writing and signed by all the parties

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440 The Act. See further *In re confirmation of three surrogate agreements* 2011 (6) SA 22 at par 15. *Ex parte WH and others* at par 38. At par 71 the court stated that: "While a surrogacy agreement is a contract whose validity is dependent upon the confirmation of the High Court, it is a contract of a special kind, unique if regard is being had to its subject-matter. The arrangement that comes into place when a surrogacy agreement is arrived at and the consequences that may follow have far-reaching and sometimes unintended consequences." *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 18. Bosman-Sadie and Corrie *Practical approach to the new Children's Act* 293. Nöthling Slabbert 2012 *SAJBL* 28. Nicholson and Bauling 2013 *De Jure* 516. *AB and another v Minister of Social Development* at par 39.

441 Baase 2019 *PELJ* 2. Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 433.

442 Oluwaseyi and Oladimeji 2021 *Obiter* 31.

involved;[443] the agreement must be concluded in the Republic of South Africa;[444] at least one of the commissioning parents (or if it is a single commissioning parent, that person) must be domiciled in South Africa at the time of conclusion of the agreement;[445] the surrogate mother (and her husband or partner if any) must be domiciled in South Africa at the time of concluding the agreement;[446] and the High Court within whose area of jurisdiction the commissioning parent(s) are domiciled or habitually residing, must confirm the agreement.[447]

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443 Sec 292(1)(a). SALC Project 65 at par 8.3.1. It is compulsory for the parties that they enter into a written agreement Report of the Ad Hoc Committee 65. It is important to establish the intention of the parties as to parental rights and their willingness to proceed with this intention. The Committee recommended that the following provisions be contained in the agreement: (a) The nature of the surrogacy (full/partial) should be identified and the parties should be provided with the current status of the law in each instance; (b) The surrogate and commissioning parent(s) should understand and agree to the terms of the agreement and the legal position relevant to their particular surrogacy agreement; (c) Specific responsibilities for each party should be established; (d) The financial responsibilities of the parties should be established regarding the expenses related to pregnancy and requiring funds to be placed in a trust account to cover the anticipated expenses; (e) The commissioning parent(s) should state that they will accept parental responsibility for the commissioned child, despite any medical or physical handicaps that the child might suffer; (f) Health insurance policies to be maintained by all the parties throughout the agreement must be stated; (g) The parties must deal with all the eventualities which could lead to either the surrogate or the commissioning parent(s) requesting an abortion and in the even that the surrogate terminate the pregnancy for non-therapeutic reasons that she is responsible for reimbursing and repaying the commissioning parent(s) for the necessary expenses incurred; (h) Any arrangements regarding the child should be specified, for example, visitation rights, access to the child etcetera. Provision should be made for custody of the child in the event of divorce or death of the commissioning parent(s); (i) It can be jointly decided between the parties if the surrogacy agreement is to be publicised. It is however important that the identity of the child is not revealed; and (j) Social disease testing (including HIV) must be performed on all the parties. The surrogate must be medically examined and declared suitable. The agreement may include optional clauses but it may not be contra bones mores. Slabbert and Roodt "South Africa" 331 SALRC Project 140 84. Mills 2010 *Stell LR* 435. Sloth-Nielsen "Surrogacy in South Africa" 187.

444 Sec 292(1)(b). SALC Project 65 at par 8.3.7. The agreement should be concluded in the Republic of South Africa and all the parties concerned should be domiciled in the country at the time of the conclusion of the agreement. LexisNexis *Family Law service* at par W3.

445 Sec 292(1)(c). LexisNexis *Family Law service* at par W3. It is argued that by opening South African surrogacy practices to foreign nationals may lead to complex questions being raised on the nationality of the child in instances where the commissioning parent(s) are foreign nationals. Sloth-Nielsen "Surrogacy in South Africa" 187. At 199 the writer states that domicile is a legal concept and it is not equitable to habitual residence. It can be established quite quickly provided that the necessary intention to establish domicile is in place. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 247. The writers explain that the requirement of domicile is found where a person is legally deemed to be constantly present even if factually absent. It is important to note that 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.

446 Sec 292(1)(d). Report of the Ad Hoc Committee 58. Nöthling Slabbert 2012 *SAJBL* 27. Through this limitation, South Africa is a less attractive reproductive tourism destination.

447 Sec 292(1)(e). Report of the Ad Hoc Committee 65. At p.70 the Committee submitted that once the court has confirmed the agreement, it should be a valid and enforceable document. Thus, in this way, the parties are legally bound by the agreement and the interests of the child is protected. SALRC Project 140 84. LexisNexis *Family Law service* at par W3. It is important that sufficient

Non-compliance with the requirements will cause the agreement to be invalid and thus unenforceable between the parties.[448] This is aligned with the Ad Hoc committee's response to the South African Law Commission's (SALC) Project 65, that a pre-approved agreement would assist to ensure that the interests of the parties to the surrogate agreement could be considered in advance before any problems would arise.[449] The pre-approved agreement can further be seen to protect the best interests of the commissioned child, as the rights and obligations in respect of the child will also be considered in such agreement and therefore further endorsed through the confirmation by the court of the agreement. Possible future issues may be anticipated in the agreement before the agreement is confirmed by the court.

The rights of children and their interests must always be placed first, even in circumstances where the rights of the prospective parents may be compromised.[450] The best interests of the children is the overriding factor.[451] It is for this reason that the requirement of a *prior, formally approved surrogate agreement* has always been considered vital in order to minimise the risks intrinsic in surrogacy.[452] The conclusion to be drawn from this (i.e the requirement of confirmation of the surrogacy agreement by the court) is that the general principles of the law of contract were deemed inadequate by the legislator to exclusively regulate the rights and the duties of the parties concerned in a surrogate agreement.[453] Despite the importance of an

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facts be set out in the founding affidavit in support of the commissioning parent(s) application to support their domicile or the place of their habitual residence that will give the court jurisdiction.

448 Sec 292. See also Nicholson and Bauling 2013 *De Jure* 518. Sloth-Nielsen "Surrogacy in South Africa" 199. It is important to note that a surrogacy agreement concluded between foreign nationals who are not domiciled in South Africa would be invalid and unenforceable and this is regardless of whether it is an altruistic or commercial surrogacy agreement. Thus, the commissioning parents would acquire no rights in respect of the child born and would also likely be ineligible for adoption with reference to the requirements of sec 25 of the Children's Act which foresees such applications as being treated as inter-country adoptions, which must be dealt with in accordance with the Hague Convention on Intercountry Adoption (1993) and which South Africa has ratified.

449 The South African Law Commission's *Report on Surrogate Motherhood* (1999) was referred to a parliamentary *Ad Hoc* Select Committee for further investigation and a report. Davel and Skelton *Commentary* 10.

450 *Ex parte CJD and others* 2018 (3) SA 197 (GP) at par 10.

451 Sec 28 of the Constitution of the Republic of South Africa 1996. *Ex parte CJD* at par 10. C and Others v Department of Health and Social Development, Gauteng and Others (CCT 55/11) [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC). Article 3(1) of United Nations Convention on the rights of the child (CRC). Article 4 of African Charter on the rights and welfare of the child (ACRWC).

452 Davel and Skelton *Commentary* 10.

453 Nicholson and Bauling 2013 *De Jure* 517.

agreement between the parties, the SALC held the view that an agreement should merely be a starting point for the parties, as legislation is better suited to determine the surrogacy procedure, including the rights and duties of the parties and the legal consequences.[454] The SALC never insisted on a formal confirmation of the agreement. The underlying aim of the confirmation by the court-requirement in section 292(1)(b) was to prevent couples from concluding surrogacy agreements in other jurisdictions where the procedure is less cumbersome.[455] The domicile requirement pertaining to the commissioning couple and the surrogate mother applies at the time of the conclusion of the agreement and thus also excludes the possibility of foreigners abusing legalised surrogacy in South Africa.[456] Clarke argues that persons who are temporarily living abroad and who are still domiciled in the Republic will have to ensure that they are physically present in the Republic for the purposes of signing of the surrogate agreement.[457] Heaton rightly points out that South African citizenship or permanent residence in South Africa does not, on its own, permit a person to become a commissioning parent or a surrogate in South Africa.[458] The provision in section 292(2), however, allows the court to dispose of the domicile requirement for good reason in the case of the surrogate mother or her partner.[459] For example, where the commissioning parent or couple can only find a relative not domiciled in South Africa to act as the surrogate, it may arguably be justifiable to dispense with the domicile requirement.[460] The domicile requirement does not prevent the pregnant surrogate from leaving South Africa to evade the legal consequences of the valid surrogate

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454 SALC Project 65 at par 8.3.

455 Heaton 2015 *THRHR* 30. The author stated that the domicile requirement is clearly an effort to discourage international surrogacy and to avoid that South Africa become a destination for reproductive tourism.

456 Sec 292(1)(c) and (d). SALC Project 65 at par 8.3.7. Davel and Skelton *Commentary* 10. The *lexi loci contractus* will thus be South African law. Heaton 2015 *THRHR* 30. It is thus important to note that the surrogate agreement may only be concluded after the commissioning parent has established a domicile in South Africa. Domicile of choice is at issue where a foreigner comes to South Africa for the purposes of entering into a surrogacy agreement to obtain a child.

457 LexisNexis *Family Law service* at par W3. Sec 292(1)(b).

458 Heaton 2015 *THRHR* 30. At 46 the author pointed out that a provision should be inserted in the Children's Act 38 of 2005 which expressly requires a thorough investigation into whether foreign commissioning parents really do meet the domicile requirement. Detailed information is thus necessary.

459 Sec 292(2).

460 Davel and Skelton *Commentary* 9. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 249. The writers point out that the High Court can dispense with the domicile requirement in relation to the surrogate mother but not the commissioning parents.

agreement.[461] There is unfortunately no provision in the relevant sections prohibiting the surrogate from leaving the country after the surrogate agreement is confirmed and after she is artificially fertilised. The commissioning parent(s) must thus accept this risk, although they may be unaware of this possibility. Prospective commissioning parents should be alerted to this possibility and that there is basically no protection for them in this regard.

Florescu and Sloth-Nielsen argue that the domicile requirement seems to imply that surrogacy agreements concluded abroad will not be recognised in South Africa.[462] Further, South Africans are not prevented from obtaining a child through surrogacy abroad. However, despite this possibility, they may encounter considerable difficulties in having their parentage recognised domestically.[463]

Section 292(1)(d) requires the High Court (and no other court) to confirm the surrogacy agreement. Section 292 does not provide any guidance to the parties as to what information is needed before the court can confirm such an agreement. This section only refers to the conclusion of the agreement in the Republic and the domicile requirement. In the *matter* of *Ex parte CJD and others,*[464] Tolmay J emphasises that it is important that all aspects of relevance to the issue of whether a surrogacy agreement should be confirmed by the court should be set out in the affidavit.[465] The best interests of the commissioned children are at stake and the applicants must play open cards

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461 Davel and Skelton *Commentary* 9. Heaton 2015 *THRHR* 33. Heaton points out that the surrogate can escape the enforcement of a valid surrogate agreement by leaving South Africa for a country where surrogacy is not recognised and where the rules of private international law will not permit the recognition and the enforcement of the South African confirmation court order.

462 Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 249.

463 Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 249.

464 2018 (3) SA 197 (GP).

465 *Ex parte CJD and others* at par 11. The court stated that the applicants must act with the utmost good faith in an application to confirm a surrogacy agreement. SALC Project 65 at par 8.3.2. The commission submitted that the parties should provide the court with all the evidence necessary to prove that all legislation has been or will be complied with. This includes medical and psychological evidence with regard to the inabilities and needs of the commissioning parents, the suitability of the surrogate, the origin of donor gametes, the interests of descendants and adopted children and particulars as to the fertilisation process that will be followed.

with the court.[466] Tolmay J further emphasises that the court has an obligation to protect and advance the best interests of children, and that all role players have an obligation to ensure that all relevant information that may impact on the court's discretion to grant or dismiss the application for confirmation, is set out in the affidavit.[467] It is unfortunate that the Children's Act does not provide guidelines regarding supporting documentation that the parties should submit to the court in support of a surrogacy agreement confirmation in the form of regulations promulgated in terms of the Act.[468]

Parties to a surrogacy agreement must realise that section 292 determines that no surrogacy agreement shall be valid unless all the requirements set out in the section are complied with. One aspect that this section does not address is the risk of the surrogate leaving the Republic after the conclusion of the surrogacy agreement. Regulations should provide guidance as to how this risk should be addressed or resolved. A surrogate who is not biologically related to the commissioned child can then flee with the commissioning parents' biologically related child and there is no provision safeguarding the interests of the commissioned child or of the commissioning parents in this scenario. Regulations should at least require that the surrogate mother discuss her intention to leave the Republic with the commissioning parents first. It would appear that the commissioning parents' only remedy would be relying on the contractual provisions governing a breach of contract (which would occur if the surrogate mother failed to honour the agreement to deliver the child).

This discussion identified some of the legal gaps regarding surrogate motherhood agreements. Not only is clarity required as to exactly what type of information and supporting documentation should be included in an application for the confirmation of a surrogate agreement, but risk of the surrogate mother leaving the Republic without

466 *Ex parte CJD and others* at par 12. See further *In re confirmation of three surrogate agreements* at para 16.

467 2018 (3) SA 197 (GP) at par 13. The court concluded at par.15 that parties in surrogacy agreements should set out the following in the founding affidavit: (a) If and how the applicants will function as a family unit and whether they are comfortable with society regarding them as such; (b) Whether they are living together or not, and if not, why this state of affairs will not impact on the interests of the child and them functioning as a family unit.

468 Nicholson and Bauling 2013 *De Jure* 517.

delivering the child should also be clarified (e.g whether this is governed by the contract between the parties only).

The next section will focus on the legal consequence of an invalid surrogacy agreement for all parties involved, especially for the commissioned child.

3.4 Section 293: Consent of the commissioning mother- and surrogate mother's husband, wife or partner[469]

Where a commissioning parent is married or in a permanent relationship, he or she must obtain the written consent of his or her husband, wife or partner before a surrogate agreement is concluded, as the husband, wife or partner must be a party to the agreement, before a court may confirm a surrogacy agreement.[470] The same consent requirement is also applicable should the surrogate be married or in a permanent relationship.[471] It is possible for the court to confirm the agreement in circumstances where the husband or partner of the surrogate (who is not the genetic parent of the child) unreasonably withholds his or her consent.[472]

Section 293(1) envisions a situation where a commissioning parent can be a single person, or a single person in a life-partnership (not legally married but in a committed relationship).[473] The case of *Ex parte CJD and others* demonstrates that although the court must give a wide interpretation of what a "permanent relationship" may entail, it still has to determine whether the nature of the permanent relationship can be regarded as supportive for the raising of a family.[474] In *Ex parte CJD and others*, Tolmay J

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469 Sec 293 of the Act. *In re confirmation of three surrogate agreements* at para 15. *Ex parte CJD and others* at par 17. Bosman-Sadie and Corrie *Practical approach to the new Children's Act* 294. Nöthling Slabbert 2012 *SAJBL* 28. *AB and another v Minister of Social Development* at par 39. SALC Project 65 at par 8.2.11.

470 Children's Act sec 293(1). Report of the Ad Hoc Committee 60. Slabbert and Roodt "South Africa" 328. SALRC Project 140 84. Sloth-Nielsen "Surrogacy in South Africa" 187. The writer points out that it was clearly the intention of the legislator to prevent South Africa from becoming an international surrogacy destination. Oluwaseyi and Oladimeji 2021 *Obiter* 32.

471 Sec 293(2).

472 Sec 293(3). Report of the Ad Hoc Committee 58. Nöthling Slabbert 2012 *SAJBL* 30. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 248.

473 *Ex parte CJD and others* at par 18.

474 *Ex parte CJD and others* at par 18. Nicholson and Bauling 2013 *De Jure* 521. The writers indicate that the concept of a permanent relationship is vague and for the sake of clarity, a regulation to

expresses the view that a reading of section 293 appears to favour an interpretation that, since a partner in a permanent relationship not only gives written consent to the surrogate agreement but also becomes a party to the application for the confirmation of the agreement, he or she acquires parental responsibilities and rights when the order of confirmation is made by the court.[475] As alluded to already, both the surrogate and the commissioning parent must obtain the written consent of his or her spouse or permanent partner before the court will confirm the surrogate agreement.[476] In circumstances where a surrogate is going through a divorce and the divorce is not yet finalised, the surrogate's spouse must still provide his consent.[477] This section refers specifically to the words "married" and "permanent relationship" and it is thus important to determine the scope of the meaning of these words to enable the parties to comply with the consent requirement. The term "marriage" is defined as a marriage recognised in terms of South African law or customary law or a marriage concluded in accordance with a system of religious law which is subject to specified procedures.[478] Heterosexual civil marriages and civil unions of the same-sex have been recognised in South Africa with the enactment of the Marriage Act[479] (for heterosexual civil marriages) and the Civil Union Act[480] (with regard to same-sex unions).

The reference to a "permanent relationship", however, remains vague and should be clarified. There is also no definition in the Children's Act that explains the meaning of a permanent relationship. The term suggests a relationship which holds a degree of permanence.[481] There seems to be no indication of who should make the decision of whether the relationship is "permanent" enough to warrant the consent of the partner

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the Act should stipulate what exactly the parties should prove in this regard. They further point out that guidelines to determine the permanence of the relationship should be provided for in a regulation.

475 *Ex parte CJD and others* at par 19.

476 Sec 293(1) and (2).

477 LexisNexis *Family Law service* at par W4. The writer argues that the support and consent of all the parties involved in a surrogacy agreement is essential to the success of the entire surrogacy process.

478 Sec 1 of the Children's Act. Further, any reference to a husband, wife, widower, widow, divorced person, married person or spouse must be construed accordingly.

479 25 of 1961.

480 17 of 2006. Civil union is defined in sec 1 as the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others. Sec 1 further defines civil union partner as a spouse in a marriage or a partner in a civil partnership, as the case may be, concluded in terms of this Act.

481 LexisNexis *Family Law service* at par W4.

of the surrogate or the commissioning parent.[482] The only assumption that can be made is that the court, dealing with the confirmation application, will have the discretion to decide if the parties to the surrogacy agreement are in a permanent relationship or not. The need for, and importance of, the scope and quality of the information that should be provided may not only be gleaned from the requirements set out in section 295, but also appear from the judgments of *Ex parte CJD and others*[483] and *Ex parte WH and others.*[484] However, despite the guidance offered by these judgments, it is submitted that regulations promulgated in terms of chapter 19 of the Children's Act should provide more detail on the issue of parties in a permanent relationship to ensure that the appropriate parties to the surrogacy agreement provide the requisite consent.

Louw argues that it is not clear from the provisions of the Children's Act whether the consent provided by the spouse or partner would also include consent to the artificial fertilisation of the surrogate[485], but I would argue that it does. The artificial fertilisation of the surrogate mother clearly is part and parcel of the surrogate agreement as it is impossible to have the one without the other. If the spouse or partner of the surrogate mother does not give his (or her) consent to the artificial fertilisation of his or her wife, parental responsibility will vest exclusively in the surrogate mother as the woman who gave birth to the child.[486] Section 293(3) appears to have created an exception to the requirement of consent by the surrogate's spouse or partner in that the court may confirm the agreement without such person's consent, should he or she unreasonably withholds consent.[487]

The Children's Act requirement that a genetic link should exist between the commissioning parent(s) and the commissioned child, will be discussed next.

3.5 Section 294: The genetic link requirement[488]

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482 Davel and Skelton *Commentary* 11.
483 2018 (3) SA 197 (GP).
484 2011 (4) All SA 630 (GNP).
485 Davel and Skelton *Commentary* 13.
486 Sections 40(1), 40(2) and 297(2) of the Act.
487 Sec 293(3) of the Children's Act 38 of 2005 Nöthling Slabbert 2012 *SAJBL* 29.
488 Sec 294 of the Act. *In re confirmation of three surrogate agreements* at para 15. *Ex parte CJD and others* at par 294. Bosman-Sadie and Corrie *Practical approach to the new Children's Act* 294. *AB and another v Minister of Social Development* at par 45.

For a child to have a genetic link with one or both of his or her parents, the gametes of one or both parents must be used for conception. Section 294 determines that at least one of the commissioning parents' gametes must be used in the conception of the child or where the commissioning parent is a single person, that person's gamete.[489]

The use of donor gametes is a controversial issue in the regulation of surrogacy. The requirement of a genetic link mirrors the SALC's and *Ad Hoc* Committee's view that donor gametes should not be permitted where it is possible to use the gametes of both the commissioning parents.[490] The gametes of the surrogate mother (partial surrogacy) may be used for the conception of the child to be born in terms of the agreement, provided that the gametes of at least one of the commissioning parents (or parent if single) is used in the conception process to enable the commissioning parents (or parent) to be genetically linked to the child.[491] Thus, the exclusive use of donor gametes is prohibited and even in a situation where a single commissioning parent is, or both commissioning parents are infertile, as to allow the latter as commissioning

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489 Sec 294. Report of the Ad Hoc Committee 56 and 59. *AB and another v Minister of Social Development* at par 45 and 46 Thaldar 2018 *De Rebus* 28. SALRC Project 140 85 and 87. Sloth-Nielson, J and van Heerden, B "The constitutional family developments in South African child and family law 2003-2013" 2014 *International Journal of Law, Policy and the Family* 28(1) 114. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 318. Heaton 2015 *THRHR* 29.

490 SALC Project 65 at par 8.2.6. The SALC was convinced that it is desirable, to promote the bond between the child and the commissioning parents, to use the gametes of at least one of the commissioning parents and that it is in the best interests of the child to do so. SALRC Project 140 87. The Ad Hoc Committee Report recommended the retention of the genetic link requirement (that the gametes of at least one of the commission parents be used towards conception or in the case of a single person, that person's gametes). It is explained that the reasoning for this recommendation is the following: "In the instance where both the male and female gametes used in the creation of the embryo are donor gametes, it would result in a similar situation to adoption, as the child or children would not be genetically linked to the commissioning parent or parents. This would obviate the need for surrogacy as the couple could adopt a child. This type of surrogacy was not preferred by most commentators. It was felt that in both partial and full surrogacy it should be a pre-condition that the child or children should always be genetically linked to the commissioning parent or parents."

491 Thaldar 2018 *De Rebus* 28. Boniface, A.E "The genetic link requirement for surrogacy: A family cannot be defined by genetic lineage" 2017 *Journal of South African Law* 2017(1) 190. Nicholson 2013 *SAJHR* 501. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 248. At 256 the writers point out that there can be situations where a child has access to information about his story of origin only in respect of one biological parent. If the genetic link requirement were dispensed with, there would be situations where the child born of surrogacy would have absolutely no identifying information about the circumstances of his birth except for the limited information available as in terms of sec 41 of the Act after he or she reaches the age of eighteen years.

parents would make the surrogacy process a 'commissioned adoption',[492] or as Meyerson explains, a situation tantamount to 'double-donor' surrogacy.[493] For her, this form of surrogacy allows the commissioning parents to be involved in selecting both the gametes and the surrogate and it also give them the chance to participate in the surrogate's pregnancy.[494] These features of double-donor surrogacy serve to encourage the development of an emotionally significant bond with the child.[495] Despite Meyerson's optimism, I believe that the benefits do not negate the risks associated with double-donor surrogacy and that an ordinary adoption should be the indicated route. With no biological link with the commissioned child, double-donor surrogacy leaves the commissioning parents with only the contract as their only legal recourse, should something go wrong.

The discussion above supports the conclusion that surrogacy agreements in South Africa are intended to assist the infertile while at the same time preventing the surrogate from being exploited.[496] However, Van Niekerk argues that the real target group that surrogacy should assist (those who are infertile) are rendered helpless by the genetic-link requirement in section 294.[497] This provision is also regarded as harsh and discriminatory by practising reproductive specialists who often have to assist parents that both suffer from infertility.[498] Van Niekerk views it as unjust to expect these couples to follow the route of an ordinary adoption, as there may be long waiting lists

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492 Nöthling Slabbert 2012 *SAJBL* 33-34. Thaldar 2018 *De Rebus* 28. SALRC Project 140 88. Louw 2013 *THRHR* 575. Thus, where none of the parties is genetically related to the child to be born. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 318. Van Niekerk 2015 *PELJ* 408. The author states that the presence or the absence of a genetic link on the part of the commissioning parents should be immaterial. The courts are described as the guardians of what could potentially be an exploitative process and they are required to vet any applicant(s) who are able to provide a genetic link. Thus, it can be presumed that they are equally equipped to do so in instances where no genetic link exists. The courts would be able to root out improper motives before surrogacy agreements are sanctioned.

493 Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 324.

494 Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 324.

495 Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 324.

496 Van Niekerk 2015 *PELJ* 419. The primary beneficiaries are the childless commissioning parent(s).

497 Van Niekerk 2015 *PELJ* 419.

498 SALRC Project 140 88. Louw 2013 *THRHR* 571. Van Niekerk 2015 *PELJ* 403. Unfortunately, the reality is that in instances where a single commissioning parent or both of the commissioning parents are infertile, they are excluded from using surrogacy as an option.

for a new-born baby or the person or couple may perhaps be too old to qualify for adoption.[499] These obstacles, in my view, are not serious enough to be convincing, as some couples may want to circumvent the requirements relating to adoption in order to conceive a child through surrogacy. What is true, however, is Van Niekerk's argument that biology or genetics provides no guarantee for the welfare of the child to be born. I do not agree with her view that the absence of a genetic link may in fact provide a better guarantee of the child's welfare.[500]

The question rightly arises whether the genetic link-requirement may be said to infringe upon an infertile person's right to make decisions regarding reproduction as in terms of section 12(2)(a) of the Constitution.[501] Access to donor gametes is fairly simple and no person should be denied the right to make decisions regarding their reproduction.[502] Regulations to chapter 19, if enacted in future, should also provide clarity on this issue to assist the High Court to exercise its discretion on good cause shown.[503] From a justice and fairness perspective, one may ask whether it is fair to exclude a person who is both pregnancy and conception infertile from using surrogacy as a way to have a child. The answer to this question would undoubtedly be "no".

During a webinar, hosted by the University of KwaZulu-Natal in March 2022, it was suggested that a case-by-case approach should be followed in determining if a pregnancy and conception infertile woman is allowed to use surrogacy to have a child.[504] The judgment in *AB and another v Minister of Social Development*[505] serves as a good example of a 'good cause shown' scenario. In this case, the commissioning mother turned to surrogacy as a last resort after fourteen failed IVF treatments. Her situation illustrates that she has made many attempts to use her own ova, without any

499 Davel and Skelton *Commentary* 15. SALRC Project 140 88. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 324.

500 Van Niekerk 2015 *PELJ* 421. She further argues that what should be important is the commissioning parent(s) suitability to parent, which can be gathered from, amongst other evidence, their intention to parent.

501 SALRC Project 140 88. Including his or her right to dignity and privacy. *AB and another v Minister of Social Development* par 213.

502 Van Niekerk 2015 *PELJ* 420.

503 Van Niekerk 2015 *PELJ* 421.

504 Webinar hosted by University of KwaZulu-Natal, organised by Prof Donrich Thaldar, on 2 March 2022. The theme of the webinar was: Is it time to reconsider the genetic link requirement?

505 2017 (3) SA 570 (CC).

success. The constitutionality of section 294 has been brought to the fore in a recent judgment, discussed in detail in chapter 4 of this thesis.

The next section will examine the legal requirements for a court to confirm a surrogate agreement in more detail.

3.6 Section 295: Confirmation of the surrogacy agreement by a High Court[506]

Section 295 directs that the court may not confirm a surrogate agreement unless the commissioning parent(s) are permanently unable to give birth to a child.[507] In addition, the commissioning parent(s) must be competent to conclude the agreement;[508] they must be suitable persons to accept the parenthood of the child that is to be conceived;[509] and they must understand and accept the legal consequences of the

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506 Sec 295. *In re confirmation of three surrogate agreements* at para 15 and 27. *Ex parte SA and others* 2014 JDR 2616 (GP) at para 11. *Ex parte WH and others* at par 38 and 69. *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 19 Bosman-Sadie and Corrie *Practical approach to the new Children's Act* 294-295. Nöthling Slabbert 2012 *SAJBL* 30. *AB and another v Minister of Social Development* at par 40.

507 Sec 295(a). Report of the Ad Hoc Committee 19, 56 and 59. Surrogacy should only be exercised by the commissioning parent(s) as a last resort. Louw, A "Ex Parte MS 2014 JDR 1012: Surrogate motherhood agreements, condonation of non-compliance with confirmation requirements and the best interests of the child" 2014 *De Jure* 47(1) 111. SALRC Project 140 85. Jordaan DW "Surrogate Motherhood in illness that does not cause infertility" 2016 *SAMJ* 684. The writer refers to this requirement as the 'threshold requirement' for surrogate motherhood. He further states that the persons who qualify in terms of this requirement include male same-sex couples and single men (who are biologically unable to give birth) and heterosexual couples or single women where the woman is medically unable to carry a pregnancy to term. Sloth-Nielsen "Surrogacy in South Africa" 194. It is confirmed through case law that medical supporting evidence of the pregnancy or conception infertility of the commissioning parents must be provided unless the commissioning parent is single of a same-sex male couple Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 247. Both situations of pregnancy infertile and conception infertile would meet the requirements of sec 295(a). Van Niekerk 2015 *PELJ* 418. The author argues that the mere fact that a commissioning parent is infertile is not a guarantee that he or she will make a good parent to a prospective child.

508 Sec 295(b)(i). Report of the Ad Hoc Committee 59. Mills 2010 *Stell LR* 435.

509 Sec 295(b)(ii). Report of the Ad Hoc Committee 19, 20 and 59. At 20 the commissioning parent(s) should be financially secure and be able to provide a healthy family environment. The Committee recommended that this should be confirmed through the screening process. However, as a result of the principle of non-discrimination and the difference of opinion in our communities as to what constitute a healthy environment, it was argued that the only criteria that should prevent people from becoming commissioning parent(s) should be medial ones. Further, unmarried, divorced or widowed persons who are not involved in a homosexual relationship should qualify. Nicholson and Bauling 2013 *De Jure* 528. The writers point out that possibly the most important and yet uncertain requirements are those regarding the suitability of the commissioning parents and the surrogate who has to act in these respective capacities. At 529 they state that it is necessary for the court to have a wide array of information at its disposal in assessing the suitability of the commissioning parents as their parenting of the intended child will go beyond their contractual

agreement, as well as their rights and obligations in terms of the agreement.[510] The surrogate mother, on the other hand, must be competent to conclude the agreement;[511] she must be a suitable person to act as a surrogate mother in all respects;[512] she must also understand and accept the legal consequences of the agreement and the Act and her rights and obligations in terms thereof;[513] she may not use surrogacy as a source of income;[514] she may only enter into a surrogacy agreement for altruistic reasons and not for commercial purposes;[515] she must have had at least one pregnancy and a viable delivery;[516] and finally, she must have a living child of her own.[517]

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statement of intentions. Some aspects which need to be evaluated during the psychosocial assessment of the commissioning parents is suggested to include the presence of existing psychological conditions, the reason for their desire to have a child, the length and stability of their relationship and whether or not the parent not genetically linked to the child will display a jealous tendency which might cause conflict in the relationship or adversely affect the child. "The inevitable result of surrogacy and adoption is that prospective parents are held to a higher standard of care than natural parents, but this is unfortunately an unavoidable by-product of the quest to protect the child." LexisNexis *Family Law service* at par W7.

510 Sec 295(b)(iii Report of the Ad Hoc Committee 61.

511 Sec 295(c)(i). Report of the Ad Hoc Committee 57. It was submitted that any competent woman, regardless of her sexual orientation or marital status, should be allowed to act as surrogate.

512 Sec 295(c)(ii). Report of the Ad Hoc Committee 57. Nicholson and Bauling 2013 *De Jure* 529. The courts need more information on the surrogate mother before she can be considered to act in this capacity. It is indicated that a thorough medical report regarding her health and physical suitability to bear a child is necessary. At 530 the writers state that the Children's Act is thus severely lacking as none of the recommendations made by the courts or other writers, and which seem to be crucial to the effective and successful implementation of the surrogate agreement, have been regulated. Reference was also made to recommendations made by the SALC (as it was known then). Since 17 January 2003 the SALC changed to the South African Law Reform Commission (SALRC). A strict six-month screening process and counselling for all parties before and after the conclusion and implementation of the agreement was recommended. It is stated that this provision aimed to ensure the suitable social and psychological backgrounds of all the parties involved. It is recommended by the writers that the promulgation of regulations to the Children's Act is still necessary to address these omissions and when, or if, these are drafted, care should be taken to make sure that provision is made for details pertaining to screening panels, timeframes and aspects to be monitored. See further the discussion of *Ex parte WH and others* in par 3.7.2. Thaldar, DW "Criteria for assessing the suitability of intended surrogate mothers in South Africa: Reflections on Ex Parte KAF II" 2019 *South African Journal of Bioethics and Law* 12(2) 61. The writer points out that the section does not provide further clarity regarding what exactly is meant by a 'suitable' person. Report of the Ad Hoc Committee 16. The Committee recommended that the surrogate should be psychologically and physically fit and proper person with moderate social habits.

513 Sec 295(c)(iii). Report of the Ad Hoc Committee 57.

514 Sec 295(c)(iv). Report of the Ad Hoc Committee 18 and 58. The surrogate should be financially secure so as to eradicate the possibility for her to use the agreement as a source of income.

515 Sec 295(c)(v). Report of the Ad Hoc Committee 23 and 58. At 23 the Committee pointed out that the main arguments in this respect was that commercial surrogacy is degrading to the surrogate as she is dehumanised to being a mere "incubator" and pregnancy is cheapened if it is entered into for financial gain, as there should be certain things in life that money cannot buy. Nicholson 2013 *SAJHR* 502. Louw 2013 *THRHR* 564.

516 Sec 295(c)(vi). Louw 2013 *THRHR* 570.

517 Sec 295(c)(vii). Oluwaseyi and Oladimeji 2021 *Obiter* 36. The authors explain that this requirement reduces the risk of a refusal to hand over the commissioned baby which can lead to legal disputes that affect such children psychologically. Report of the Ad Hoc Committee 18 and 58.

The court may also not confirm the agreement if the application does not include adequate provisions for the contact, care, upbringing and general welfare of the child that is to be born in a stable home environment, including the child's position in the event of the death of the commissioning parents or one of them, or their divorce or separation before the birth of the child.[518] The court must have regard to the personal circumstances and family situations of all the parties concerned, but above all the interests of the child that is to be born.[519] The issue of sexual intercourse between the surrogate and her husband or partner during her pregnancy needs to be considered

518 Sec 295(d). Report of the Ad Hoc Committee 50. Nicholson and Bauling 2013 *De Jure* 522. The writers point out that our courts have not as yet stipulated what should be incorporated in the 'care' clauses in the agreement in order to be deemed sufficient. The further uncertainty is regarding what constitutes a stable home or by whom the existence thereof should be determined. They further point out that the suitability of the commissioning parents is intrinsically linked to the care-requirement. It is thus clear that a regulation to the Act regarding the above would be helpful to both the parties to the application as well as the court hearing the matter. Slabbert and Roodt "South Africa" 332. SALRC Project 140 85. *Ex Parte SA and others* (case no 82202/2014). At par 15 the Court pointed out that proof was given of the appointed guardians for the child/children in the event of death of the commissioning parents as well as evidence in respect of the financial welfare of the child/children in case of death of one or both of the commissioning parents or in case of divorce or separation before the child/children is born Mills 2010 *Stell LR* 435. Sloth-Nielsen "Surrogacy in South Africa" 190. Oluwaseyi and Oladimeji 2021 *Obiter* 32.

519 Sec 295(e). Nicholson and Bauling 2013 *De Jure* 531. It was mentioned by the writers that the parties may voluntarily include other types of clauses (*incidentalia*) in their surrogate agreement that is not set out in the Act. These *incidentalia* should be lawful and in accordance with the prevailing *boni mores*. Examples of clauses are: social disease testing on all the parties; assurance provided by the commissioning parents that they will accept parentage of the child regardless of the physical or mental defects or disabilities; clarification of the situation where such disabilities are due to actions of the surrogate mother; clarification regarding a duty of care where the surrogate mother is advised by a medical professional that it is better to terminate the pregnancy and she chooses not to do so; specifications regarding the number of embryos to be transferred at one time; etcetera. At 532 the writers further state that the fact that the surrogate mother should observe a sensible lifestyle, diet and standard of hygiene throughout the pregnancy is also viewed as a contractual stipulation which should be required by legislation. It is however still unclear how non-compliance with the requirements of such a personal nature could be enforced. It is important that the financial arrangements between the parties is set out clearly in order to protect all the parties to the agreement. It is recommended that the financial clauses should specify all the aspects that will be compensated for, as claims above and beyond what is stipulated might not be contractually enforceable. At 533 it is further stated that stipulations regarding the breach of contract by any of the parties should be addressed as well and highlighted in the *incidentalia*. It is thus better for the parties to the agreement to act preventatively and include as much information in the agreements as possible as this will help the court in its attempt to balance the true intention of the parties with what ch 19 of the Children's Act prescribe. Slabbert and Roodt "South Africa" 332. Rautenbach, I.M "Overview of constitutional court judgments on the bill of rights – 2016" 2017 *Journal of South African Law* 2017(2) 363. The writer argues that we should never lose sight of the reason why sec 28(2) of the Constitution refers to the 'paramount' importance of children's interests in every matter. It is explained that the fundamental reasons are that children are not capable of defending their own interests and that they more than often become innocent victims of endeavours by adults who exercise their 'autonomy' to assert their adult rights. Oluwaseyi and Oladimeji 2021 *Obiter* 32.

by the parties to avoid any problems which may arise as a result of the paternity of the commissioned child.[520]

The SALC (as it was known then) was of the opinion that, given the extent of the risk factors inherent in surrogacy, it should be accessible only as a last option.[521] The SALC observed that the majority of problematic cases in surrogacy arose as a result of insufficient screening of the parties involved.[522] Importantly, the social and psychological background of the parties should be meticulously scrutinised to serve the best interests of the child to be born.[523] Years ago, this requirement was emphasised by the Ad Hoc Committee who recommended proper screening for physical and psychological suitability of all the parties to the agreement and presentation of these results to the court in support of the application for the confirmation of the surrogate agreement.[524]

3.6.1 "The commissioning parent or parents are not able to give birth to a child and that the condition is permanent and irreversible" (s 295(a))

At the time, the SALC recommended that a surrogate agreement should only be allowed in circumstances where it is proved that the commissioning wife is unable to give birth to a child because of a medical condition.[525] This view is the result of the fact that artificial fertilisation at that time was available to a couple under the then (and now repealed) Human Tissue Act.[526]

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520 Report of the Ad Hoc Committee 34.

521 SALC Project 65 at par 8.2.1. Report of the Ad Hoc Committee 59.

522 SALC Project 65 at par 8.2.3. At par 8.2.9 the SALC submitted that the surrogate should be in good health with no mental defect. Further, the psychological impact of the surrogacy on herself, her family and her immediate social circle is a factor that has to be taken into account. It is important to determine if she has already given birth or has completed her family as this may have an effect on her relinquishing the child.

523 SALC Project 65 at par 8.2.3. Further, the surrogate and the person whose gametes are being used should be subjected to strict medical selection.

524 Report of the Ad Hoc Committee 45. The reports should also be made available to each party. At 62 the Committee recommended a continuous process of counselling before and after the conclusion and implementation of the agreement. At 63 the Committee recommended a screening of all the parties to the agreement six months before the conclusion of the agreement. Further, compulsory HIV testing of all the parties involved for a period of 12 months before the artificial fertilisation of the surrogate.

525 SALC Project 65 at par 8.2.4.

526 65 of 1983. SALC Project 65 at par 8.2.4.

Section 295(a) retains this original requirement, which has been extended to include one or both commissioning parents. Up to date, there is no complete list detailing what the possible cause of the inability to give birth could be, just as long as the condition is permanent and irreversible.[527]

An important question arising from section 295(a) is whether all three requirements mentioned in the provision should be present contemporaneously.[528] In the case of a gay commissioning couple, all three the requirements (permanent medical condition, irreversible medical condition and unable to give birth to a child) may be easily met and the requirements of the Act thus complied with.[529] The question is more complex where a heterosexual commissioning mother suffers from a serious medical condition which could be exacerbated by a pregnancy or where she is unlikely to survive a pregnancy.[530] Despite her infertility, a commissioning mother may still be able to carry and give birth to a child by reason of the fact that her uterus is intact.[531]

Florescu and Sloth-Nielsen argue that once the threshold in section 295(a) is established, a couple would meet the requirement of section 294(a).[532] However, the couple would still be required to provide a gamete for the purposes of fertilisation.[533] A narrow interpretation of section 295(a) would clearly lead to an insensible result, as it would force a woman who wishes to have her own biologically related child, to undergo a pregnancy which might result in significant and/or life-threatening medical harm to herself.[534]

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527 Davel and Skelton *Commentary* 18. One can assume that a medical practitioner would need to testify or a medical report would need to be filed to show the cause the wife's inability. Nicholson 2013 *SAJHR* 501. Heaton 2015 *THRHR* 29.

528 LexisNexis *Family Law service* at par W6.

529 LexisNexis *Family Law service* at par W6.

530 LexisNexis *Family Law service* at par W6.

531 LexisNexis *Family Law service* at par W6.

532 Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 248.

533 Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 248.

534 *APP and another v NKP* 2021 JDR 1650 (WCC)/ (17962/2020) [2021] ZAWCHC 69 (11 March 2021) at par 24.

3.6.2 *"The commissioning parent or parents — (i) are in terms of this Act competent to enter into the agreement; (ii) are in all respects suitable persons to accept the parenthood of the child that is to be conceived; and (iii) understand and accept the legal consequences of the agreement and this Act and their rights and obligations in terms thereof; are in all respects suitable persons to accept the parenthood of the child that is to be conceived" (s 295(b))*

The existence of a family unit and common household is regarded as an important aspect in surrogacy applications, as it is desirable that a family share a community of life.[535] There is acknowledgment and respect for the many varied permutations of what a family would constitute of in South Africa's constitutional dispensation. The court will look at the circumstances of each case.[536] In the judgment of *Ex parte WH and others,*[537] the court cautions against the setting of unreasonably high standards that are not justifiable for people who select surrogacy as an option to have a child, since that would contravene the spirit of the Constitution and the Equality Act.[538] It is an objective test that needs to be applied when determining if the commissioning parent(s) is or are suitable or not.[539]

Section 295 provides no indication as to whom must inform the parties about the legal consequences of the agreement and the court should *mero motu* be able to satisfy itself that the parties understand and accept the legal consequences of the agreement. Section 295(b)(iii) determines that a court may not confirm a surrogate agreement without the commissioning parent(s) understanding and accepting the legal consequences of the agreement and this Act, as well as their rights and obligations in terms of the said agreement and Act. This provision can be seen as vital insofar as the aim of eliminating the most obvious risks inherent in surrogate arrangements is concerned. Taking into account the importance for the parties to understand the legal consequences of the arrangement, it is probably more imperative that the surrogate (and her spouse or partner) accept and understand the legal consequences because

535 *Ex parte CJD and others* at par 22 – 24.
536 *Ex parte CJD and others* at par 26.
537 2011 (6) SA 514 (GNP) at para 54.
538 4 of 2000. *Ex parte WH and others* at par 70.
539 *Ex parte WH and others* at par 70.

she is the one who will be exposed to all the risks inherent in the conclusion of the agreement, including that she is the person subjecting herself to the physical risks of artificial fertilisation and pregnancy.

3.6.3 *"The surrogate mother— is in terms of this Act competent to enter into the agreement; (ii) is in all respects a suitable person to act as surrogate mother; (iii) understands and accepts the legal consequences of the agreement and this Act and her rights and obligations in terms thereof" (s 295(c))*

The surrogate needs to understand that she would need to hand the child over to the commissioning parent(s) upon the birth of the child, as it is not her child, even in circumstances where she is genetically related to the child. This provision justifies why psychological screening of the surrogate is very important. It is necessary to make sure that the surrogate fully understand what will be expected of her and to what she actually agrees in the surrogate agreement.

3.6.4 *"The surrogate mother— (iv) not using surrogacy as a source of income; (v) has entered into the agreement for altruistic reasons and not for commercial purposes; (vi) has a documented history of at least one pregnancy and viable delivery; and (vii) has a living child of her own" (s 295(c))*

Sections 295(c)(iv) and 295(c)(v) determine that a court may not confirm a surrogate agreement if the surrogate is using surrogacy as a form of livelihood, and where she has entered into the agreement for commercial purposes instead of for altruistic purposes.[540] One of the strongest concerns with regard to surrogacy is that it can lead to baby-selling if the surrogate stands to gain financially from the arrangement.[541] By inclusion of this section, the Children's Act aims to prevent the situation where the

[540] Sec 295(c)(iv) and (v). The court may not confirm an agreement which provides for commercial surrogacy which means that the agreement is inevitably invalid.

[541] SALC Project 65 at par 2.5.1 and 8.2.8. Louw 2013 *THRHR* 570. The writer states that if the surrogate mother's child is no longer alive, that her motives for becoming a surrogate mother should be investigated, but should this automatically make her unsuitable?

surrogate mother is motivated by pure financial gain.[542] This was also the view of the SALC at the time, when it submitted that this could be seen as a form of exploitation if an economically disadvantaged woman is used to carry a child for a more affluent member of the community.[543] This requirement appears to limit the possible abuse of economically disadvantaged women and preventing problems from arising in the event of the commissioning parent(s) refusing to pay the agreed amount or to take the child.[544]

Section 295(c)(vii) requires that the surrogate mother must have a child of her own.[545] This requirement of already having an existing child could be seen as both an advantage and disadvantage.[546] The rationale for this provision appears from the SALC's report that stated that when a surrogate gives birth to her own child, she would be able to appreciate the risks related with pregnancy and the implications of surrendering a child upon birth.[547] The other side of this, however, is that the child(ren) of the surrogate could be traumatised upon surrendering the child, fearing that they too will be given away.[548] Despite the latter concern, it remains a fact that having previously been pregnant and giving birth to a child(ren), will at least provide a reasonable measure of physical suitability, if not also the desired psychological disposition.[549] The reasons for this requirement is arguably linked to the possibility that a surrogate who does not have a child of her own may be more inclined to bond with the commissioned child, making her more reluctant to surrender the child born as a result of such an agreement.[550]

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542 SALC Project 65 at par 2.4.5. *Ex parte KAF and others (I)* (14341/17) [2017] ZAGPJHC 227 (10 August 2017) at par 18. Bonthuys and Broeders 2013 *SALJ* 490. The writers argue that the emphatic prohibition on commercial surrogacy is expressed as a prohibition on payment for the surrogate beyond the allowed reimbursement for specified categories of expenses and loss of earnings.

543 SALC Project 65 at par 2.4.5.

544 SALC Project 65 at par 2.4.5.

545 LexisNexis *Family Law service* at par W9. Clarke states that details of the surrogate's obstetric history, her pregnancies, deliveries and any complications experienced during a pregnancy must be set out in the application. Clarke argues that the surrogate must at least have one living child of her own. She will not qualify as a surrogate if her child is deceased or if she adopted a child.

546 Davel and Skelton *Commentary* 22.

547 SALC Project 65 at par 2.6.1.

548 SALC Project 65 at par 2.6.1.

549 SALC Project 65 at par 8.2.9.

550 SALC Project 65 at par 8.2.9.

3.6.5 *"The agreement includes adequate provisions for the contact, care, upbringing and general welfare of the child that is to be born in a stable home environment, including the child's position in the event of the death of the commissioning parents or one of them, or their divorce or separation before the birth of the child" (s 295(d))*

Section 295(d) determines that a court may not confirm a surrogate agreement if the agreement does not include satisfactory provisions for the contact, care, upbringing, and general welfare of the child that is to be born in a stable home environment, including what will happen with the child in the event of the death, divorce or separation before the birth of the child. The parties thus have to consider the care of the child in the event of a change in the commissioning parties' circumstances caused by death, separation or divorce before the commissioned child is born.[551] The parties are thus obliged to reach consensus on the care of the child to be born and the word "including" seems to allow the parties to make provision for matters not regulated by the Act.[552] One such provision may relate to the appointment by the commissioning parents of suitable guardians for the child to be born in the event of death.[553] Clark argues that it is advisable for the commissioning parents to take out life insurance for the benefit of the child to be born as a result of the agreement.[554] It is critical to remember, as Dhai and McQuoid-Mason advise, that any unfair clauses in the surrogacy agreement may fall foul of the Consumer Protection Act.[555]

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551 Nöthling Slabbert 2012 *SAJBL* 28.

552 Davel and Skelton *Commentary* 21. It is further explained that other important aspects that can be included is for example, the health and insurance policies to be maintained by all parties throughout the agreement; the financial responsibility of the parties requiring funds to be placed in trust to cover all anticipated expenses; specific arrangements regarding the child or children, including custody in the case of divorce or death of the commission parents and visitation rights, if any of the surrogate mother, a provision requiring that social disease testing, incl. HIV, be performed on all parties as well as a provision that the proposed surrogate mother be medically examined and declared suitable, etcetera.

553 LexisNexis *Family Law service* at par W10. The commissioning parents should make provision in their will for the appointment of a guardian(s) for the child. She advises that details on the relationship of the guardian(s) to the commissioning parents must be explained and the guardians must be suitable person(s) to accept the guardianship of the child to be born and the person(s) must be willing and able to act in such a capacity. Letter(s) of acceptance of the guardianship should be attached to the affidavits in the application to court.

554 LexisNexis *Family Law service* at par W10.

555 68 of 2008. Dhai and McQuoid-Mason *Bioethics, Human Rights and Health Law* 146. The authors made specific reference to sec 49.

3.6.6 *"In general, having regard to the personal circumstances and family situations of all the parties concerned, but above all the interests of the child that is to be born, the agreement should be confirmed" (s 295(e))*

Lastly, section 295(e) determines that a court may not confirm a surrogacy agreement unless the court has regard to the personal circumstances and family situations of all the parties to the agreement, and especially, the best interests of the child that is to be born.[556] This provision places the responsibility on the court to make sure that the confirmation of the agreement will be in the best interests of the commissioned child to be born.[557] This was confirmed by the Constitutional Court in *AB and another v Minister of Social Development*, when it emphasised that the court must on every possible occasion make a decision whether or not to confirm a surrogate agreement, and engage with the value judgment of whether the confirmation would serve the best interests of the commissioned child to be born.[558] The best interests yardstick requires a flexible enquiry which must be determined on the facts of each particular case.[559]

One conclusion that may be drawn from this provision is that the Act seems to require strict adherence to narrowly defined requirements, yet leaves a back door of discretion open if, in the court's opinion, the confirmation would not be in the resultant child's best interest.[560] For Rautenbach, the significance of section 295(e) regarding the different interests that it serves may be summarised as follows:

> An interesting and outstanding feature of section 295(e) of the Children's Act is that it provides protection to the best interests of children yet to be conceived when infertile

556 Sec 295(e). Heaton 2015 *THRHR* 30.
557 Nöthling Slabbert 2012 *SAJBL* 28.
558 *AB and another v Minister of Social Development* at par 192.
559 *AB and another v Minister of Social Development* at par 193.
560 Louw 2013 *THRHR* 572. The writer states that while investing the court with such residual discretionary powers is not uncommon in legislation, it may be problematic in the context of confirmation proceedings. Since it is so difficult to determine what would be in the resultant child's best interests, it is not entirely clear on what grounds the court would be able to exercise its residuary discretion. Unless perhaps it is argued that the refusal may be justified on the basis that the parties have not in the agreement sufficiently catered for e eventualities that are reasonably foreseeable as far as the child is concerned. She further states that the vagueness of sec 295(e) in which the discretionary powers of the court are outlined also makes it difficult to ascertain how (in)flexible the Children's Act was meant to be as far as the regulation and confirmation of surrogate agreements are concerned. The ambivalence found in this regard in the Children's Act would seem to be reflected the approach which was adopted by the court in the WH case.

> people take steps to alleviate the negative psychological effects of their infertility by concluding surrogacy agreements.[561]

Part of the court's responsibility is to consider all the personal circumstances of the parties concerned.[562] Thaldar argues that there is a *lacuna* in the South African law on surrogacy in that it lacks objective criteria for evaluating the suitability of a surrogate mother.[563] He posits that in the absence of clear, objective criteria, the different psychologists and the different judges will all be working with their own tacit, subjective criteria and this is clearly not in the interests of justice.[564]

A recent case confirms Thaldar's concern. In a 2017 confirmation application in *Ex parte KAF and others (I)*,[565] the court expressed two pertinent concerns: (a) the objectivity of the relevant health care professionals; and (b) the possible commercialisation of surrogacy.[566] The court cautions that there is a need for medico-legal experts involved in the surrogacy process to be impartial and objective regarding the facts at hand in their attempt to assist the court.[567] These professionals owe their allegiance to the court and not to the parties to the surrogate agreement.[568] Moreover, in order to diffuse any risk of commercial motive in surrogacy arrangements, the court concludes that it is desirable that medico-legal professionals, who are involved in the process, function independently.[569]

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561 Rautenbach 2017 *TSAR* 363.

562 In the judgment of *Ex parte WH and others* the court emphasised that the court as upper guardian of all minors is not simply a rubber stamp validating the private arrangements between the parties. At 531D the court concluded that the affidavit supporting the application for confirmation should contain all the factors as set out in the Act together with documentary proof where applicable. Nicholson and Bauling 2013 *De Jure* 520-521. The writers give the example of documentary proof regarding the sterility of the commissioning parent/parents where such proof may take the form of a letter from a specialist medical practitioner stating the exact cause of the irreversibility of the sterility. The writers further stated that the current lack of regulations pertaining to ch 19 hinders the process of compiling an application for the confirmation of a surrogate agreement as it still remains unclear what constitutes sufficient evidence of compliance with the requirements set out in the Act.

563 Thaldar 2018 *SAJBL* 35. He explains that a court gradually, on a case-by-case basis as required by the facts of a particular matter, applies the general principles of our law to the requirements stipulated by the Act. Metaphorically, the Act created the legal hoops and the court then determines how one is to jump through the hoops. In the matter of *Ex parte KAF* the court determined how not to jump through the hoops.

564 Thaldar 2018 *SAJBL* 36.

565 2017 ZAGPJHC 227. (Hereinafter referred to as *Ex parte KAF and others (I)*). This case is discussed in detail in par 3.7.7. Thaldar 2018 *SAJBL* 36.

566 Thaldar 2018 *SAJBL* 36.

567 *Ex parte KAF and others (I)* at par 27.

568 *Ex parte KAF and others (I)* at par 27.

569 *Ex parte KAF and others (I)* at par 28.

In *Ex parte KAF*, the first confirmation of a surrogate agreement application was dismissed by the court.[570] In the second confirmation application in the same matter,[571] the court discusses section 292(1)(e), read together with section 295 of the Act, focussing specifically on the suitability of the intended surrogate mother and the criteria to be applied in assessing her suitability.[572] The court alludes to the dangers of commercialisation of surrogacy and states that the effort to achieve a balance between the rights and interests of all the parties to a surrogate arrangement is a delicate one.[573] The court also points out that considering the interests of the child to be born, it is important to subject an application to strict judicial scrutiny, especially since the court is the upper guardian of all minor children.[574] Reference was made in *Ex parte KAF and others* cases to the earlier cases of *Ex parte WH and others*[575] and *Re Confirmation of three Surrogate Motherhood Agreements*,[576] where criticism that the Act fails to establish objective criteria regarding the supporting documents that should be placed before the court in support of a confirmation application, was also raised.[577] The *Ex parte KAF and others* cases reiterates that more clarity is needed regarding the requirements for assessing the suitability of the surrogate mother.[578]

The need for regulations to provide clarity as to the type of information to be provided to court to enable the court to make an informed decision in respect of confirming a

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570 *Ex parte KAF and others (I)* at par 29-30. Thaldar "Criteria for assessing the suitability of intended surrogate mothers in South Africa: Reflections on *Ex Parte KAF II*" 2019 *SAJBL* 61.

571 *Ex parte KAF and others (II)* 2019 (2) SA 510 (GJ). (Hereinafter referred to as *Ex parte KAF and others (II))* at par 1. This case is discussed in detail in par 3.7.7.

572 *Ex parte KAF and others (II)* at par 1 and 11.

573 *Ex parte KAF and others (II)* at par 7. Thaldar 2019 *SAJBL* 64. Thaldar referred to the experts (used in the application) and that they suggested that the intended surrogate mother should be financially stable in that she or her family unit must have a reliable source of income and be living within their means.

574 *Ex parte KAF and others (II)* at par 16.

575 See par 3.7.2 below for full discussion of case.

576 See par 3.7.1 below for full discussion of case.

577 *Ex parte KAF and others (II)* at par 17. The Court stated that it is evident that given the discretionary powers conferred and the likely different circumstances where the court's confirmation is sought, each court may construe the parameters for the exercise of discretion differently from the next.

578 *Ex parte KAF and others (II)* at par 20. Thus, the court said, there is a need to develop further the guidelines and requirements as was set out in *Ex parte WH and others*. (See par 3.7.2 below). Thaldar 2019 *SAJBL* 64-65. The writer states that the main issue with the judgment that detracts from its practical utility is that many criteria are vaguely formulated to the point of being merely factors for consideration and thus lacking any clear standard that must be complied with. He concluded by saying that "by adding factors for consideration without indicating exactly how such factors should impact on the overall assessment of suitability, the court is not solving the problem of uncertainty regarding how to assess suitability. In fact, the court is creating additional loci of uncertainty.

surrogate agreement is long overdue. The regulations should also provide clarity on what is required in respect of the "care" of the commissioned child. Since a stable home environment has different meanings for different people and different cultures, a consensus description of a "stable home environment" will put the parties in a position to provide the court with the necessary information. Guidance is furthermore needed regarding the evidence necessary for complying with section 295(a)'s requirements. For example, does the court require various medical reports or will one report by a specific expert suffice? The need for clarity also relates to the assessment of the suitability of the parties to the surrogacy agreement.

The next discussion will turn to section 296 of the Act. From a medical perspective, surrogacy starts when the surrogate mother is artificially fertilised.

3.7 Section 296: Artificial fertilisation of the surrogate mother[579]

Because the surrogate will carry the commissioned child to term, and this child must be genetically linked to the commissioning parent(s), the surrogate must be artificially fertilised. Thus, even in circumstances where the surrogate's own ovum will be used, she still has to participate in the process of artificial fertilisation.[580] Section 296 prohibits the surrogate to be artificially fertilised before the surrogate agreement is confirmed by the court,[581] which may not take after the lapse of eighteen months from the date of the confirmation of the said agreement by the court.[582]

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579 The Act. *In re confirmation of three surrogate agreements* at para 15. *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 20. Bosman-Sadie and Corrie *Practical approach to the new Children's Act* 296. Nöthling Slabbert 2012 *SAJBL* 28. *AB and another v Minister of Social Development* at par 41.

580 Partial or traditional surrogacy is explained in par 2.11 above.

581 Sec 296(1)(a). SALC Project 65 at par 8.3.2. Louw 2014 *De Jure* 116. Louw points out that health professionals acting in contravention of the prohibition remain open to criminal prosecution provides no assurance of future compliance with the requirement. Nöthling Slabbert 2012 *SAJBL* 28. SALRC Project 140 85. Thaldar 2019 *SAJBL* 61. *AB and another v Minister of Social Development* at par 41.

582 Sec 296(1)(b). Nöthling Slabbert 2012 *SAJBL* 28. Slabbert and Roodt "South Africa" 332. Louw 2013 *THRHR* 570. The writer asks the question of why the artificial fertilisation of the surrogate may not take place later than 18 months after the confirmation of the surrogate agreement as it is a well-known fact that artificial fertilisation procedures are time-consuming and multiple attempts may be needed to conceive. Further, by reasoning that a time limit would avoid circumstances changing too much after the confirmation of the agreement also does not hold sway as circumstances, such as death or separation of the commissioning parents, can change at any time. Sloth-Nielsen "Surrogacy in South Africa" 192.

The artificial fertilisation of a surrogate in the execution of the said agreement must furthermore be performed in accordance with the provisions of the NHA[583] and Regulations.[584]

It is important to bear in mind what the consequences will be if the surrogate is artificially fertilised without the court confirming the agreement first. The purpose of the above provision seems to protect the parties to the agreement, and especially the surrogate and/or her partner or spouse.[585] Although legal precedent exists where the court confirmed the surrogate agreement after artificial fertilisation of the surrogate, it was done to protect the best interests of the children to be born. It is possible that faced with another scenario, the court may refuse to confirm the agreement 'after the fact'.[586] Should the agreement not be confirmed, and as a consequence be invalid, any child born as a result of the invalid surrogate agreement will be deemed to be the child of the surrogate for all purposes.[587] As mentioned earlier, the child born will thus not be seen as that of the commissioning parents and they would then have to adopt the child.[588]

As was cautioned by the SALC earlier, it is of fundamental importance that the best interests of the commissioned child be considered *before* conception.[589] Situations where a court has to make a decision after conception should be prevented at all costs.[590]

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583 61 of 2003. Sec 2. Louw 2014 *De Jure* 116. Louw further points out that neither the NHA nor the Regulations specifically address the artificial fertilisation of a surrogate mother in the execution of a surrogate agreement. He argues that the health professional can therefore simply deny any knowledge of the surrogacy agreement at the time of performing the procedure, thereby escaping prosecution.

584 Regulations relating to the artificial fertilisation of persons published under Government Notice R175 in Government Gazette 35099 of 2 March 2012.

585 Sec 292 and sec 297(2).

586 Judgments will be discussed below.

587 Sec 297(2). Nicholson and Bauling 2013 *De Jure* 523. Heaton 2015 *THRHR* 35. The author explains that the wording of sec 296 suggests that the legislature envisaged that the section would apply only to confirmed surrogate agreements.

588 Sec 299(d). Nicholson and Bauling 2013 *De Jure* 523. It can be a complicated process should the commissioning parent(s) be biologically linked to the child as there are problems associated with adopting one's own child. Thus, when the parentage of a child comes into question, it could have disastrous effects on the child. Heaton 2015 *THRHR* 35 and 38. The commissioning parent(s)' names would not appear on the birth certificate as the surrogate, and if she is married, her husband or civil partner would be registered as the parents of the child born as a result of the invalid surrogate agreement.

589 SALC Project 65 at par 8.2.14.

590 SALC Project 65 at par 8.2.14.

Section 296 further prohibits the artificial fertilisation of the proposed surrogate after a lapse of eighteen months after said confirmation by the court.[591] This restriction may be seen as a way of preventing the circumstances of the parties involved from changing so drastically over the time that the agreement no longer reflects the real circumstances and/or intentions of the said parties, in spite of contractual provision for some changes in the agreement, for instance death or divorce of the commissioning parents.[592] However, conception may not always be achieved within this time frame, which will mean that the parties would need to approach the court for a new confirmation of the surrogacy agreement.[593] The pregnancy must be established within the stated eighteen months but the surrogate does not have to give birth to the child within the period.[594]

Clarke argues that the last-mentioned provision does not clarify whether the commissioning parents are permitted to cryopreserve their gametes for future use in instances where surrogacy is medically indicated.[595] She argues that an interpretation of section 303(2) of the Children's Act which provides that "no person may in any way

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591 Sec 296(1)(b). Nicholson and Bauling 2013 *De Jure* 523. The writers point out that parties are ignoring the requirement that the court confirmation of the surrogate agreement must precede the artificial fertilisation of the surrogate and that the law is thus being flouted, either out of ignorance or disrespect and this may be to the detriment of the parties or the child.

592 Davel and Skelton *Commentary* 23.

593 Nicholson and Bauling 2013 *De Jure* 522. The writers point out that the process of artificial fertilisation can be time consuming and it is not always successful on the first or second attempt which may necessitate the drafting and confirmation of a further surrogate agreement. This can lead to further costs. LexisNexis *Family Law service* at par W11. Clarke argues that the parties may apply to Court for an extension of the time period by showing good cause why an extended period of time is required for further artificial fertilisation treatments of the surrogate. She states that the extension is usually required for medical reasons especially in instances where the commissioning mother has utilised her own eggs without success and will require donor eggs to be fertilised with her partner's sperm/gametes for the sake of improving their chances of conception.

594 LexisNexis *Family Law service* at par W11.

595 LexisNexis *Family Law service* at par W11. Reg 1 of Regulations 2021. Freezing or cryopreservation is defined as freezing or cryopreserving genetic material including ova, sperm, embryos, ovarian tissue or stem cells by an authorised institution. Further, it is the ability to freeze and thaw with retention of viability—provides flexibility in human infertility therapy when gametes or embryos are handled *in vitro* because frozen tissue can be stored indefinitely in liquid nitrogen at -196°C. Gamete and embryo cryopreservation accessed from the Global Library of Women Medicine (https://www.glowm.com/section_view/heading/gamete-and-embryo-cryopreservation/item/365#:~:text=Cryopreservation%E2%80%94the%20ability%20to%20freeze,nitrogen%20at%20%2D196%C2%B0C) (accessed on 14 February 2021). She further argues that cryopreservation of embryos or gametes is often medically indicated, for example, prior to chemotherapy treatment or where the intended parent is placed on medication which may adversely affect their gametes.

for or with a view to compensation make known that any person is or might possibly be willing to enter into a surrogate motherhood agreement", would imply that even rendering assistance in artificial fertilisation without the authorisation of the court would be prohibited.[596] This conclusion is strengthened by the fact that the definition of artificial fertilisation includes *in vitro* fertilisation in terms of the NHA. Thus, this seems to indicate that no fertilisation is permitted to take place of the egg and the sperm; however, the prohibition does not extend to the extraction of a woman's eggs and the subsequent cryopreservation thereof in anticipation of being used in a future surrogate agreement.[597]

This discussion on the application of section 296 also points to the need for clarity in regulations regarding the issue of cryopreservation of embryos or gametes, especially in circumstances where the parties decide to extract gametes before lodging an application for confirmation of a surrogate motherhood agreement. Looking at the Children's Act more closely, there is no prohibition in chapter 19 regarding the extracting of gametes. In specific cases, it is conceivable that this may be the only way for the commissioning parents to use their gametes when required. An example would be where one or both the commissioning parents must undergo medical treatment that carries the risk of affecting the viability of the gametes. It is my submission that in these instances, gametes should be withdrawn and frozen before treatment of the person commences. In these instances, the commissioned child will still have a genetic link to the commissioning parents.

The discussion will next turn to the consequences of the surrogate motherhood agreement for the relevant parties thereto.

3.8 Section 297: The consequence of a surrogate motherhood agreement on the status of the child[598]

596 LexisNexis *Family Law service* at par W11. Act 61 of 2003. The definition of *in vitro* fertilisation is explained in par 1.2.5 above.

597 LexisNexis *Family Law service* at par W11.

598 The Act. *Ex parte WH and others* at par 58. *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 22. Bosman-Sadie and Corrie *Practical approach to the new Children's Act* 296-297. Nöthling Slabbert 2012 *SAJBL* 28. *AB and another v Minister of Social Development a*t par 42.

This section determines what the *effect* of a valid surrogate agreement is, as well as the effect on the legal status of the commissioned child.[599] Should the agreement be valid, any child born of a surrogate in terms of the agreement is for all purposes legally the child of the commissioning parent(s) from the moment of the birth of the child concerned;[600] the surrogate is obliged to hand the child over to the commissioning parent(s) as soon as it is reasonably possible after the birth;[601] the surrogate or her husband, partner or relatives has no rights of parenthood or care of the child;[602] the surrogate or her husband, partner or relatives has/have no right of contact with the child unless it is specifically provided for in the surrogacy agreement between the parties, subject to sections 292 and 293; [603] the surrogate agreement may not be terminated after the artificial fertilisation of the surrogate has taken place;[604] and the child will not have a claim for maintenance or of succession against the surrogate mother, her husband or partner or any of their relatives.[605]

Section 297(2) determines further that any surrogate agreement that does not comply with the provisions of the Act is invalid and the child born as a result of any action taken in execution of such an arrangement, is for all purposes deemed to be the child of the woman that gave birth to that child.[606] This section must be read in conjunction with and subject to the provisions of section 298, which provides for the dissolution of a surrogate agreement, and section 299, which deals with the consequences of

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599 Louw 2014 *De Jure* 111. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 248.

600 Sec 297(1)(a). Mills 2010 *Stell LR* 435. Sloth-Nielsen "Surrogacy in South Africa" 191.

601 Sec 297(1)(b). SALC Project 65 at par 8.3.10. The child should be handed over to the commissioning parents as soon as possible despite any disputes regarding compensation between the parties. The commission submitted that handing over of the child should have no connection with the payment of the compensation Report of the Ad Hoc Committee 33. Nöthling Slabbert 2012 *SAJBL* 31. LexisNexis *Family Law service* at par W12. Provision may be made in the agreement for the post birth protocols which are to be followed between the parties. Examples would be, who may be present at the birth and may the surrogate hold the child after birth.

602 Sec 297(1)(c). Mills 2010 *Stell LR* 436.

603 Sec 297(1)(d). Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 433. Oluwaseyi and Oladimeji 2021 *Obiter* 31.

604 Sec 297(1)(e). Sloth-Nielsen "Surrogacy in South Africa" 191.

605 Sec 297(1)(f).

606 Sloth-Nielsen "Surrogacy in South Africa" 192. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 248.

termination of a surrogate agreement.[607] The full effect of the surrogate agreement depends on whether the parties have intended a full or a partial surrogacy agreement.[608]

Section 297 in essence provides that a valid surrogate agreement will automatically confer full parental responsibilities on the commissioning parent(s) from the moment of birth.[609] Contrary to the common-law rule, identifying the mother as the woman who gave birth to the child, encapsulated in the maxim *mater sempter certa est*, the surrogate and her spouse or partner do not obtain any rights of parenthood and are thus obliged to hand over the child as soon as it is reasonably possible after birth.[610] This provision is aligned with the SALC's recommendation that a child born as a result of a legal surrogate agreement should, from the moment of birth, for all purposes have the legal status of a legitimate child of the commissioning parent(s). Similarly, the commissioning parent(s) should have the legal status of the lawful parent(s) of the said child.[611]

Regarding section 297(e), which determines that the effect of a valid surrogate agreement is that the agreement may not be terminated after the surrogate was artificially fertilised, Louw argues that apart from a partial surrogate who may terminate the agreement in terms of section 298 and the right of any surrogate to terminate the agreement by terminating her pregnancy in terms of the Choice on Termination of

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607 Davel and Skelton *Commentary* 25. Sections 298 and 299 determines that a partial surrogate mother may withdraw from a fully enforceable surrogate agreement. The surrogate who is not genetically linked to the child (full surrogacy) does not have this option. Slabbert and Roodt "South Africa" 329. Thus, if the surrogate mother is genetically related to the child, she has the right to cancel the agreement and keep the child but if the surrogate mother is only carrying the child for the commissioning parents, she does not have the same right.

608 Sec 298(1) and sec 299 of the Children's Act. Davel and Skelton *Commentary* 25. Louw 2013 *THRHR* 571. The writer states that it is fallacious to assume that a partial surrogate who is genetically linked to the child may find it more difficult to give up her baby compared to a full surrogate who is not so related. She argues that the Children's Act differentiates between these types of surrogate mothers based on their biological connection or absence thereof. She further argues that biology alone cannot explain why parental rights upon termination of the agreement should vest in the surrogate mother and her husband or partner, if she has any, but if she is single, she shares parental rights with the commissioning father.

609 Sec 297(1)(a). LexisNexis *Family Law service* at par W12. The High Court order is declaratory in nature and it declares the commissioning parent(s) to be the parent(s) of the child prior to conception taking place. Thus, the commissioning parent(s) does no longer need to adopt the child born of the agreement.

610 Sec 297(b). Nöthling Slabbert 2012 *SAJBL* 31.

611 SALC Project 65 at par 8.2.12. The surrogate should have no lawful claim to or legal obligation towards the commissioned child.

Pregnancy Act,[612] the surrogate agreement may not be terminated *after* the surrogate has been artificially fertilised.[613] It is clear from the construction of the sections that the commissioning parent(s) do not have a right to terminate the agreement after the surrogate was artificially fertilised. The surrogate, on the other hand, has the right to terminate the agreement as will be discussed in section 298 below.[614]

The effect of section 297(2) is that an invalid surrogate agreement will sever the rights of the commissioning parent(s), who will not be regarded as the parent(s) of the child, whereas the surrogate who gives birth to the child would become the legal parent.[615] The surrogate and her husband or partner need to understand the consequences should she refuse to hand over the commissioned child. Although the valid agreement gives full responsibilities and rights to the commissioning parent(s), the surrogate's actions after the birth of the child may change the consequences as set out in the agreement. The commissioning parent(s) will thus have no rights in respect of the commissioned child where the surrogate decides to keep the commissioned child after birth. The termination of a surrogacy agreement will next be considered.

3.9 Section 298: The dissolution of a surrogate agreement[616]

Section 298 determines that a surrogate, who is also a genetic parent of the child, may terminate the surrogate agreement at any time *within a period of sixty days after* the birth of the child *and by the filing of a written notice with the court*.[617] The confirmation

612 92 of 1996. Sec 300 of the Children's Act.

613 Davel and Skelton *Commentary* 26. Sloth-Nielsen "Surrogacy in South Africa" 191.

614 Nöthling Slabbert 2012 *SAJBL* 31.

615 Sec 297(2).

616 The Act. Bosman-Sadie and Corrie *Practical approach to the new Children's Act* 297. *AB and another v Minister of Social Development* at par 43.

617 Sec 298(1). Nöthling Slabbert 2012 *SAJBL* 31. Slabbert and Roodt "South Africa" 329. SALRC Project 140 85. Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 434. The writer states that it is suggested that this cooling off period would, in light of the implications of epigenetics (as discussed in ch 5 below), be available to all surrogates, irrespective of whether or not their gametes are used as all surrogate mothers are, as a result of the epigenome, genetically linked to the child. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 248. Oluwaseyi and Oladimeji 2021 *Obiter* 22. At 32 the authors explain that the rights of the commissioning parents to the child are suspended until the surrogate makes a decision either to renege or abide by the terms of the surrogacy agreement. The authors further explain that the distinction between full and partial surrogacy is made because of the surrogate mother's rights

of the termination of the agreement must be confirmed by the court and the court may issue any other appropriate order if it is in the best interest of the child, after notice to the other parties to the agreement, and after a hearing, upon the finding that the surrogate mother has willingly terminated the agreement and that she understands the consequences of the termination.[618] Should the surrogate exercise her rights of termination, she will not incur any liability to the commissioning parent(s), except for compensating them for any payments made by them in terms of section 301.[619]

With the introduction of chapter 19 of the Children's Act, the legislator adopted the 'delayed direct-parentage' model in the case of a partial surrogacy.[620] In terms of this model, the effects of the agreement are postponed until sixty days after the birth of the child, unless the surrogate decides not to surrender the child as agreed upon.[621] It can be explained that the acquisition of parental rights and responsibilities by the commissioning parent(s) is/are therefore suspended for a 'cooling-off' period within which time a surrogate, who is genetically related to the child, has the right to terminate the surrogacy agreement and keep the child.[622] A surrogate who is genetically related to the child may change her mind and decide to keep the child at any time until sixty days after the birth of the child, whereas the commissioning parent(s) and a full surrogate may only terminate the agreement before the artificial fertilisation of the surrogate.[623] Thus, it would appear that the full surrogate has no right to terminate the agreement as there is no 'cooling-off period' for her and the child will be the child of the

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to dignity, privacy and autonomy are violated by being forced to give up the baby contrary to her wishes.

618 Sec 298(2). Nöthling Slabbert 2012 *SAJBL* 31. Sloth-Nielsen "Surrogacy in South Africa" 191. Sloth-Nielson, J and van Heerden, B "The constitutional family developments in South African child and family law 2003-2013" 2014 *International Journal of Law, Policy and the Family* 28(1) 115. Heaton 2015 *THRHR* 33.

619 Sec 298(3). Nöthling Slabbert 2012 *SAJBL* 31. Slabbert and Roodt "South Africa" 329. SALRC Project 140 85.

620 Report of the Ad Hoc Committee 8. Direct parentage is defined as a child or children born as a result of a surrogate agreement are considered the legitimate child or children of the commissioning parent or parents immediately at birth. Davel and Skelton *Commentary* 29. Louw 2013 *THRHR* 575.

621 Sec 298(1).

622 Nöthling Slabbert 2012 *SAJBL* 29. LexisNexis *Family Law service* at par W13. Clarke argues that the traditional surrogacy agreements should be discouraged because of the potential risks inherent to all the parties may prove to be problematic. Thus, she argues, traditional surrogacy agreements should only be resorted to as a last resort and only in exceptional circumstances due to the extensive availability of anonymous egg donors to infertile commissioning parent(s).

623 Davel and Skelton *Commentary* 30. Nöthling Slabbert 2012 *SAJBL* 31. The writers point out that the specific enforcement of a surrogate agreement against the will of the surrogate mother may also violate her rights to dignity, privacy and bodily autonomy, including the child's right to dignity.

commissioning parent(s).[624] The surrogate must give notification of the termination through the filing of a written notice with the court.[625] The procedure for the termination is sufficiently outlined in the Act and it is imperative that the parties understand the consequences of a termination, especially the effect thereof on the status of the commissioned child and all the parties concerned.

Section 298(3), which directs that the surrogate must compensate the commissioning parent(s) for any payments made by them in terms of section 301, can be seen as a form of protection of the commissioning parent(s) in that the surrogate must understand the financial consequences of a decision to terminate the agreement in terms of section 298(1). There are clearly consequences for all the parties to the agreement should the agreement be terminated. The effect of termination will next be examined.

3.10 Section 299: The consequence of termination of the surrogate agreement[626]

Two scenarios regarding the termination of the agreement arise, e.g termination after the child is born and before the child is born. Where the agreement is terminated after the child is born, the parental rights established in terms of section 297 are terminated and will vest in the surrogate, her husband or partner, if any, or if she has none, the commissioning father.[627]

Should the agreement be terminated before the child is born, the child will legally be the child of the surrogate, her husband or partner, if any, or if she has none, the commissioning father, from the moment of the child's birth.[628] Where the agreement is terminated, the surrogate and her husband or partner, if any, or if she has none, the commissioning father, is obliged to accept the obligation of parenthood.[629] Subject to sections 299(a) and 299(b), upon termination of the agreement either before or after the child is born, the commissioning parent(s) will have no rights of parenthood and

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624 Sloth-Nielson, J and van Heerden, B "The constitutional family developments in South African child and family law 2003-2013" 2014 *International Journal of Law, Policy and the Family* 28(1) 115. The authors mention that if needs be, the child will be the child of the commissioning parents under the compulsion of the court.

625 Sec 298(1).

626 The Act. Bosman-Sadie and Corrie *Practical approach to the new Children's Act* 298.

627 Sec 299(a). Sloth-Nielsen "Surrogacy in South Africa" 192.

628 Sec 299(b). Sloth-Nielsen "Surrogacy in South Africa" 192.

629 Sec 299(c).

can only obtain such rights through adoption.[630] Furthermore, section 299(e) provides that, also subject to sections 299(a) and 299(b), that the child will have no claim for maintenance or of succession against the commissioning parent(s) or any of their relatives in the event that the surrogate agreement was terminated.[631]

The surrogate's right to terminate the pregnancy will be canvassed next.

3.11 Section 300: Termination of the pregnancy by the surrogate mother[632]

A surrogate agreement is terminated when the surrogate terminates her pregnancy in terms of the Choice on Termination of Pregnancy Act.[633] The decision to terminate the pregnancy lies with the surrogate, but she must inform the commissioning parent(s) of her decision and consult with them before her pregnancy is terminated.[634] By exercising her right, the surrogate incurs no liability to the commissioning parent(s) except for compensation for any payments made by the commissioning parent(s) in terms of section 301 where the decision to terminate is for any other reason than on medical grounds.[635]

Section 300 permits a surrogate to terminate her pregnancy in terms of the Choice of Termination of Pregnancy Act, even after an undertaking in terms of the surrogate agreement, to carry and give birth to the child on behalf of the commissioning parent(s).[636] Louw argues that a right to terminate the pregnancy necessarily includes the right to refuse to terminate the pregnancy and that is even at the risk of giving birth

630 Sec 299(d). Sloth-Nielsen "Surrogacy in South Africa" 192.
631 Sec 299(e).
632 The Act. *Bosman-Sadie and Corrie Practical approach to the new Children's Act* 298.
633 92 of 1996. Sec 300(1). SALC Project 65 at par 8.3.4. The SALC submitted that provisions of the Abortion and Sterilisation Act 2 of 1975 should be incorporated in surrogacy legislation. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 248. Heaton 2015 *THRHR* 33.
634 Sec 300(2). LexisNexis *Family Law service* at par W14.
635 Sec 300(3).
636 Sec 300(2). Report of the Ad Hoc Committee 32. The Committee submitted that the surrogate's rights should not be considered in isolation. Her rights should be weighed up against the rights of the commissioning parent(s). At 75 the Committee recommended that the issue of an abortion should be handled by the parties in their terms of contract as it is a complex issue. This, however, should be done within the confines of the Constitution and the Choice on Termination of Pregnancy Act 92 of 1996.

to a child with severe physical or mental defects.[637] One may argue that it would be in the best interests of all the parties concerned, especially the commissioned child, to make provision for circumstances where the child might be born with severe physical or mental defects, if detected during the surrogate's pregnancy.[638] The Ad Hoc committee was adamant that there should be an agreement by the commissioning parent(s) that the commissioned child would be accepted in spite of any mental or physical handicap.[639] The SALC recommended that the commissioning parent(s) should be consulted in the event that a medical risk regarding the foetus is detected, as they may wish to continue to have the child, despite the risk of disability or a handicap.[640] This recommendation by the SALC is rational, as the commissioning parent(s) will at least have a chance to make an informed decision instead of agreeing to accept a child with mental or physical handicaps without having the opportunity to make an informed decision.

Section 300(3) also protects the commissioning parent(s) in the event that the surrogate terminates the pregnancy for a reason other than medical grounds, for example, social reasons.[641] In circumstances where the pregnancy is potentially life threatening to the surrogate or the foetus, the surrogate will not need to compensate the commissioning parent(s) for any payments made by them in respect of the agreement.[642]

Parties should be advised to agree in advance on what should happen when a termination of pregnancy is necessary. This will create some degree of certainty in preventing a termination without a medical basis. The agreement may not require a surrogate mother not to exercise her fundamental right to decide whether or not to continue with the pregnancy. In all instances the final decision on termination still rests with the surrogate.[643]

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637 Davel and Skelton *Commentary* 33.

638 Report of the Ad Hoc Committee 47. The Committee submitted that provision should be made for the possibility that the commissioned child being born abnormal as no person can be guaranteed a healthy child.

639 Report of the Ad Hoc Committee 47.

640 SALC Project 65 at par 8.3.4.

641 LexisNexis *Family Law service* at par W14.

642 LexisNexis *Family Law service* at par W14.

643 LexisNexis *Family Law service* at par W14. Clarke recommends that the psychological assessment on the parties should fully deal with this aspect and the different scenarios discussed

The form of payments that are allowed to be made in terms of a surrogacy agreement will be discussed in the next section, as the Act permits only a limited number of expenses.

3.12 Section 301: Prohibition of payments in respect of surrogacy[644]

Section 301 expressly states that no person may give or promise to give to any person, or receive from any person a reward or compensation in cash or in any kind in respect of a surrogate agreement, subject to subsections (2) and (3).[645] The only promise or agreement for the payment of compensation to a surrogate, or any other person in connection with a surrogate agreement or the execution of such an agreement which is enforceable, is for the compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate, the birth of the child; the confirmation of the surrogate agreement;[646] loss of earnings suffered by the surrogate as a result of the surrogate agreement;[647] or for the insurance to cover the surrogate for anything that may lead to death or disability as a result of the pregnancy.[648] Reasonable compensation may be paid to a person who renders a *bona fide* professional legal or medical service with a view to the confirmation of a surrogate agreement in terms of section 295 or in the execution of such an agreement.[649]

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in which a termination would or would not be undertaken by the surrogate. SALC Project 65 at par 8.3.4. The final choice of termination of pregnancy should remain with the woman who is carrying the child.

644 The Act. *In re confirmation of three surrogate agreements* at par 15 and 22. *Ex parte HPP and others; Ex parte DME and others* par 27 and 28. *Ex parte WH and others* at par 40 and 65. Bosman-Sadie and Corrie *Practical approach to the new Children's Act* 299. *AB and Another v Minister of Social Development* at par 44.

645 Sec 301(1). SALC Project 65 par 8.4.2. Report of the Ad Hoc Committee 61 and 74. It was submitted that a criminal ban on compensation of the surrogate would be impractical. SALRC Project 140 85.

646 Sec 301(2)(a). Report of the Ad Hoc Committee 25 and 62. SALRC Project 140 86.

647 Sec 301(2)(b). SALRC Project 140 86.

648 Sec 301(2)(c). Report of the Ad Hoc Committee 49. The commissioning parent(s) should also be insured accordingly. SALRC Project 140 86.

649 Sec 301(3). Nöthling Slabbert 2012 *SAJBL* 32. The writer explain that medical or legal professionals providing a *bona fide* professional service in respect of the surrogate agreement, for example, drawing op of the contract, and in its execution, for example, the artificial fertilisation of the surrogate mother, are entitled to reasonable compensation for their different services. SALRC Project 140 86. Bonthuys and Broeders 2013 *SALJ* 490.

Section 301 provides for limited exceptions to the above instances, underscoring the principle that commercial surrogacy is unlawful.[650] Should a person contravene this provision, he or she is committing a criminal offence and if found guilty, will be liable to pay a fine or to imprisonment for a period not exceeding ten years, or both a fine and imprisonment.[651]

Furthermore, any agreement or a promise between the parties to pay compensation in connection with a surrogate agreement is unenforceable.[652] Clarke sees the purpose of this section to prevent the abuse of persons charging a fee in relation to the surrogacy process, who are not professional persons required for the successful outcome of the surrogacy process.[653] Should facilitation agreements be valid, it would open the floodgates and lead to commercial surrogacy and the abuse of vulnerable persons, which is exactly what section 301 was intended to prevent.[654]

A surrogacy facilitator's services are also covered by the prohibition in section 301 as these services are not directly linked to the allowed lawful expenses relating to surrogacy agreements.[655] Louw argues that the pre-authorisation requirement in terms of the Act makes the surrogacy model adopted in South Africa far more inflexible,

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650 *Ex parte HPP and others; Ex parte DME and others* par.27. Nöthling Slabbert 2012 *SAJBL* 32. *Ex Parte KAF and others* 2019 (2) SA 510 (GJ) at par 7. The court stated that it is to prevent the potential exploitation of commissioning parents from likely financial damage that could result on the one hand, as well as the potential exploitation and commodification of would be surrogates as well as the rights of the child to be born. It is also likely that some surrogate mothers may be desperate enough to enter into these contracts for the limited financial benefit that they may receive. Bonthuys and Broeders 2013 *SALJ* 490. Louw 2013 *THRHR* 580. The writer argues that South Africa prohibits commercial surrogacy for fear that it would lead to the commodification of babies because it could amount to baby selling if the surrogate stands to gain financially from the agreement. SALC Project 65 at par 8.2.8. The SALC submitted that paying a surrogate is seen as trading in children. It would be fair though for the surrogate to be reimbursed for actual expenses incurred in respect of the pregnancy.

651 Sec 305(1)(b). SALRC Project 140 86. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 247.

652 Sec 301(2). LexisNexis *Family Law service* at par E207.

653 LexisNexis *Family Law service* at par W8. Thus, no agency, surrogate coordinator/facilitator or person may charge an introductory fee for the purpose of introducing a surrogate to potential commissioning parent(s). Agencies and persons are also not allowed to charge a fee which is disguised as an introductory fee.

654 LexisNexis *Family Law service* at par W8. Report of the Ad Hoc Committee 26. Agencies and brokers that provide services in respect of surrogacy agreements should be outlawed to prevent any abuse of these arrangements.

655 LexisNexis *Family Law service* at par W8.

especially if compared to the broader and more flexible approach in the UK.[656] She furthermore submits that the court does not have a discretion to authorise payments other than those listed in section 301 and if the court cannot confirm the agreement, the agreement will be invalid and unenforceable.[657]

3.13 Section 302: The identity of the parties to a surrogate agreement[658]

It is only with the written consent of the parties to court proceedings relating to a surrogate agreement, that their identities may be published.[659] No person may publish any facts that reveal the identity of a commissioned child.[660]

The purpose of this section is the protection of the identities of the parties to the agreement, as well as the commissioned child. Should a person fail to comply with the above prohibition, such person will be committing a punishable offence and he or she would be liable to a fine or to imprisonment or to both a fine and such imprisonment.[661] The Ad Hoc Committee also emphasised that strict confidentiality should be maintained, as the practice of surrogacy should not be promoted.[662] It was also submitted that sensational publicity must be discouraged at all costs as it is important to protect the dignity of the child.[663] The section also protects the identity of the surrogate mother to be disclosed to the commissioned child.[664]

Clarke, on the contrary, argues that there is no practical basis for prohibiting the disclosure of the identity in a gestational surrogacy agreement as the surrogate is only the carrier of the child.[665] She regards section 297(1) of the Act as contradicting section

656 Louw 2013 *THRHR* 583. The writer explains that in the UK, the approach would allow intending parents to be granted legal parentage even where reasonable expenses have been exceeded.
657 Louw 2013 *THRHR* 583 - 584. At 585 the writer argues that payments should be regulated in South Africa in terms of a set minimum and maximum fee, alternatively, the approval of payments not expressly sanctioned by the act, could be placed in the discretion of the court.
658 The Act. *Bosman-Sadie and Corrie Practical approach to the new Children's Act* 299. *Ex Parte SA and others* (case no 82202/2014) at par 17.
659 Sec 302(1). Report of the Ad Hoc Committee 74.
660 Sec 302(2). SALC Project 65 at par 8.3.5. It is in the interests of the child that no facts that could reveal his or her identity should be published.
661 Section 305(1)*(b)* read with s 305(6). Imprisonment is for a period not exceeding ten years. LexisNexis *Family Law service* at par E208 and par E209. Nöthling Slabbert 2012 *SAJBL* 28.
662 Report of the Ad Hoc Committee 48.
663 Report of the Ad Hoc Committee 48.
664 LexisNexis *Family Law service* at par W15.
665 LexisNexis *Family Law service* at par W15.

41 of the Act, as section 41 determines that the identity of the surrogate may not be disclosed to the child born, but section 297(1) determines that the surrogate or her husband may have contact with the child by agreement between the parties.[666] Thus, should the agreement stipulate that the surrogate may have contact with the commissioned child, the identity of the surrogate will need to be known to the child.[667] It was pointed out by the Ad Hoc Committee that notions regarding anonymity may not have a place in surrogacy arrangements where mutual support between the parties involved becomes essential, so that the surrogate may develop trust in the commissioning parent(s) to enable her to hand over the commissioned child after birth.[668]

3.14 Section 303: Certain acts are prohibited[669]

A person may only artificially fertilise a woman in the execution of a surrogate agreement or render assistance in such artificial fertilisation, if such person is authorised by a court in terms of the provisions of this Act.[670] Moreover, no person may advertise the services of a surrogate with a view to compensation.[671]

This section prohibits any person from artificially fertilising a proposed surrogate in the execution of a surrogate agreement or rendering assistance in such artificial fertilisation, unless the process was first authorised by a court.[672] The person who

666 LexisNexis *Family Law service* at par W15.

667 LexisNexis *Family Law service* at par W15.

668 Report of the Ad Hoc Committee 49.

669 The Act. *In re confirmation of three surrogate agreements* at par 15 *Ex parte HPP and others; Ex parte DME and others* par 30. *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 21. Bosman-Sadie and Corrie *Practical approach to the new Children's Act* 299. *AB and another v Minister of Social Development* at par 44.

670 Sec 303(1). SALC Project 65 at par 8.3.6. Illegal assistance to establish a surrogate pregnancy is punishable. The SALC was not in favour of criminalising any aspect of surrogacy but realised that it was necessary to serve as a deterrent. Nöthling Slabbert 2012 *SAJBL* 28.

671 Sec 303(2). SALC Project 65 at par 8.3.8. It was submitted that a ban on advertising may also contribute towards the restriction of commercialism. Report of the Ad Hoc Committee 28 and 74. Nöthling Slabbert 2012 *SAJBL* 33. It is pointed out that it is thus illegal to broker surrogacy arrangements on a commercial basis. The writers explain that a woman is free to offer her services to enter into a surrogate agreement that complies with the provisions of the Act and in terms of which she will only be compensated for reasonable expenses provided for in the Act. It is common in South Africa to advertise for egg donors and they offer to pay between R 5,000.00 and R 6,000.00 per donation.

672 Report of the Ad Hoc Committee 74. Nicholson and Bauling 2013 *De Jure* 523. Sloth-Nielsen "Surrogacy in South Africa" 191.

contravenes the provisions of this section is guilty of an offence and he or she will be liable to a fine or imprisonment or both a fine and imprisonment.[673] The SALC believed illegal surrogacy could be restricted in as far as medical practitioners will be discouraged from becoming involved in illegal surrogacy.[674]

As some of the provisions discussed in this chapter were the focus of litigation in recent times, it is necessary to turn to these cases next, and also to determine if the judgments provide clarity and guidance in respect of the legal gaps identified in these provisions above.

3.15 Judgments with a focus on chapter 19 of the Children's Act

At the time of writing of this thesis, no regulations have yet been promulgated in terms of the Children's Act relating to surrogacy.[675] The discussion below will turn to recent case law in respect of chapter 19 of the Children's Act.

3.15.1 In re confirmation of three surrogate agreements[676]

Three applications were brought in terms of section 292 of the Children's Act[677] for the confirmation of surrogate motherhood agreements.[678] The first application was brought by a 43-year old single male, with the surrogate married (to the third applicant, a female).[679] The second application was brought by a married couple (heterosexual), with the surrogate a divorced female.[680] The third application was brought by a married couple (heterosexual), with the surrogate married to a male.[681] The applicants all

673 Sec 305(1)(b) and sec 305(6). Imprisonment for a period of not more than ten years.
674 SALC Project 65 at par 8.3.6.
675 Nöthling Slabbert 2012 *SAJBL* 29. The Deputy Judge President of the South Gauteng High Court has issued a practice directive dealing with surrogate agreement applications in view of the shortcoming of the Act.
676 2011 (6) SA 22 (GSJ). This was the first unreported judgment from the South Gauteng High Court. Slabbert and Roodt "South Africa" 333.
677 38 of 2005. Hereinafter "the Act"."
678 *In re confirmation of three surrogate agreements* at par 1.
679 *In re confirmation of three surrogate agreements* at par 14.
680 *In re confirmation of three surrogate agreements* at par 14.
681 *In re confirmation of three surrogate agreements* at par 14.

qualified as commissioning parents and surrogate mothers pursuant to the provisions of the Act.[682]

Wepener J and Victor J reiterate that applications for the confirmation of surrogacy agreements have significant implications for all the applicants concerned, not to mention those for the children to be born.[683] The court also alludes to section 28 of the Constitution of South Africa, 1996, which provides an omnibus of the rights afforded to children in terms of the Constitution, as well as the relevance of article 20 of the African Charter on the Rights and Welfare of the Child, to which South Africa is a signatory.[684] In view of the court's duty to regard children's' interests as paramount,[685] judges are duty bound to ensure that the interests of the child, once born, are best served by the contents of the agreement, which the court is requested to confirm.[686] As the upper guardian of minors, the court may require detailed information regarding: (a) who the commissioning parents are; (b) what their financial position is; (c) what support systems, if any, they have in place; (d) what their living conditions are; and (e) how the child will be taken care of.[687]

In the above application, the court refers to the good practice which is found in adoptions where expert assessment reports from social workers are required, and in practice, a police clearance is obtained to demonstrate the suitability of the adoptive parents.[688] The court suggests that these could be applied to the commissioning parents with good results. An expert report could also address the suitability of the surrogate mother.[689] Applicants must supply proper and full details regarding

682 *In re confirmation of three surrogate agreements* at par 14.
683 *In re confirmation of three surrogate agreements* at par 5.
684 *In re confirmation of three surrogate agreements* at par 16.
685 *In re confirmation of three surrogate agreements* at par 16 Nöthling Slabbert 2012 *SAJBL* 29. The writers pointed out that the judgment emphasises that the court, in confirming the agreement, is not merely 'rubber stamping' the agreement. The court, in considering all the facts on which the application is based, will regard the interests of the child to be born of paramount importance. Slabbert and Roodt "South Africa" 333.
686 *In re confirmation of three surrogate agreements* at par 16. Louw 2013 *THRHR* 569. The writer argues that the impact of applying the best interest standard to a resultant child, rather than to an existing child when confirming a surrogate agreement, was never considered by the court in either this judgment or *Ex parte WH and others* 2011 (6) SA 514 GNP). She further argues that while the best interests of the child is expressly dealt with under a separate heading in the *Ex parte WH and others* judgment, the court does not seem to appreciate that the best interests of an existing child cannot be determined in the same way as the best interests of a resultant child.
687 *In re confirmation of three surrogate agreements* at par 17.
688 *In re confirmation of three surrogate agreements* at par 17.
689 In re confirmation of three surrogate agreements at par 17.

themselves in matters where the interests of children are paramount, otherwise the court would not be able to determine whether the commissioning parents are indeed fit and proper to be entrusted with full parental responsibilities.[690]

The court concludes that for it to perform its duty pursuant to the Act and the Constitution, complete and full compliance with all the provisions of the Act is required, as well as compliance with the requirements raised in the judgment.[691] This judgment is helpful in that the court provides some guidance as to what information is needed to decide in respect of a confirmation of a surrogate agreement.

3.15.2 Ex parte WH and others[692]

The facts of the above case are briefly the following: The first and second applicants, the commissioning parents, are two males married to one another.[693] They brought an application for the confirmation of a surrogate agreement.[694] They are Dutch and Danish citizens respectively, both domiciled in South Africa with the intention to stay in South Africa permanently.[695] The couple was introduced to the potential surrogate mother by an agency known as Baby-2-Mom.[696] The parties compiled a list of estimated costs regarding payments related to the surrogacy agreement and the execution thereof.[697] No details, however, were provided regarding the specifics in respect of the costs.[698] The court concludes that a detailed list of surrogacy expenses with sufficient specificity should be provided to minimise the possibility of abuse.[699]
The court furthermore considers the application with the view to establish guidelines on how similar applications brought in the future should be dealt with.[700] The Bar, Law

690 *In re confirmation of three surrogate agreements* at par 24.
691 *In re confirmation of three surrogate agreements* at par 26. Pillay, R and Zaal, FN "Surrogate motherhood confirmation hearings: The advent of a fundamentally flawed process" 2013 *South African Law Journal* 130(3) 478.
692 2011 (4) All SA 630 (GNP).
693 *Ex parte WH and others* at par 15. Jordaan DW "Surrogate Motherhood in illness that does not cause infertility" 2016 *SAMJ* 685. Pillay and Zaal 2013 *SALJ* 478.
694 *Ex parte WH and others* at par 14. Louw 2013 *THRHR* 566.
695 *Ex parte WH and others* at par 15.
696 *Ex parte WH and others* at par 18 Pillay and Zaal 2013 *SALJ* 478. Louw 2013 *THRHR* 566.
697 *Ex parte WH and others* at par 28.
698 *Ex parte WH and others* at par 29.
699 *Ex parte WH and others* at par 29 Nöthling Slabbert 2012 *SAJBL* 29. Pillay and Zaal 2013 *SALJ* 479.
700 *Ex parte WH and others* at par 9.

Society and Centre for Child Law were invited to make submissions regarding the following aspects: (a) the approach that should be followed in the case where the reproductive genetic material used is not that of the parties; (b) the approach, if any, that should be followed when same-sex couples apply for a surrogacy agreement confirmation; (c) the appropriate steps that should be followed and factors to be considered to determine the best interests of the child.[701]

The court states that it should in all instances where an agency is involved in the surrogacy arrangement, be fully appraised of: (a) all the facts and circumstances relating to the *modus operandi* of the said agency, (b) the relationship between the agency and the commissioning parents, as well as (c) between the agency and the surrogate.[702] Tolmay and Kollapen JJ allude to pertinent constitutional and legal issues which may arise out of surrogacy applications, namely those following from (a) surrogacy and same sex relationships; (b) the best interests of the child; (c) the surrogate and the risk of commercial surrogacy; and (d) a suitable parent.[703]

The court emphasises that same-sex couples should be treated in the same way as heterosexual couples as far as their appropriateness to act as commissioning parents were concerned.[704] The court also points out that the mothering of a child is a function that very often does not have anything to do with the gender of a parent.[705] It further states that many children grow up without a father or a mother and courts should safeguard that it does not try and create a utopia for commissioned children that is far removed from the social reality of society.[706]

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701 *Ex parte WH and others* at par 10.

702 *Ex parte WH and others* at par 30. Nöthling Slabbert 2012 *SAJBL* 29. Pillay and Zaal 2013 *SALJ* 480.

703 *Ex parte WH* at par 54 to par 70.

704 Revision Service (RS) 4, 2012 ch 19 – p15 ***Background to Children's Act*** 38 of 2005.

705 *Ex parte WH* at par 54.

706 *Ex parte WH* at par 54. At par 55 the court referred to sec 292(1)(c) and stated that it is evident that the legislature had contemplated that a single person may also be a commissioning parent and this appears to be in line with the prohibition of non-discrimination found in sec 9 of the Constitution. Bonthuys and Broeders 2013 *SALJ* 488. The writers argue that the court can be found lacking in the application of substantive equality to the facts of the case. The court seems to require formal equality between same-sex and opposite-sex commissioning parents in that they should be treated in exactly the same manner. The court warned that different tests should not apply to same-sex and opposite-sex commissioning parents. But, on the other hand, the realisation that requiring maternal influences from a gay couple would affectively preclude them from becoming surrogate parents indicates an awareness of the different contexts that is applied to gay couples who wish to become parents. This, the writers argue, would require substantive,

Regarding the best interests of the child, the court refers to section 28(2) of the Constitution and section 7 of the Children's Act, both underscoring the importance of a child's best interests in every matter concerning a child.[707] The court briefly considers the legal situation relating to surrogate motherhood, prior to the promulgation of the Children's Act, which provided that commissioning parent(s) could only become the legal parent(s) of the child through adoption.[708] Unfortunately, under this dispensation, in instances where the surrogate changed her mind and refused to consent to the adoption of the child, she could do so irrespective of the genetic origin of the child.[709] This was undoubtedly an untenable situation, which signalled uncertainty regarding the parents of the child, which could impact negatively on the child.[710] Such a scenario was clearly not in the best interests of the child.

In casu, the court refers to section 297(1)(b) of the Act which requires the surrogate mother to hand over the child as soon as it is reasonably possible after birth.[711] The court emphasises that the surrogate, her partner and relatives do not have any right to parenthood or care.[712] Furthermore, reference is made to section 298(2) in terms of which the court must terminate the confirmation of the agreement (after notice to the parties and a hearing) upon finding that the surrogate has voluntarily terminated the agreement and that she understands the effect of the termination.[713] A court may grant any other appropriate order if it is in the child's best interests.[714]

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rather than formal, equality between same-sex and opposite-sex commissioning couples. The court should question and transcend heteronormative legal and social assumptions.

707 *Ex parte WH and others* at par 56.

708 *Ex parte WH and others* at par 57.

709 *Ex parte WH and others* at par 57.

710 *Ex parte WH and others* at par 57.

711 *Ex parte WH and others* at par 58.

712 *Ex parte WH and others* at par 58.

713 *Ex parte WH and others* par 60.

714 *Ex parte WH and others* at par 60. It is stated that the court will be in a position to ensure that the best interests of the child is protected on the termination of the surrogate agreement. At par 63 the court stated importantly: "Thus when a court considers the question of the best interests of the child care should be taken that the rights of the commissioning parents in terms of the Bill of Rights and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 are not violated by unnecessary invasion of the privacy of commissioning parents or by setting the bar too high for parents whose only option is to have a child by way of surrogacy. This will entail a value judgment by the court taking into consideration the circumstances of the particular case." Pillay and Zaal 2013 *SALJ* 480. Louw 2013 *THRHR* 568.

Regarding the issue of a surrogate and the risk of commercial surrogacy, the court cites section 301 of the Act that prohibits payment to any person other than those specifically set out in the Act, which would include any facilitation fee to any person who introduced the surrogate to the commissioning parent(s) or any compensation of any nature other than those that the Act provides for.[715] The court advises that the affidavit should state that no such fee was paid to anyone.[716]

Regarding section 295(b)(ii), in discussing the issue of a suitable parent, [717] the court observes that courts should knowingly guard against personal perceptions influencing any decision on the suitability of a person to either accept parenthood or to act as a surrogate during the exercise of their discretion.[718] The court should, however, have regard to the personal and character details of a commissioning parent for instance, details of previous criminal convictions, particularly those relating to violent crimes or crimes of a sexual nature.[719] Importantly, when a court needs to decide on the suitability of a parent, an objective test should be applied (bearing in mind the

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715 *Ex parte WH and others* at par 65. Nicholson and Bauling 2013 *De Jure* 527.

716 *Ex parte WH and others* at par 65. The court further stated at paras 66 and 67 what information is required to be set out in the affidavit. In the event that an agency was involved, the full particulars regarding the agency should be set out and an affidavit by the agency should also be filed with the following information: "(a) the business of the agency;(b) whether any form of payment is paid to or by the agency in regard of any aspect of the surrogacy; (c) what exactly the agency's involvement was regarding the (i) introduction of the surrogate mother, (ii) how the information regarding the surrogate mother was obtained by the agency, and (d) whether the surrogate mother received any compensation at all from the agency or the commissioning parents." Further, the court stated that: "Full particulars should be set out in the founding affidavit on how the commissioning parents came to know the surrogate mother and why she is willing to act as a surrogate to them. The surrogate mother's background as well as her financial position should be investigated and set out in the affidavit. Furthermore, a comprehensive report by a psychologist is essential to assess the suitability of the surrogate mother. This should deal in particular with her background, psychological profile and the effect that the surrogacy and the giving up of the baby will have on her. Full medical reports should also be obtained regarding her physical condition to indicate whether surrogacy poses any dangers for her and/or the child. In our view, the medical report should deal with the HIIV status of the mother, as well as any disease that could be transferred from her to the child in order to protect the child and to allow the court to exercise its discretion properly in confirming the agreement." At par 68 the court further stated that in their view, the application should also state where the gametes will come from without the parties revealing the identity of the donor. Nöthling Slabbert 2012 *SAJBL* 28. Nicholson and Bauling 2013 *De Jure* 527. Slabbert and Roodt "South Africa" 334 - 335. The writers pointed out that a detailed and specific list of surrogacy expenses should be provided to minimise the possibility of abuse. Bonthuys and Broeders 2013 *SALJ* 490-491. Sloth-Nielsen "Surrogacy in South Africa" 193.

717 *Ex parte WH and others* at par 69. Pillay and Zaal 2013 *SALJ* 480.

718 *Ex parte WH and others* at par 69.

719 *Ex parte WH and others* at par 69. The court pointed out that this information should be disclosed and fully set out as well as the circumstances surrounding them. Nöthling Slabbert 2012 *SAJBL* 30.

constitutional principles referred to) which would include an enquiry into the ability of the parents to care for the child both emotionally and financially and to provide an environment for the harmonious growth and development of the child.[720]

The vital role that the court plays in the confirmation of the agreement, is emphasised in this judgment.[721] On the one hand, the court is enjoined to advance the spirit and objectives of the Act without creating or placing additional obstacles in the path of the litigants who seek relief, but on the other hand, as the upper guardian of all minor children, it cannot simply be a rubber stamp validating the private arrangements between contracting parties.[722] The court must ensure that both the formal and substantive requirements of the Act are complied with and as it is dependent on the information placed before it by the applicants, the utmost good faith is expected and required from them in an application.[723]

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720 *Ex parte WH and others* at par 70. Nicholson and Bauling 2013 *De Jure* 529.

721 *Ex parte WH and others* at par 72.

722 *Ex parte WH and others* at par 72. Nicholson and Bauling 2013 *De Jure* 520. Pillay and Zaal 2013 *SALJ* 481. At 484 the writers state that the resultant disparity between what courts is supposed to be doing and what the courts are actually able to do, does much to explain the dissonance between what the court directed and what it did in the case of WH. The unfortunate consequence is a real danger of inappropriate confirmations and it must be concluded that the chapter 19 confirmation process is fundamentally flawed. At 485 the writers recommended that a patient review panel should be appointed and this panel should prepare a psychological and medical report, together with a recommendation in respect of the confirmation of the surrogacy agreement to court. Louw 2013 *THRHR* 567.

723 *Ex parte WH and others* at par 73. At par 76 the court stated that the court hearing such an application and in the exercise of its judicial discretion may request any additional information from the parties or any other institution to assist the court in the determination of the said application. At par 77 the court set out the following information which the affidavit should contain: "77.1 all factors set out in the Act together with documentary proof where applicable. The affidavit should also contain the information referred to in paragraphs [67] (Full particulars should be set out in the founding affidavit on how the commissioning parents came to know the surrogate mother and why she is willing to act as a surrogate to them. The surrogate mother's background as well as her financial position should be investigated and set out in the affidavit. Furthermore, a comprehensive report by a psychologist is essential to assess the suitability of the surrogate mother. This should deal in particular with her background, psychological profile and the effect that the surrogacy and the giving up of the baby will have on her. Full medical reports should also be obtained regarding her physical condition to indicate whether surrogacy poses any dangers for her and/or the child. In our view, the medical report should deal with the HIV status of the mother, as well as any disease that could be transferred from her to the child in order to protect the child and to allow the court to exercise its discretion properly in confirming the agreement.) and [74] (In satisfying itself that the peremptory requirements of the Act have been met, the court must be placed in possession of sufficient information to support any of the conclusions that the applicants contend for. Where an applicant seeks to draw certain conclusions with regard to matters which may include the financial, emotional or general suitability as a parent, there should be facts to support such conclusions that a court can interrogate. Ultimately, the court must be satisfied that the conclusions arrived at are supported by the facts. Accordingly, vague and generic allegations in this regard that fall short of supporting a conclusion may well render an application defective.) hereof; 77.2 whether there have been any previous applications for surrogacy, the division in which the application was brought,

This judgment emphasises the importance of complying with the provisions of the Act, and also the importance of providing an as detailed as possible list of surrogacy expenses to curb possible abuse and the possibility of commercial surrogacy. The court's approach and insistence on specific information, especially where an agency is involved in the surrogacy process, the manner in which the agency operates and the relationship between the parties and the agency, is strongly commended. Also significant is the court's guidance that same-sex couples should be treated the same as heterosexual couples in respect of the appropriateness to act as commissioning parents.

The prohibitions in section 301 in respect of payments allowed in a surrogacy agreement include the payment of a facilitation fee to a person introducing a surrogate and commissioning parent(s). The affidavit accompanying the application should specifically state that no such a payment was made. The personal and character details of the commissioning parent(s), especially with regards to past criminal convictions, are very important. The suitability of a parent is an objective test which includes the ability of the commissioning parent(s) to provide in the emotional and financial needs of the commissioned child, as well as a harmonious environment for the growth and development of the said child. This judgement is invaluable with regard to the court's

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whether such an application was granted and/or refused. If it was refused the reasons for the refusal should be set out; 77.3 a report by a clinical psychologist in respect of the commissioning parents and a separate report in respect of the surrogate and her partner; 77.4 a medical report regarding the surrogate mother which must include the details referred to in paragraph [67] in this judgment; 77.5 details and proof of payment of any compensation for services rendered, either to the surrogate herself or to the intermediary, the donor, the clinic or any third party involved in the process; 77.6 all agreements between the surrogate and any intermediary or any other person who is involved in the process; 77.7 full particulars, if any agency was involved, any payment to such agency as well as an affidavit by that agency containing the information referred to in paragraphs [65]–[66] of this judgment; 77.8 whether any of the commissioning parents have been charged with or convicted with a violent crime or a crime of sexual nature, as envisaged in paragraph [69] of this judgment." The court further gave the following guidelines regarding the enrolment of the matter to enable the protection of the identities of the parties at par 78: " 78.1 any party who seeks to bring an application will cause same to be issued by the Registrar in the ordinary course; 78.2 the court file must thereafter immediately be brought to the office of the Deputy Judge President, together with a letter explaining the facts and that the application is brought in terms of section 295 of the Children's Act 38 of 2005 and requesting a date for hearing. In the event that there exists any urgency in the hearing of the matter that must be set out in the letter as well; 78.3 the Deputy Judge President will then give further directions as to how this matter shall be heard in due course, including the allocation of the judge for the hearing of the matter; 78.4 any consideration as to hearing in camera must be addressed to the judge allocated to hear the matter once the parties are notified of the relevant date of the hearing." Further see Nöthling Slabbert 2012 *SAJBL* 30.

approach in considering the financial aspects relating to a surrogate agreement and the involvement of a surrogacy agency. Finally, the court's discussion of the factors which the court will consider determining what will be in the best interests of the commissioned child, may be regarded as a yardstick for further applications.

3.15.3 CM v NG[724]

This judgment concerns an application in terms of sections 23 and 24 of the Children's Act, which regulate applications for contact, care and guardianship of a child.[725] Section 23 provides that any person having an interest in the care, well-being or development of a child may apply to court for an order that he or she may have care and/or contact in respect of the child, whereas section 24 provides for the same regarding guardianship of a child. The parties in this case, although involved in a same sex relationship for several years, were not married.[726] A child conceived through artificial fertilisation was born on 29 October 2008.[727] The respondent in this case was the biological mother of the minor child, whereas the applicant had no biological connection with the child.[728] The parties' relationship ended in November 2010.[729] On 12 April 2011, the respondent advised the applicant that she wanted to stop the applicant's contact with the minor child as she believed that the contact was not in the child's best interest.[730] The applicant brought an urgent application seeking an order to have full parental rights and responsibilities in respect of the minor child.[731]

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724 2012 (3) All SA 104 (WCC).

725 38 of 2005. *CM v NG* at par 1.

726 *CM v NG* at par 1.

727 *CM v NG* at par 2.

728 *CM v NG* at par 2. Because the child was born in London, the respondent was recorded as the parent as she gave birth to the child. Sloth-Nielson, J and van Heerden, B "The constitutional family developments in South African child and family law 2003-2013" 2014 *International Journal of Law, Policy and the Family* 28(1) 115.

729 *CM v NG* at par 3.

730 *CM v NG* at par 3.

731 In terms of sec 18(2), (3), (4) and (5) of the Children's Act. *CM v NG* at par 1. The facts of the matter are set out in par 2 and 3. The parties applied in December 2006 to the Cape Fertility Clinic for the Respondent to undergo artificial insemination. The applicant underwent a similar process in August 2007. Respondent is the biological mother of the minor child and the applicant has no biological bond with the child. After the parties separated in November 2010, the applicant continued to have contact with the minor child. The parties did agree that the child's primary residence shall be with the respondent. The parties indicated that the fertilisation problem was as a result of 'lesbian couple'. It is further clear that the respondent signed forms in March 2009 consenting to the artificial insemination of the applicant.

The court observes that if the parties *in casu* were in a heterosexual relationship, the male person in the applicant's position would have been recognised as the father figure whose bond with the child would have been viewed as being that of a parent.[732] There is thus no reason why the applicant should not be treated in the same way.[733] The court points out that it is evident that it was the intention of the parties to have the child together and that applicant played the role of a parent to the minor child.[734] Turning to section 18(2) of the Act, the court stated that both "care" and "contact" are components of "parental rights and responsibilities" that are relevant to this aspect.[735] Gangen AJ states that if one has regard to the best interest of the child standard, the specific facts of the matter in each instance will determine what are in the child's best interest.[736] It could well be possible that not all the aspects of "care" and "contact" as set out in the definition may be relevant to a particular set of facts.[737] Thus, the court retains the discretion to delineate the specific aspects of care and contact to be allocated to each party.[738]

Gangen AJ concludes that the applicant has no automatic parental rights and responsibilities in terms of sections 19 to 21 of the Act as she has no biological link to the minor child.[739] Furthermore, the applicant does not acquire automatic parental rights and responsibilities in terms of section 40 (which deals with children conceived by artificial fertilisation) as she did not enter into a marriage with the respondent.[740] Thus, in absence of an agreement in terms of section 22, the applicant's recourse is to apply to the court in terms of sections 23 and 24 of the Act.[741] The best interests of the child, the relationship between the applicant and the child and any other relevant person and the child, and any other factor which the court considers should be taken

732 *CM v NG* at par 21.
733 *CM v NG* at par 21.
734 *CM v NG* at par 22. Sloth-Nielson, J and van Heerden, B "The constitutional family developments in South African child and family law 2003-2013" 2014 *International Journal of Law, Policy and the Family* 28(1) 115. The authors pointed out that the social role which the applicant played as a parent, despite the complete absence of any biological or genetic link with the child, came to the fore as the determinant of the applicant's status as holder of parental responsibilities and rights.
735 *CM v NG* at par 32.
736 *CM v NG* at par 34.
737 *CM v NG* at par 34.
738 *CM v NG* at par 34.
739 *CM v NG* at par 59.
740 *CM v NG* at par 60. This section makes reference to spouses.
741 *CM v NG* at par 61. At par 62 the court explained that it has to consider the application against the criteria set out in the Act in sections 23(2) and 24(2).

into account, are common to both sections.[742] The court holds that section 23(2) goes further in that it specifies the degree of commitment that the applicant has shown towards the child and the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child.[743] The court concludes that the applicant is entitled to parental rights and responsibilities as set out in section 18, as it would be in child's best interests to have a relationship with two parents.[744]

3.15.4 Ex parte SA and others[745]

This case concerns an application for the confirmation of a surrogate agreement by the applicants which was entered into on 28 October 2014.[746] Manamela AJ remarks that each matter depends on its own circumstances, especially when dealing with issues such as surrogacy, which is very personal in nature.[747] Specific mention was made to the prohibition of payments in respect of surrogacy, which requires very special attention due to its implications beyond the contractual and/or personal relationships of the said applicants.[748] The court points out that commercial surrogacy is a real possibility in present times and that the court is assigned with a critical responsibility in this regard.[749]

In this matter also, as was the case in the matter of *CM v NG* above, the court observes that each matter is dependent on its own circumstances, especially when dealing with highly personal matters, such as surrogacy. Personal circumstances of the different parties involved in the agreement will always be different from the parties in the next application for confirmation of an agreement. The significance of this judgment is that it emphasises that a careful case-by-case consideration of all relevant circumstances is required to determine if the agreement will be in commissioned child's best interest.

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742 *CM v NG* at par 63.
743 *CM v NG* at par 64.
744 *CM v NG* at par 72.
745 2014 JDR 2616 (GP).
746 *Ex parte SA and others* at par 1.
747 *Ex parte SA and others* at par 3.
748 *Ex parte SA and others* at par 16.
749 *Ex parte SA and others* at par 16.

3.15.5 Ex parte HPP and others; Ex parte DME and others[750]

These cases refer to applications brought for the confirmation of surrogate agreements in terms of section 292(1)(e), read with section 295 of the Children's Act.[751] In these cases, Ms Strydom acted as a surrogacy coordinator, providing surrogacy facilitation services for which she charged a fee of R 5,000.00.[752] The court was called upon to interpret section 301 of the Children's Act in such a way that Ms Strydom's constitutional right to follow the occupation or trade of her choice is protected.[753] The salient issues identified in these applications were:

> (a) Whether the surrogacy facilitation agreements constitute a transgression of s 301 of the Children's Act; and
> (b) Whether the court could confirm the surrogate motherhood agreements if it is found that the agreements between Ms Strydom and the applicants were unlawful.[754]

Aside from the issue above, both the applicants had complied with the requirements pertaining to surrogate agreements as provided for in the Act.[755] They also complied with the guidelines provided by the court for surrogacy agreements.[756] *In casu*, the court emphasises that commercial surrogacy is unlawful in South Africa and the payments are limited to only those specifically set out in the Act.[757] Tolmay J remarks that the courts must apply the law within the existing legislative framework, as the foundational principle of the relevant framework is inextricably linked to the objective to protect persons involved in surrogacy arrangements.[758] The court observes that the commonly held view seems to be that the potential for abuse far outweighs any possible advantage in surrogacy arrangements.[759] Section 303(2) of the Act states that no person may in any way, for or with a view to compensation, make known that any person is or may possibly be willing to enter into a surrogate agreement.[760] Tolmay J concludes that this provision makes the payment of any introductory fee pertaining to

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750 2017 (4) SA 528 (GP); [2017] 2 All SA 171 (GP).
751 *Ex parte HPP and others; Ex parte DME and others* at par.1
752 *Ex parte HPP and others; Ex parte DME and others* at par.2 and 8. At par 6. Ms Strydom is a surrogacy consultant through Destiny Babies and she advertised her services online.
753 *Ex parte HPP and others; Ex parte DME and others* at par 12.
754 *Ex parte HPP and others; Ex parte DME and others* at par 3.
755 *Ex parte HPP and others; Ex parte DME and others* at par 4.
756 *Ex parte HPP and others; Ex parte DME and others* at par 4.
757 *Ex parte HPP and others; Ex parte DME and others* at par 24.
758 *Ex parte HPP and others; Ex parte DME and others* at par 24 and par 26.
759 *Ex parte HPP and others; Ex parte DME and others* at par 26.
760 Sec 303(2) of the Children's Act. Nicholson and Bauling 2013 *De Jure* 528.

the surrogate unlawful, which also explained why Ms Strydom categorically stated that she had not received any introductory fee.[761] The court confirms that any surrogate agreement that does not comply with the provisions of the Act will be invalid and any child born as a result of any action taken in execution of such an agreement would, for all purposes, be deemed to be the child of the woman who gave birth to that child.[762] The payment of a facilitation fee or any compensation of any nature other than those that the Act makes provision for is expressly prohibited and the affidavit should state that no such payment was made.[763] There was thus a duty on the applicants in the second application to inform the court in the affidavit about the payments made to Ms Strydom.[764] The attorney in a surrogacy application should file an affidavit confirming that as far as he or she could ascertain, no payments were made to anyone apart from those provided for in the Act.[765]

Analysing section 301, the court refers to the two distinct categories of lawful expenses that are catered for.[766] Firstly, the costs directly related to (a) artificial fertilisation and pregnancy; (b) the birth of the child; and (c) the confirmation of the surrogate agreement;[767] and secondly, the *bona fide* professional legal and medical expenses.[768] The expenses in the first category must be directly related to the processes referred to. It is important to note that the expenses listed are limited to those necessary to ensure that the process of surrogacy and the subsequent pregnancy are successfully completed and the surrogate agreement confirmed.[769] The court admits that these expenses will obviously include costs that are necessary to ensure that the fertilisation

761 *Ex parte HPP and others; Ex parte DME and others* at par 24 and par 30.
762 *Ex parte HPP and others; Ex parte DME and others* at par 31.
763 *Ex parte HPP and others; Ex parte DME and others* at par 33.
764 *Ex parte HPP and others; Ex parte DME and others* at par 33.
765 *Ex parte HPP and others; Ex parte DME and others* at par 33. The court referred to the case of *Ex parte WH and others* 2011 (6) SA 541 GP in par 32, 35 and 37. The court set out guidelines that the parties need to comply with apart from the statutory requirements in the Act. Tolmay J stated the purpose of the directives in *Ex parte WH* is clearly to enable the court to obtain all relevant information pertaining to compliance with the Act and to determine whether there was any contravention of the Act. Tolmay J concluded that the same requirements should apply to whoever introduces the surrogate mother and whoever provides related services.
766 *Ex parte HPP and others; Ex parte DME and others* at par 43. At par 42 The court explained that: "A court should when interpreting legislation follow a purposive and contextual approach. In doing so a court is enjoined to provide a broad and generous reading in determining the ambit of constitutionally enshrined rights."
767 *Ex parte HPP and others; Ex parte DME and others* at par 43.
768 *Ex parte HPP and others; Ex parte DME and others* at par 43.
769 *Ex parte HPP and others; Ex parte DME and others* at par 45.

process can be completed as well as costs that are directly linked to the pregnancy.[770] This will include, *inter alia,* the costs of the embryologist, which, although essential for the fertilisation process, may not necessarily qualify as a medical expense.[771]

With regards to Ms Strydom, the court held that the services rendered by her are not directly linked to either the fertilisation process or the subsequent pregnancy, as they are not essential to ensure either the fertilisation or the pregnancy.[772] Neither can it be argued that her costs are directly related to the birth.[773] With regard to costs relating to the confirmation of the surrogacy agreement, the court limits these to costs attendant to the confirmation of the agreement, which will include costs to comply with the court's requirements.[774] These will include those due to psychologists, social workers or any costs that may be occasioned by the requirements set by the court and which will ensure that the surrogacy agreement is confirmed.[775] The services of Ms Strydom were regarded as not falling into any of the categories stated above, nor directly related to the confirmation of the surrogate agreement[776] or those provided for in section 301.[777] The court reiterates that the purpose of the prohibition in section 301 is to prevent commercial surrogacy.[778] The limitation's purpose, as stated already, is to prevent commercial surrogacy, which is ultimately enacted to protect the public interest.[779] Thus, important issues of public policy arise which justify a limitation of Ms Strydom's right to ask for payment for her services.[780] The reason for regulating surrogacy is

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770 *Ex parte HPP and others; Ex parte DME and others a*t par 45.
771 *Ex parte HPP and others; Ex parte DME and others* at par 45.
772 *Ex parte HPP and others; Ex parte DME and others* at par 45.
773 *Ex parte HPP and others; Ex parte DME and others* at par 45.
774 *Ex parte HPP and others; Ex parte DME and others* at par 46
775 *Ex parte HPP and others; Ex parte DME and others* at par 46.
776 *Ex parte HPP and others; Ex parte DME and others* at par 46.
777 *Ex parte HPP and others; Ex parte DME and others* at par 47. At par 48, the court looked at sec 22 of the Constitution in the context of what sec 301 is trying to accomplish and while taking into account the provisions of sec 36 of the Constitution. Sec 22 provides that the practice and trade may be regulated by law. The court stated at par 51: "As far as the alleged limitation of Ms Strydom's right to exercise her chosen profession is concerned, it would not seem to me that her choice to exercise her chosen profession is limited. What is limited is her right to ask for payment of expenses which fall foul of the provisions of sec 301." The court further said that the purpose of the limitation is for a greater good and as such it is justifiable. The court explained at par 52 that there is a very real danger in allowing surrogacy facilitation agreements as literally anyone could give himself out as a surrogacy coordinator which will open the floodgates and with no control, this could and probably would lead to commercial surrogacy and the abuse of vulnerable people.
778 *Ex parte HPP and others; Ex parte DME and others* at par 51.
779 *Ex parte HPP and others; Ex parte DME and others* at par 51.
780 *Ex parte HPP and others; Ex parte DME and others* at par 51.

ultimately to protect the public against unprincipled people who may exploit vulnerable participants.[781] The limitations enacted in chapter 19 of the Act are therefore reasonable and justified in an open and democratic society in accordance with the section 36 of the Constitution.[782] Because the expenses Ms Strydom had claimed fell afoul of the provisions of section 301 of the Act, the agreements between her and the commissioning parents were accordingly declared unlawful and unenforceable.[783]

The pertinent question asked by the court was whether it should refuse to confirm a surrogate agreement which, although compliant with the Act's requirements, is tainted by the unlawful collateral agreement (surrogacy facilitation agreement) between the applicants and a third party (Ms Strydom).[784] The court expresses concern that there is a real danger that courts may unwittingly facilitate and encourage illegal agreements if a surrogate agreement emanating from the illegal facilitation agreement is confirmed.[785] The court explains as follows:

> Consequently, when deciding whether one should confirm the surrogate motherhood agreement, it is important to keep in mind why the legislature has created a strict regulatory framework within which only certain limited expenses are allowed. The unlawfulness of commercial surrogacy sits at the heart of the limitations provided for in the Children's Act. This entails that one must establish whether the unlawful contract has tainted the lawful contract to such an extent that the lawful contract cannot be endorsed. From the aforesaid, it would seem that the appropriate approach would be that the court has a discretion, which discretion must be exercised keeping in mind the purpose of the legislative framework and the ban on commercial surrogacy.[786] I am of the view that a court should be sensitive to the fact that if courts proceed to declare surrogacy agreements valid, despite the fact that they are tainted by an unlawful surrogacy facilitation agreement, it might actually negate the whole purpose of sec 301, and commercial surrogacy will have sneaked in through the back door. Court can't be seen to condone commercial surrogacy directly or indirectly in the light of the existing legislative framework. In my view the invalidity of the subsequent surrogate motherhood agreements may in many instances be the unfortunate result of entering into an unlawful surrogacy facilitation agreement.[787]

However, despite the declaration of unlawfulness of the facilitation agreement, Tolmay J rightly decides that in the circumstances of these two applications, she is of the view that she should exercise her discretion and confirm the surrogacy agreements.[788]

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781 *Ex parte HPP and others; Ex parte DME and others* at par 51.
782 *Ex parte HPP and others; Ex parte DME and others* at par 51.
783 *Ex parte HPP and others; Ex parte DME and others* at par 53.
784 *Ex parte HPP and others; Ex parte DME and others* at par 55.
785 *Ex parte HPP and others; Ex parte DME and others* at par 66.
786 *Ex parte HPP and others; Ex parte DME and others* at par 67.
787 *Ex parte HPP and others; Ex parte DME and others* at par 67-68.
788 *Ex parte HPP and others; Ex parte DME and others* at par 71.

It is important for courts to apply the law within the existing legislative framework so as to protect the parties to a surrogacy agreement and the commissioned child. The lesson to be noted from this judgment is that it confirms that any introductory fee in respect of a surrogate is unlawful.

The court's guidance that parties should specify in the affidavit if any payments other than those provided for in the Act was made and or received, is commendable, as the parties must take the court into their confidence.

3.15.6 Ex parte CJD and others[789]

In this application for the confirmation of a surrogacy agreement, the commissioning parents (CJD and HN, a homosexual couple in a relationship of ten years at the time), did not live together because the one party (HN), does not want his sexual orientation to become public.[790] The plan was that CJD's sperm, together with the gametes of an unknown egg donor, would be used during the fertilisation process.[791]

For Tolmay J, two questions that the court had to consider were: Firstly, the issue of how the fact that the parties do not live together impact on the best interests of the commissioned child, and secondly, how HN's refusal to have his sexual orientation made public, impact on the best interests of the commissioned child.[792] It would seem that HN had reservations about the impact that having a child with his partner may have on himself and his career.[793]

It is trite that the court as upper guardian of children has a duty to consider whether the concerns raised above may negatively affect the best interests of the child to be born.[794] As emphasised elsewhere in this chapter, all aspects that may be pertinent to

789 2018 (3) SA 197 (GP).
790 *Ex parte CJD and others* at par 2.
791 *Ex parte CJD and others* at par 3.
792 *Ex parte CJD and others* at par 4. Sloth-Nielsen "Surrogacy in South Africa" 194.
793 *Ex parte CJD and others* at par 6.
794 *Ex parte CJD and others* at par 10. The court further pointed out that no one can judge a gay person who, as a result of persisting public prejudice is reluctant to reveal his/her sexual orientation. The court further said that it is a sad indictment against society that HN is placed in this position, but the court must always place the rights of the children and their interests first, even in circumstances where the rights of the prospective parents may be compromised.

the question of whether a surrogacy agreement should be confirmed, should be set out in the affidavit.[795] Parties should "play open cards with the court", as Tolmay J explains:

> The interests of children are at stake and it is essential that applicants play open cards with the court. All relevant information must be set out in the affidavit itself and properly dealt with by the parties under oath. The fact that issues of relevance are set out in the reports attached to the application is not sufficient at all. It goes without saying that the best interests of the child to be born from a surrogacy agreement must be considered by the court, in order for a court to make an informed decision on whether the surrogacy agreement should be confirmed.[796]

She advises that parties to surrogacy agreements should set out the following in the founding affidavit to assist the court in exercising its discretion properly:[797]

> (a) If and how the applicants will function as a family unit and whether they are comfortable with society regarding them as such;
> (b) whether they are living together or not, and if not, why this state of affairs will not impact on the interests of the child and them functioning as a family unit.

The court next considers section 293(1) of the Act, which provides that where a commissioning parent is married or in a permanent relationship, he or she must obtain the written consent of his or her husband, wife or partner, and also that the husband, wife or partner become a party to the agreement before a court may confirm a surrogacy agreement.[798] Although the court agrees that a wide interpretation of this provision is preferred, a court still needs to determine whether the manner in which the permanent relationship is structured is sufficiently supportive for the purpose of raising a family.[799] Tolmay J views an interpretation of section 293 to support the conclusion that because a partner in a permanent relationship consents to the surrogacy agreement and becomes a party to the application for the confirmation of the agreement, he or she acquires parental responsibilities and rights when the order of confirmation is made.[800]

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795 *Ex parte CJD and others* at par 11.

796 *Ex parte CJD and others* at par 12. The court further, at par 14, states that it is not only the court's obligation to protect and advance the best interests of children, but the obligation of all role players to ensure that all relevant information, that may impact on a court's discretion to either grant or dismiss the application is set out in the affidavit.

797 *Ex parte CJD and others* at par 15.

798 *Ex parte CJD and others* at par 17.

799 *Ex parte CJD and others* at par 18. Sloth-Nielsen "Surrogacy in South Africa" 195.

800 *Ex parte CJD and others* at par 19. The court further referred to sec 22 of the Act and stated that the interpretation is in line with sec 22 of the Act which opened the door for 'any person having an interests in the care, well-being and development of the child' to obtain parental rights and obligations. He explained that someone who co-signs the surrogacy agreement may be such a person.

The court turns to section 231 of the Act which deals with adoption next.[801] The categories of persons eligible to adopt a child in terms of section 231(1) of the Children's Act suggests that for persons to jointly adopt a child, a permanent household or common household run by such persons should exist.[802] The existence of a family unit and common household is similarly an important aspect in surrogacy applications.[803] As one may have expected, the court did not confirm the agreement in this application, yet emphasised that South Africa's constitutional dispensation acknowledges and respects the many varied permutations of what a family would constitute.[804]

I concur with the court's reasoning and judgment not to confirm the said agreement. It is important for a child to have a stable home environment and to be able to have a relationship with both parents in circumstances where there will be two commissioning parents. It will not be in a child's best interests to have a parent who is not comfortable with the public knowing that he is homosexual, as there is a possibility that the parent will not want to be seen in public with the child, which could be detrimental to the child's emotional well-being. The further importance of this judgment is the guidance in respect of the information that the parties must include in their affidavits and the type of attached expert reports that will not suffice.

3.15.7 Ex parte KAF and others (I)[805] and Ex parte KAF and others (II)[806]

Both these cases dealt with confirmation applications in which the assessment and reporting on the suitability of the surrogate was the focus. Both the Gauteng High Court judgments will be discussed to enable understanding of the different views and arguments advanced in the two judgments.

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801 *Ex parte CJD and others* at par 21 and 22. Section 231(1): "A child may be adopted (a) jointly by - (i) a husband and wife; (ii) partners in a permanent domestic life-partnership; or (iii) other persons sharing a common household and forming a permanent family unit; (b) by a widower, widow, divorced or unmarried person; (c) by a married person whose spouse is the parent of the child or by a person whose permanent domestic life-partner is the parent of the child; (d) by the biological father of a child born out of wedlock; or by the foster parent of the child."

802 *Ex parte CJD and others* at par 22.

803 *Ex parte CJD and others* at par 22.

804 *Ex parte CJD and others* at par 26.

805 (14341/17) [2017] ZAGPJHC 227 (10 August 2017) (hereinafter "*Ex parte KAF and others (I)*")

806 2019 (2) SA 510 (GJ) (Hereinafter "*Ex parte KAF and others (II)*").

In the application of *Ex parte KAF and others (I),*[807] the applicants sought the confirmation of a surrogate agreement in terms of section 295 of the Children's Act.[808] The commissioning parents have been married for eleven years and as a result of the commissioning mother suffering from a congenital malformation of the uterus, they were unable to naturally conceive a child together.[809] They underwent five *in-vitro* procedures which were unsuccessful because the commissioning mother was unable to conceive and carry a pregnancy to term.[810] Medfem Clinic, which has an internal surrogacy programme, introduced the surrogate mother to the commissioning parents.[811] The court was particularly concerned with three issues that arose in this application, namely, (a) whether the surrogate is using surrogacy as a means of income, (b) whether there are problems regarding the surrogate's well-being, and (c) whether a risk of commercialisation of the surrogate arrangement exists.[812]

Unfortunately, there was insufficient evidence before the court to satisfy the court that the surrogate is not using the agreement as a means of income.[813] From the facts, it appears that the surrogate was twenty years old and a stay-at-home mother for her two children.[814] The court found that the surrogate and her partner did not take the court into their confidence as they did not provide the court with a full disclosure of their financial circumstances.[815] Further, a breakdown of expenses covered by the proposed allowance to the surrogate was not stated in the papers.[816]

Rightly so, the court questions the surrogate's psychological well-being, as this is one of the critical factors that the court must be satisfied of.[817] The court accordingly rejects

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807 (14341/17) [2017] ZAGPJHC 227.
808 38 of 2005.
809 *Ex parte KAF and others (I)* at par 4.
810 *Ex parte KAF and others (I)* at par 4.
811 *Ex parte KAF and others (I)* at par 6.
812 *Ex parte KAF and others (I)* at par 9.
813 *Ex parte KAF and others (I)* at par 10.
814 *Ex parte KAF and others (I)* at par 11.
815 *Ex parte KAF and others (I)* at par 14.
816 *Ex parte KAF and others (I)* at par16.
817 *Ex parte KAF and others (I)* at par 19. At par 21 the court said that the surrogate's personal circumstances do not paint a picture of a person who was able to make decisions in her best interests as teenager. The assessment report did not give the court an objective analysis of the surrogate's psychological well-being in the light of the disconcerting facts. Par 11 sets out her personal circumstances. In short, the surrogate was thirteen years old when she met her partner and their first child was born when she was sixteen years old. The surrogate dropped out of school and the second child was born when she was eighteen years old.

the assessment report that was done with regard to the surrogate, as the surrogate's well-being was not evident or clear from the report that was presented, which brings her suitability to act as a surrogate into question.[818] The court concluded further that the nature of the relationship between the medical professionals involved and Medfem was not disclosed to the court.[819] Accordingly, Modiba J held that the parties have failed to satisfy the court that the surrogate agreement met the requirements as set out in the Children's Act and the application was thus as a result thereof dismissed.[820]

Ex parte KAF and others (II)[821] was the second application brought by the parties for the confirmation of a surrogate agreement after their first confirmation application was dismissed by the court previously.[822] Siwendu J states that it is a trite legal position that it is in the court's discretion to confirm a surrogate agreement or not.[823] The application is subjected to strict judicial scrutiny in light of the fact that the court is the upper guardian of all minor children and the interests of the commissioned child has to be taken into account.[824] The court states that it is necessary to scrutinise the value chain and the relationship between the parties to ensure that the agreement is lawful and that it meets the requirements under section 301.[825]

Regarding the interpretation of section 295 of the Act, which concerns the confirmation of the surrogacy agreement by a High Court, Siwendu J remarks that the relevant section should not be read in isolation but in the context of the objects of chapter 19 of

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818 *Ex parte KAF and others (I)* at par 23.

819 *Ex parte KAF and others (I)* at par 26. At par 25 the court mentioned the risk of commercialisation of the surrogacy process that arose from the papers with specific reference to the internal surrogacy programme of Medfem Clinic. It appeared that the same medical specialist who conducted the medical assessment of the parties involved will be the one who administer the artificial fertilisation treatment on the surrogate. At par 26 the court pointed out that no information was provided regarding the payment, if any, of the complementary medical professional services to the surrogacy matching service of Medfem Clinic.

820 *Ex parte KAF and others (I)* at par 30.

821 2019 (2) SA 510 (GJ).

822 *Ex parte KAF and others (II)* at par 1. See *Ex parte KAF and others (I)* (14341/17) [2017] ZAGPJHC 227 (10 August 2017). At par 20 the court points out that *Ex parte KAF and others (I)* illustrates that the requirements for assessing the suitability of the surrogate to act as such remains unclear. The court further pointed out that there is thus a need to develop further the guidelines and the requirements as is set out in *Ex parte WH.*

823 *Ex parte KAF and others (II)* at par 16.

824 *Ex parte KAF and others (II)* at par 16. At par 17 the court further explained that it is evident that given the discretionary powers conferred on the court, and the likely different circumstances where the court's confirmation is sought, each court may construe the parameters for the exercise of the discretion differently from the next.

825 *Ex parte KAF and others (II)* at par 16.

the Children's Act and other relevant provisions, particularly, taking into account the interplay of sections 293(1), 297(1) and 301(1) (discussed above) in the assessment and the decision of the court.[826] This assessment is an objective one, although the decision is made with regard to the subjective circumstances of the applicants, which will differ from case to case.[827] The following guidelines were set out by the court *in casu*:[828]

(a) The personal clinical assessment of the prospective surrogate mother and her surrounding circumstances must be supported by other relevant information, where necessary, and include information on whether the surrogate mother:[829]

(i) is physically and medically fit to carry the gamete and in turn the unborn child to full term;[830]

(ii) has an agreement with the commissioning parents regarding selective reduction and the risks pertaining thereto;[831]

(iii) is of sound mind enjoys good mental health, and does not suffer from any personality disorder, severe psychiatric illness, or has a history of self-harming behaviour;[832]

826 *Ex parte KAF and others (II)* at para 25. The court explained that its primary purpose of the assessment under this section is thus to safeguard the health of the commissioned child, the fulfilment of the surrogate agreement and to prevent the potential commercial exploitation of the commissioned parents and the surrogate mother in equal measure.

827 *Ex parte KAF and others (II)* at par 26. The structure of the family unit has evolved over the years and in view of the varying circumstances, there cannot be an exhaustive closed checklist and each case requires that it be judged on its peculiar facts.

828 *Ex parte KAF and others (II)* at par 27-29. Thaldar 2019 *SAJBL* 62. The writer states that it is clear that the court's intent was that these paragraphs contain the criteria for assessing the suitability of an intended surrogate mother. The writer interprets para 11 of the judgment as implicitly adding an additional criterion for assessing the suitability of an intended surrogate mother as the court did not state that this list of criteria is exhaustive.

829 *Ex parte KAF and others (II)* at par 27.

830 *Ex parte KAF and others (II)* at par 27.1.

831 *Ex parte KAF and others (II)* at par 27.2. Thaldar 2019 *SAJBL* 62. The surrogate must understand that the commissioning parents may not wish to have multiple children and they may want the surrogate to undergo 'selective reduction'. Thaldar stated that the assessing clinical psychologist should be familiar with both the potential psychological sequelae of selective reduction as well as the potential medical sequelae.

832 *Ex parte KAF and others (II)* at par 27.3. Thaldar 2019 *SAJBL* 63. The proposed surrogate mother must not suffer from any personality disorder or severe psychiatric illness or have a history of any self-harming behaviour.

(iv) does not have a history of substance abuse, including drugs and/or alcohol and addiction, likely to have similar effects as those referred to in (iii) above.[833]

(b) The emotional welfare, emotional needs and resources available to the surrogate must be considered to determine the likely effects on the commissioned child as well as the fulfilment of the agreement.[834] Thus, having regards to section 293(1) of the Act which requires the written consent of the spouse if the surrogate is married or involved in a permanent relationship, a report is required relating to the:[835]

(i) surrogate's need for emotional resources, if any;[836]

(ii) existing emotional resources;[837]

(iii) quality and stability of the existing emotional support structure; and[838]

(iv) whether the surrounding relationships are conducive for the fulfilment of the surrogacy agreement and may result in termination of the agreement after artificial fertilisation or a breach of the agreement.[839]

(c) In terms of sections 297(1)(a) and 297(1)(c) of the Children's Act, as discussed above, the surrogate will not have any rights of parenthood or care of the commissioned child or contact with the child and neither will her husband, partner or relatives.[840] As the surrogate must thus understand the nature of the surrogacy relationship, the nature of surrogate motherhood and that the child to

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833 *Ex parte KAF and others (II)* at par 27.4. Thaldar 2019 *SAJBL* 64. Thaldar pointed out that the court was silent on the social drinking of alcohol and smoking during pregnancy although the experts (in their joint opinion to the court) suggested that if an intended surrogate smokes, she must refrain from smoking for at least three months prior to conception, submit a blood test result to indicate that she stopped smoking, undertake to refrain from smoking for the duration of pregnancy and be free of any medication that she may use to stop smoking unless authorised by the attending gynaecologist.

834 *Ex parte KAF and others (II)* at par 28.

835 *Ex parte KAF and others (II)* at par 28.

836 *Ex parte KAF and others (II)* at par 28.1.

837 *Ex parte KAF and others (II)* at par 28.2.

838 *Ex parte KAF and others (II)* at par 28.3.

839 *Ex parte KAF and others (II)* at par 28.4. Thaldar 2019 *SAJBL* 63.

840 *Ex parte KAF and others (II)* at par 29.

be born will legally not be her child, but the child of the commissioning parents, a report on the following issues is required:[841]

(i) the psycho-social support structure of the surrogate;[842]

(ii) the understanding and influence of the husband, partner, relatives or extended family in the decision;[843]

(iii) the understanding that the child to be born will belong to the commissioning parents;[844]

(iv) how handing the baby over to the commissioning parents will affect her;[845]

(v) that the psychosocial support structure is not likely to result in the termination of the agreement after fertilisation or in a breach;[846] and

(vi) whether she is emotionally available for her own child/ children, including her readiness to discuss the surrogate pregnancy with her child/ children, depending on their ages and levels of comprehension. [847]

Siwendu J concludes by stating that a court must, as far as possible, provide a 'check' on a potential intrusion or encroachment on the fundamental rights of the commissioning parents and that of the surrogate and offer equal weight to their protection.[848]

Thaldar maintains that the very purpose of the pre-approval mechanism for surrogate motherhood is to establish legal certainty for all the parties involved in the agreement, including the child to be born.[849] The pre-approval mechanism depends heavily on the

841 *Ex parte KAF and others (II)* at par 29.
842 *Ex parte KAF and others (II)* at par 29.1.
843 *Ex parte KAF and others (II)* at par 29.2. Thaldar 2019 *SAJBL* 63.
844 *Ex parte KAF and others (II)* at par 29.3. Thaldar 2019 *SAJBL* 62.
845 *Ex parte KAF and others (II)* at par 29.4.
846 *Ex parte KAF and others (II)* at par 29.5. Thaldar 2019 *SAJBL* 63.
847 *Ex parte KAF and others (II)* at par 29.6. Thaldar 2019 *SAJBL* 64. Thaldar pointed out that this includes the readiness to discuss the surrogate pregnancy with her child/children, depending on their ages and levels of comprehension.
848 *Ex parte KAF and others (II)* at par 33.
849 Thaldar 2019 *SAJBL* 61.

input from clinical psychologists.[850] The reason why the psychological assessment of the proposed surrogate mother is so important, is that because the commissioning parents are motivated by the desire to have a child, it is generally unusual for a woman to offer to gestate someone else's child without any financial benefit.[851]

Both the *Ex parte KAF* judgments are valuable in that they provide additional guidance in respect of what type of information is required for the purpose of applications for the confirmation of surrogate agreements. Lessons to be learned from these judgments speak to the requirements of the objectivity of the medical practitioners who perform the assessments on the parties, as well as the significance of the assessments to provide clarity on the proposed surrogate's mental and physical health. Moreover, parties to a surrogate agreement must provide adequate information in respect of their financial positions, especially the proposed surrogate mother. It is important that the court is able to discern if acting as a surrogate is for reasons other than generating an income, as the court has to be satisfied that the agreement is not for commercial gain.

3.15.8 Ex parte MS and others; In re: Confirmation of surrogate mother agreement[852]

This judgment, briefly referred to under paragraph 2 in this chapter, follows an application for the confirmation of a surrogate agreement *after* the surrogate was already artificially fertilised.[853] The surrogate was thirty-three weeks pregnant at the time that the application was brought.[854] Her pregnancy came about as a result of

850 Thaldar 2019 *SAJBL* 61.

851 Thaldar 2019 *SAJBL* 61. At 62 the writer criticises the court in that it focussed on the budget or the out-of-pocket expenses for which the commissioning parents would have to reimburse the surrogate instead of including altruistic motivation in its list of criteria for assessing the potential surrogate mother. Thaldar stated that the apparent inference is that the actual agreement regarding reimbursable expenses is the only relevant consideration on which altruism will be judged and that an intended surrogate mother's motivation for engaging in surrogacy is not legally relevant. At 63 Thaldar pointed out that there is an important lesson to be learned from the *Ex parte KAF and others (II)* judgment and that is that motivation as expressed by an intended surrogate during consultation with the assessing clinical psychologist must be aligned with the reality of the financial provisions of the surrogacy agreement.

852 2014 (2) All SA 312 (GNP).

853 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 1. Louw 2014 *De Jure* 110.

854 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 4. Louw 2014 *De Jure* 111.

fertilisation using her ova and the commissioning father's sperm.[855] The parties had a verbal agreement in terms whereof the surrogate agreed to act as surrogate mother for the commissioning parents.[856]

The court referred to sections 292, 296, 303(1), and 297(1) and (2), which detail the eligibility requirements for those wishing to enter into lawful surrogacy arrangements.[857] Parties thus do not have *carte blanche* to enter into surrogacy agreements.[858]

Regarding the competence of a court to confirm a surrogate agreement post-fertilisation, the court explains that the Act does not stipulate what the consequences of non-compliance with the Act's provisions will be on the validity of a written agreement subsequently entered into between the parties.[859] The court refers to the well-established common law principle that an agreement to commit an unlawful act is not enforceable and this include acts that are unlawful in terms of a statute.[860] *In casu*, the unlawful act is the artificial fertilisation of the surrogate prior to the written agreement being confirmed by the court.[861]

A surrogacy agreement aims to protect the best interests of the commissioned child and his or her right to family and parental care.[862] The regulation of the rights and obligations of the respective parties in the agreement also advances further constitutional rights of the parties, which include the right to dignity, the right to make decisions concerning reproduction and the surrogate mother's right to security in and

855 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 5.

856 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 5. Baase 2019 *PELJ* 5. The writer explains that the non-compliance by the parties was both administrative (parties failed to adhere to the provisions of ch 19 that regulate the confirmation of a surrogate agreement) and material (the non-compliance resulted in the artificial fertilisation of the surrogate mother) in nature.

857 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 18 to 23.

858 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 24.

859 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 30. Louw 2014 *De Jure* 112.

860 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 31. Baase 2019 *PELJ* 6.

861 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 32. "However, it was the very absence of a written agreement duly confirmed and authorised by the court that rendered the artificial fertilisation unlawful."

862 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 34.

control over her body.[863] Section 295 appears to cover both the situation where a child has not yet been conceived at the time that confirmation of a surrogacy agreement is sought and the situation where a child has already been conceived, but is not yet born at the time.[864] Neither section 292, nor section 295 requires the court to be satisfied that the surrogate has not yet undergone the process of artificial fertilisation and that she is not already pregnant as a result thereof.[865]

The Act expressly prohibits the artificial fertilisation of a surrogate before the agreement is confirmed by the court.[866] It is an offence to artificially fertilise a woman in the execution of a surrogacy agreement without the authorisation by a court for such fertilisation.[867] Interestingly, the Act does not make it unlawful for the parties involved in the prohibited act to proceed afterwards by entering into a valid surrogacy agreement and to apply to court to confirm the agreement.[868] The question arising is whether the prohibition regarding the surrogate mother's artificial fertilisation without the court's authorisation should have a legal effect on the validity of the surrogacy agreement, or prevent the court from confirming the said agreement.[869]

The court further argues that to interpret the Act as precluding the court from sanctioning a surrogacy agreement after artificial fertilisation has already taken place, would undermine the constitutional rights of the parties involved and would be contrary to the broad objective of the Act.[870] Should it have been that the agreement was invalid,

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863 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 35.

864 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 41. Baase 2019 *PELJ* 8.

865 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 42. Louw 2014 *De Jure* 113. Baase 2019 *PELJ* 7.

866 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 45. Sec 296 of the Act.

867 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 45. Sec 303 of the Act.

868 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 46. Louw 2014 *De Jure* 115. Baase 2019 *PELJ* 8.

869 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 48. "The Act prescribes an express criminal penalty for the commission of a prohibited act of artificial fertilisation; it does not provide for invalidity of the surrogacy agreement as penalty." Louw 2014 *De Jure* 114-115. Louw argues that the care and welfare of a child before its birth is exclusively in the hands of the surrogate mother. Sec 295(e) gives the court a discretion to confirm the agreement if, in general, having regard to the considerations as set out in the section, the court is satisfied that the agreement should be confirmed. She further argues that the considerations in sec 295 refer to anticipated circumstances and family situations of all the parties concerned and the best interests of the child, specifically after the child is born.

870 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 50.

the result would have been that once the child is born, he or she would be deemed for all purposes to be the legal child of the surrogate.[871] In the court's opinion, it would also infringe on the dignity of the commissioning parents who would then be denied the opportunity to experience a family of their own.[872] Moreover, it would encroach on their right to make reproductive choices, as the commissioning parents would then be required to adopt the child born of the surrogate.[873] It would also violate the surrogate's full parental rights and responsibilities in respect of the child, which could be an infringement of her constitutional right to make her own decisions regarding reproduction.[874] The rights and interests of the "sleeping partner" in the surrogacy relationship, meaning the unborn child, should demand the most protection. The court explains its reasoning as follows:[875]

> [U]ncertainty regarding the parents could impact negatively on the child. He or she is denied the family life that was planned for him or her. The child will have to rely instead on the parental care of the surrogate mother, who, by virtue of the agreement, has deliberately chosen not to take responsibility for another child.[876]

Such an effect should never follow without a court considering all the facts at hand and making a determination as to what is in the best interests of the child.[877] It would be patently contrary to section 29(2) of the Constitution to hold that a court has no discretion to confirm a surrogacy agreement in circumstances like this where the confirmation is sought post-fertilisation.[878] The court must thus retain the discretion to do so if it is satisfied that this is in the best interests of the child to be born.[879] It goes

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871 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 50.

872 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 51. The court further stated: "The rights of individuals to bear and raise children are broadly recognised and supported by the State through various measures, including the provision of financial assistance, social and other support services. It encompasses the right to have one's own child with whom the parents share a genetic link, the right to adopt a child under certain circumstances, and, more recently, in recognition of the physical and medical difficulties people may experience in seeking to have a child of their own, the right to have a child through a surrogacy arrangement." Baase 2019 *PELJ* 9.

873 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 51. Louw 2014 *De Jure* 115. Baase 2019 *PELJ* 9.

874 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 52. Baase 2019 *PELJ* 9.

875 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 53. "Section 28(1)(b) of the Constitution guarantees to every child the right to family or parental care. In addition, section 29(2) specifies that: "A child's best interests are of paramount importance in every matter concerning the child."

876 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 54. Louw 2014 *De Jure* 115.

877 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 55.

878 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 55.

879 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 55.

without saying that the discretion to confirm such agreements should only be exercised in exceptional circumstances and when the best interests of the child demand the said confirmation.[880]

Regarding the approach which the courts should adopt in confirmation applications post-fertilisation, a court will always be guided by the particular facts of each case before it.[881] The parties would need to place sufficient facts before the court, in addition to the required information, to explain why confirmation is sought at a late stage and why the confirmation is warranted, notwithstanding their being in breach of the general scheme.[882] The court would have to be satisfied that the application is not aimed at, or will not have the effect of, permitting the parties to circumvent the objectives of the regulatory scheme.[883]

It is important to note that the window period for a post-fertilisation confirmation of a surrogacy agreement exists only during the period before the child is born as the purpose of chapter 19 is to establish certainty regarding the legal and parental status

880 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 57. Louw 2014 *De Jure* 116. Louw argues that what the court is saying here does little to assuage the effect of its judgment on the enforcement of the Act (in par 51-54 of his judgment) as discussed above. Louw poses the question of when it would not be in the best interests of a child to confirm a surrogacy agreement once the child has been conceived in light of the negative effect of imposing parenthood on the surrogate mother. At 117 Louw observes that sec 295(e) could be used to prove the existence of the court's residuary discretion. She further argues that the court has the power to confirm a surrogacy agreement if it is satisfied that the agreement should be confirmed. The personal circumstances and the family situation in the MS case could easily have justified a post-fertilisation confirmation of the agreement especially taking into account the two previously failed surrogacy agreements. For Louw, the judgment of the court could have been justified based on the exceptional circumstances and not, as indicated by the court, on the implied unconstitutionality of the requirement as a whole.

881 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 59. Louw 2014 *De Jure* 118. Louw observes that the MS case should be used as another example of hard cases making bad law. She argues that while the applicants may have been accommodated not entirely without good cause, the arguments justifying the intervention of the court have undermined the value of the legislation in question and created uncertainty in the fragile context of surrogacy where it can be ill afforded.

882 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 62. Baase 2019 *PELJ* 10.

883 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 63.

of, and in relation to, the child that will be born.[884] Parental rights and responsibilities in respect of a child are established and these take effect at birth.[885]

Finally, in ordering confirmation of this specific agreement, the court cautions that it is mindful of the need for courts to facilitate a balance between ensuring compliance with the regulatory scheme established under chapter 19 of the Act, on the one hand, and not setting the bar too high for parents whose only option is to have a child by way of surrogacy, on the other.[886]

This judgment points to the importance of complying with the requirements in respect of a court order allowing artificial fertilisation of the surrogate as the court might not confirm an agreement post-fertilisation. A discussion of chapter 19 of the Act would not be complete without reference to the punishable offences relating to the regulation of surrogate motherhood.

3.16 Criminal offences in terms of chapter 19 of the Children's Act[887]

884 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 67. At par 68 the court makes reference of the definition of a child. In terms of the Act, a child is a person under the age of 18 years and in terms of the common law, a person is someone who is born. At par 71 the court stated that a court will not blithely reach the conclusion that a surrogacy agreement is in the best interests of the child to be born. They therefore need adequate time to consider the application and to make a properly considered judicial decision in this regard. The applicant should thus understand that if they leave the application for the confirmation too late, that they run the risk that a decision will not be made before the child is born. It is thus important that post-fertilisation confirmation applications should be made timeously and as soon as practically possible in the circumstances. Baase M "The Ratification of Inadequate Surrogate Motherhood Agreements and the Best Interest of the Child" 2019 *PELJ* 10.

885 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 68.

886 *Ex parte MS and others; In re: Confirmation of surrogate mother agreement* at par 76. Baase M "The Ratification of Inadequate Surrogate Motherhood Agreements and the Best Interest of the Child" 2019 *PELJ* 10-12. The writer criticises the judgment by stating that the Court's interpretation and application of ch 19 and other provisions contained in the Constitution raises concern. It is pointed out by the writer that the deviation from the protocol by the applicants was not in the interest of justice but due to personal preference and financial implications. Furthermore, the commissioning parents' behaviour de-emphasises the imperative purpose of the surrogate agreement and it undermines the complex inter-relational nature of such agreements by merely taking their own rights and interests into account. Baas points out that while sec 292 and sec 295 may not have required that the surrogate mother may not be artificially fertilised prior to the court confirming the agreement, sec 296 and sec 303 prohibit such an act. Sec 297(2) makes provision for parties' non-compliance. The non-compliance does affect the legal status of the child although the affect is not permanent, and it can be altered after the child is born. At p 16-17 the writer explains that in surrogacy matters there is no guarantee that the child will be born alive, and the surrogate still reserves the right to terminate the pregnancy before the child is born or she can terminate the agreement after the child has been born.

887 38 of 2005.

The Act provides for several criminal offences relating to breaches of provisions in chapter 19. Section 301 specifically prohibits a reward or compensation in respect of a surrogate agreement.[888] Promises or agreements to pay compensation in respect of a surrogate agreement are unenforceable except for the exceptional circumstances set out in section 301(2) of the Act.[889]

No person is permitted to publish or disclose the identity of parties to court proceedings in respect of a surrogate agreement without the written consent of those parties.[890] An offence will be committed by any person publishing information that reveals the identity of a person that was born of a surrogate agreement.[891] Any person who artificially fertilise a woman pursuant to a surrogate agreement, but without a court order authorising the person to do so, will commit an offence.[892]

It is also an offence for a person to publish the fact that a person is willing or might be willing to enter into a surrogate agreement.[893] A person found guilty of committing any of the above offences, will be liable, upon conviction, to pay a fine or may be imprisoned for a maximum period of ten years. Section 305(7) however determines that a second or subsequent conviction may cause imprisonment of a maximum of twenty years or a fine, or both.[894]

3.17 The medical threshold requirement and permanent illness

The medical threshold requirement in section 295(a) requires that a court may not confirm a surrogate agreement unless the commissioning parent(s) is or are permanently unable to give birth to a child.[895]

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888 Sec 301.
889 Sec 301(2).
890 Sec 305(6) read with sec 305(1)(b) and sec 302(1).
891 Sec 305(6) read with sec 305(1)(b) and sec 302(2).
892 Sec 305(6) read with sec 305(1)(b) and sec 303(1). The same applies where the person assists someone in artificially fertilising a woman without the necessary court order.
893 Sec 305(6) read with sec 305(1)(b) and sec 303(2).
894 Sec 305(7).
895 Sec 295(a). Louw 2014 *De Jure* 111. SALRC Project 140 85. Jordaan, DW "Surrogate Motherhood in illness that does not cause infertility" 2016 *South African Medical Journal* 106(7) 684. The writer refers to this requirement as the 'threshold requirement' for surrogate motherhood. He further states that the persons who qualify in terms of this requirement include male same-sex couples and single men (who are biologically unable to give birth) and

Sloth-Nielsen, in analysing this section, distinguishes between conception infertile (when a person is unable to contribute a gamete for the purposes of conception through artificial fertilisation) and pregnancy infertile (when a person is permanently and irreversibly unable to carry a pregnancy to term).[896] Jordaan explains that a narrow interpretation of the threshold requirement focuses only on a person's inherent ability to carry a successful pregnancy and excludes considering the medical *sequelae* of pregnancy.[897] A broader interpretation on the other hand, would consider the medical *sequelae* of pregnancy as integral to the person's ability to give birth to a child.[898] The legislative intent of the requirement was to exclude surrogacy for convenience and restrict surrogacy to a reproductive remedy as a last resort to the persons.[899]

A case in point is the unreported judgment of *Ex Parte LS*, where the court dealt with an application where the commissioning mother was fertile but suffering from a permanent illness that would render pregnancy a significant risk to her health and that of the prospective baby's health *in utero*.[900] The applicants (commissioning parents) in this case applied to have their surrogacy agreement confirmed by the court.[901] Persons qualifying in terms of the threshold requirement would include male same-sex couples, single men and heterosexual couples or single women medically unable to carry a pregnancy to term.[902] In *Ex Parte LS*, the court granted the application for the confirmation of the surrogate agreement, but did not provide reasons.[903] It is possible to conclude from the case that not all three requirements set out in section 295(a) need to be present contemporaneously and that it will suffice if an intended mother has a serious and irreversible medical condition which will be exacerbated by a pregnancy.[904]

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heterosexual couples or single women where the woman is medically unable to carry a pregnancy to term.

896 Sloth-Nielsen "Surrogacy in South Africa" 187. Both these situations will meet the requirements of sec 295(a).

897 Jordaan 2016 *SAMJ* 684.

898 Jordaan 2016 *SAMJ* 684.

899 Jordaan 2016 *SAMJ* 684. The writer states that the wording 'not able to give birth' was thus designed to give effect to the legislative intent.

900 Jordaan 2016 *SAMJ* 684. Unreported case of the High Court of South Africa, Gauteng Local Division, Johannesburg, Case no 2015/24392. LexisNexis *Family Law service* at par W6. The commissioning mother had a permanent and irreversible medical condition known as cystic fibrosis.

901 Jordaan 2016 *SAMJ* 684. They were a heterosexual couple.

902 Jordaan 2016 *SAMJ* 684.

903 Jordaan 2016 *SAMJ* 685. The matter thus cannot be used to establish a precedent regarding the interpretation of the threshold requirement.

904 LexisNexis *Family Law service* at par W6.

It could well be that the commissioning parent(s) are able to give birth to a child but serious health risks may arise for both or either the mother and the foetus as a result of permanent illness of the mother.[905] Fundamental rights issues may come into play, notably those relating to human dignity, the right to freedom and security of the person and the best interests of the child.[906]

Jordaan regards the objective of the threshold prerequisite as striving to balance the right of a person to start a family with the government's purpose of avoiding surrogacy agreements for convenience and of reserving surrogacy as reproductive means of last resort.[907] There are, however, cases where there is a significant health risk for the commissioning mother and the child, surrogacy cannot be seen as a matter of convenience as it is a reproductive means of last resort.[908] The right to freedom of security of a person clearly includes the right not to be treated in an inhuman or demeaning way. To expect a commissioning mother (with a permanent illness) to become pregnant to enable her to start a family and thereby to potentially sacrifice her health as well as the child's, would be inhuman and demeaning.[909] Here, the best interests of the child clearly demand that a surrogate be used instead of the commissioning mother.[910]

Jordaan argues that the human rights dimension requires a broad interpretation of the threshold prerequisite.[911] Further, a narrow interpretation of the threshold prerequisite clearly ignores the consequences of pregnancy and is hence untenable.[912] The commissioning mother is considerably compromised as she remains childless, or she becomes pregnant and accepts the risk of a significant health risk to herself or to her prospective child.[913] Jordaan concedes that pregnancy in general carries health risks,

905 Jordaan 2016 *SAMJ* 685.
906 Jordaan 2016 *SAMJ* 685.
907 Jordaan 2016 *SAMJ* 685.
908 Jordaan 2016 *SAMJ* 685.
909 Jordaan 2016 *SAMJ* 685.
910 Jordaan 2016 *SAMJ* 685. The Constitution further provides that the best interests of the child is paramount in all matters pertaining to the child.
911 Jordaan 2016 *SAMJ* 685.
912 Jordaan 2016 *SAMJ* 685.
913 Jordaan 2016 *SAMJ* 685. Jordaan concludes by stating that this is an inhuman choice that the law cannot force on any person.

not to mention a range of permanent illnesses that may increase a woman's health risk during pregnancy.[914]

In conclusion, it is important to evaluate each case on its own merits as not all health risks would satisfy the threshold prerequisite.[915] Courts should rule that the threshold prerequisite is fulfilled and allow surrogacy as a reproductive means of last resort *only* if expert medical evidence shows that pregnancy by the commissioning mother would entail a significant health risk to her or the child and she is effectively unable to give birth to a child.[916] As Clarke rightly maintains, the intention of the legislature could never have been to limit surrogacy to only be available to male parent(s) or to intended mothers who had hysterectomies, or in instances where the intended mother was born without an uterus.[917] She further argues that the legislature clearly intends for surrogacy to have a broader purpose to assist persons with a serious medical condition that is both permanent and irreversible.[918] The fact that an intended mother's uterus is still present does not and should not disqualify her from surrogacy.[919]

A recent Western Cape High Court judgment on this exact issue provides more clarity on the threshold requirement, discussed below.

3.17.1 APP and another v NKP[920]

The first and second applicants in this case (concerning an application for the confirmation of a surrogate agreement) are married and have two children.[921] The third applicant is the proposed surrogate. Although the first applicant was able to have a

914 Jordaan 2016 *SAMJ* 685.
915 Jordaan 2016 *SAMJ* 685.
916 Jordaan 2016 *SAMJ* 685. It must be as a result of a permanent illness.
917 LexisNexis *Family Law service* at par W6.
918 LexisNexis *Family Law service* at par W6.
919 LexisNexis *Family Law service* at par W6.
920 2021 JDR 1650 (WCC)/ (17962/2020) [2021] ZAWCHC 69 (11 March 2021).
921 *APP and another v NKP* at par 3 and 4. The first child was born from a surrogate agreement and the second child was born from a natural pregnancy. At par 9 it is apparent that she only conceived after undergoing five IVF treatments and the pregnancy was complicated and difficult which became life-threatening. The first applicant suffered from hypertension and gestational diabetes during her pregnancy and she developed placenta previa. She was hospitalised from 32 weeks whereafter she underwent an emergency caesarean section which was complicated by significant blood loss for which she required a blood transfusion and a further four surgeries post birth brought on by infection.

natural pregnancy, a further pregnancy would endanger her life and that of the foetus, hence the first and second applicants' decision to have another child through surrogacy.[922] Because of the first applicant's medical problems, which are both permanent and irreversible, she is unable to give birth to a child.[923] She is also forty-five years old.[924] Her condition was described to the court as follows: She suffers from post-traumatic stress disorder and a recurrent depressive disorder for which she has been taking a range of psycholeptic medications in high doses for the past fifteen years.[925] There is thus an increased risk of congenital abnormalities of the foetus should the first applicant continue to use these medication during her pregnancy.[926] Moreover, she also suffers from hypothyroidism and diabetes for which she needs to take chronic medication.[927] At one point, she stopped taking her medication, which resulted in an acute deterioration in her condition. Her psychological condition was described as permanent and irreversible.[928]

Bozalek J rightly observes that the use of the word 'condition' is not qualified or prefaced by anything to limit the meaning of the term to a physical medical condition only.[929] Thus, the condition should include both physical and psychological conditions.[930] The court remarks that a narrow interpretation of section 295(a) would be at odds with the apparent purpose of chapter 19 which are designed to afford an opportunity to persons who would not otherwise be able to have a child genetically related to them to do so by means of surrogacy.[931] The court interprets the term 'not

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922 *APP and another v NKP* at par 4. Another pregnancy will be life threatening to first applicant as a result of various medical and psychological conditions.

923 *APP and another v NKP* at par 7.

924 *APP and another v NKP* at par 8.

925 *APP and another v NKP* at par 8.

926 *APP and another v NKP* at par 8. The first applicant's obstetrician and gynaecologist stated in her report that some of the adverse pregnancy outcomes of the first applicant's medication is pre-term labour, low birth weight, poor neo-natal adaptation and increased risk of congenital abnormalities.

927 *APP and another v NKP* at par 8.

928 *APP and another v NKP* at par 9. The first applicant's age plays a role as she is more at risk of gestational diabetes recurring and early onset pre-eclampsia which is life-threatening to both the mother and the foetus and she is further at risk of the complication of a repeat placenta previa with possible morbid adherence. At par 10 a reproductive medicine specialist further confirmed that surrogacy is the only way for the first and second applicants to have a child genetically linked to at least one of them.

929 *APP and another v NKP* at par 21.

930 *APP and another v NKP* at par 21.

931 *APP and another v NKP* at par 24. The court also considered the meaning of 'not able to give birth' and whether this entails absolute physical incapacity or something less.

able to give birth' as unable to give birth without a significant medical risk to the health of the life of the mother.[932] The court concludes that the first applicant did establish, on the basis of the risk to her own health and life by a further pregnancy, that she is not able to give birth to a child and that her condition is permanent and irreversible.[933] The surrogacy agreement was subsequently confirmed by the court.[934]

This judgement is of great assistance as it paves the way courts should interpret section 295(a). Medical evidence in this case has convincingly demonstrated that psychological problems can also interfere with pregnancy and conception of a woman.

4. CONCLUSION

Chapter 19 has brought legal certainty in respect of the status of the commissioned child, as well as the rights that a child, conceived by artificial fertilisation, will have. Furthermore, there is clarity regarding parental rights and responsibilities in respect of the commissioned child. Case law has assisted to clarify the position of same-sex couples and/or spouses where chapter 19 did not specifically provide for such a scenario. A number of judgments have also offered guidance on the specific issues that should be put before the court when applications for the confirmation of agreements are submitted.

This chapter has alluded to the specific instances where regulations may complement the Act by providing more granularity. For example, the term "permanent relationship" must be defined to enable parties to know when the other the partner must provide written consent and become a party to the surrogacy agreement. The same applies to the reference "stable home environment".

932 *APP and another v NKP* at par 25.
933 *APP and another v NKP* at par 30.
934 *APP and another v NKP* at par 32.

Currently, each High Court has its own practice directives that attempt to provide guidance to legal practitioners where the Act is lacking regulations, but this is clearly not the most practical or conducive option at present.

The constitutional framework relevant to surrogate motherhood will be explored next. This chapter will also interrogate the constitutionality of some of the provisions in chapter 19 of the Children's Act.

CHAPTER 4

CONSTITUTIONAL FRAMEWORK RELEVANT TO SURROGATE MOTHERHOOD

1. INTRODUCTION

The Constitution of the Republic of South Africa, 1996, sets out the values underpinning South Africa's new constitutional democracy, and includes the Bill of Right as the cornerstone of the South African democracy,[935] contained in Chapter 2 of the Constitution. The rights of each person are protected by the Bill of Rights, the democratic values of human dignity, equality and freedom.[936] It is the duty of the State to protect, respect, promote and fulfil each of the rights contained in the Bill of Rights.[937] Each right, however, is subject to certain limitations as provided for in section 36 in the Bill of Rights.[938]

The most pertinent human rights relevant to the regulation of surrogacy and artificial fertilisation are the right to equality[939], the right to dignity[940] and the right to bodily and psychological integrity which includes, among others, the right to make choices regarding reproduction.[941] These rights are crucial, especially in respect of the woman acting as a surrogate mother. The rights of all parties—the surrogate mother, the commissioning parents, including those of the commissioned child, must be respected throughout the surrogacy process.

As stated, the focus of this chapter will be on the constitutional provisions relevant to surrogacy and artificial fertilisation.[942] Modern international and national legal developments reflect an increased awareness of the need to recognise and protect the human rights of both women and children.[943] This view is borne out by the protection of the rights of the parties to the surrogacy arrangement, supported by relevant case

935 Sec 7(1).
936 Sec 7(1).
937 Sec 7(2).
938 Sec 7(3).
939 Sec 9.
940 Sec 10.
941 Sec 12(2)(b).
942 Constitution of the Republic of South Africa, 1996 - Chapter 2: Bill of Rights.
943 Nicholson 2013 *SAJHR* 502.

law explored in the previous chapter. Although the Constitution does not directly protect a person's right to have children or to procreate, this right is indirectly protected, as will be discussed below.[944]

The discussion on human rights is necessary to gain a complete picture of the legal position regarding surrogacy and artificial fertilisation in South Africa. The discussion below will explore the relevant rights in more detail.

2. RIGHTS OF PARTIES TO SURROGATE MOTHERHOOD AND ARTIFICIAL FERTILISATION

2.1 The right to bodily and psychological integrity of a person

In terms of section 12(2), every person has the right to bodily and psychological integrity, which includes the right to make decisions regarding reproduction;[945] the right to security in and control over their own body;[946] and not to be subjected to medical or scientific experiments without their informed consent.[947] In the case of *Christian Lawyers Association v Minister of Health and Others (Reproductive Health Alliance as Amicus Curiae)*, the court describes the right to individual self-determination that flows, *inter alia*, from section 12(2), as follows:

> The fundamental right to individual self-determination itself lies at the very heart and base of the constitutional right to termination of pregnancy.[948]

Mojapelo J further states that the recognition of the right of every individual to self-determination has now become an imperative under the Constitution and particularly sections 12(2), 27(1)(a), 10 and 17 of the Bill of Rights.[949]

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944 Nicholson 2013 *SAJHR* 502.
945 Sec 12(2)(a).
946 Sec 12(2)(b).
947 Sec 12(2)(c).
948 Christian Lawyers Association v Minister of Health and Others (Reproductive Health Alliance as *Amicus Curiae)* 2005 (1) SA 509 (T).
949 Christian Lawyers Association v Minister of Health and Others (Reproductive Health Alliance as *Amicus Curiae)* 2005 (1) SA 509 (T) at 518.

Psychological and physical integrity include the ideas of self-determination and autonomy.[950] Referring to the case of *AB and another v Minister of Social Development*,[951] Rosenberg emphasises the court's observation that a child's proper emotional development is dependent upon the child's ability to maintain contact with his or her family.[952] She argues that section 12(2) protects both the physical and psychological well-being of a person.[953] From this, it follows that the judgment in *AB and another v Minister of Social Development* may be interpreted to protect a child's right to know his or her origins, as the child's psychological development may be affected without such knowledge.[954]

Chapter 19 of the Children's Act invokes the constitutional right to make decisions concerning reproduction.[955] The question arising is whether the state's legitimate interest in the regulation of surrogate agreements is adequately compelling to suggest that most aspects of chapter 19 will survive constitutional scrutiny. As stated above, the right to bodily and psychological integrity has a bearing on reproductive issues as it is specifically recognised that this right includes the right to make decisions concerning reproduction.[956] The scope of the right to "make decisions concerning reproduction" in section 12(2) is not clear. Van Niekerk is convinced that reproductive rights are protected under section 12(2)(a).[957] However, with reference to the judgment in *AB and another v Minister of Social Development*, it may be argued that the latter

950 Rosenberg 2020 *TSAR* 724.

951 2017 (3) BCLR 267 (CC); 2017 (3) SA 570 (CC).

952 Rosenberg 2020 *TSAR* 728.

953 Rosenberg 2020 *TSAR* 724. At 740 the author stated that it in the instance of surrogacy agreements, there is a loss experienced by the child in that he or she is being separated from the gestational mother but despite this loss, the children have not shown any negative impact psychologically.

954 Rosenberg 2020 *TSAR* 724.

955 LexisNexis *Bill of Rights Compendium* at par 3E28. Nicholson 2013 *SAJHR* 503. Van Niekerk 2015 *PELJ* 404. The author points out that making decisions regarding reproduction can be interpreted as deciding to have a child or not to have a child.

956 Carstens and Pearmain *Foundational Principles* 177. Van Niekerk 2015 *PELJ* 420. The author points out that this right has not been interpreted as referring only to choices in respect of contraception and the termination of pregnancy. It includes the right to make decisions about the manner which one reproduces, and this includes the right to decide to use a surrogate and donor gametes if necessary.

957 Van Niekerk 2017 *PELJ* 14. Van Niekerk 2015 *PELJ* 405. The author states that sec 12(2)(a) presumably suggests (in the absence to the contrary) that every person can make decisions regarding reproduction and that is regardless of whether the person is fertile or not. Further, the content of the right to decide includes the right to make use of natural conception or conception by assisted means. Importantly, she argues that this entails the decision whether to use one's own gametes or those of a gamete donor and whether recourse will be had to a surrogate mother or not.

judgment implies that whilst section 12(2)(a) protects the right to reproduce non-coitally, it applies only to parties who are physically involved in the reproductive process.[958] Looking at the reference in section 12 to both bodily and psychological integrity as a tacit acknowledgement that both the body and the psyche are protected,[959] Van Niekerk concludes that the provision in section 12(2)(a) is not flexible enough to accommodate advancements in medical technology and that it should be amended or at least interpreted more broadly in the future.[960] As alluded to earlier in this thesis, section 294 of the Children's Act does not permit infertile persons unable to provide a genetic link to the commissioned child to enter into a surrogacy arrangement, and by doing so, arguably denies these persons their right under section 12(2)(a) of the Constitution.[961]

2.2 The right to human dignity

Section 10 of the Constitution provides every person a right to an inherent dignity and the right to have their dignity respected and protected.[962] Dignity may be described as the state or quality of being worthy of honour or respect[963]

and also:

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958 Van Niekerk 2017 *PELJ* 15. Presumably either by providing genetic material or by carrying the child. The author stated that this effectively excludes individuals who cannot meet these criteria. Thus, the person's own body must be engaged in the act of reproduction.

959 Van Niekerk 2017 *PELJ* 16. The author pointed out that the provision in sec 12(2)(b) makes specific reference to "security in and control over their body" in comparison to sec 12(2)(a). Deciding on reproduction may involve the assistance of others in the reproductive process and the need of a person to provide his or her own gametes would be unnecessary in these circumstances. She explains that if the interpretation of the majority in the *AB and another v Minister of Social Development* case (the need to provide one's own gametes) is followed, then all forms of noncoital reproduction are not protected by sec 12(2)(a).

960 Van Niekerk 2017 *PELJ* 16. At 18 the author stated that section 294 of the Children's Act violates the rights of individuals to exercise their reproductive choice and to do so freely. Further, the limitations of these rights are not reasonable and justifiable and she agrees with the minority judgment in *AB and another v Minister of Social Development*. AB should at least have been awarded the same opportunity as other individuals to exercise her reproductive autonomy. She further explains that sec 12(2)(a) does not guarantee the right to give effect to a decision but merely to make one and the Constitutional Court failed AB in this respect.

961 Van Niekerk 2015 *PER*/*PELJ* 406. The denial of the right thus amounts to a limitation of the said the right. At 412 the author stated that the infringement of sec 12(2)(a) is neither reasonable nor justifiable.

962 Nicholson 2013 *SAJHR* 503.

963 https://www.vocabulary.com/dictionary/dignity (accessed on 31 January 2023).

> The importance and value that a person has, that makes other people respect them or makes them respect themselves.[964]

Ackerman J, in the judgment of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others*,[965] reaffirms the view expressed earlier in *S v Makwanyane*[966] that the right to dignity is the cornerstone of the South African Constitution. The importance of this right is emphasised in the role accorded to it in section 36 of the Constitution.[967] The Court further explains this right by stating:

> Dignity is a difficult concept to capture in precise terms. At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.[968]

Sachs J explains the centrality to the concept of dignity by reference to other constitutional rights:[969]

> It will be noted that the *motif* which links and unites equality and privacy, and which, indeed, runs right through the protections offered by the Bill of Rights, is dignity.[970]

For O'Regan J, the value of dignity in our Constitutional framework cannot be doubted.[971] The court furthermore observes that the Constitution asserts dignity to contradict our past and to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.[972] It can be said that human dignity informs constitutional adjudication and interpretation at a range of levels, most possibly all other rights.[973] Not only is dignity a value that is fundamental to our Constitution, it is

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964 The definition may be accessed from https://dictionary.cambridge.org/dictionary/english/dignity (accessed on 4 January 2023).

965 1999(1) SA 6 (CC).

966 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 at par 144. The Court held that the rights to life and dignity were the most important of all human rights and the source of all the other personal rights detailed in Chapter 3 of the Interim Constitution.

967 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* at par 28.

968 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* at par 28.

969 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* at par 120.

970 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* at par 120.

971 *Dawood and Another v Minister of Home Affairs and others; Shalabi and Another v Minister of Home Affairs and others; Thomas and Another v Minister of Home Affairs and others* 2000 (3) SA 936 (CC) at par 35.

972 *Dawood and Another v Minister of Home Affairs and others; Shalabi and Another v Minister of Home Affairs and others; Thomas and Another v Minister of Home Affairs and others* at par 35.

973 *Dawood and Another v Minister of Home Affairs and others*; *Shalabi and Another v Minister of Home Affairs and others*; *Thomas and Another v Minister of Home Affairs and others* at par 35.

also a justiciable and enforceable right that must be respected and protected.[974] When the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right in many cases, for example, the right to bodily integrity or the right to equality.[975]

The prohibition of commercial surrogacy protects the surrogate's right to dignity.[976] Section 294 of the Children's Act, on the other hand, has the effect of treating persons who are able to provide genetic material differently from those who are unable to.[977] This differentiation is based on personal traits inherently attached to the infertile person.[978] Van Niekerk thus argues that these persons' right to human dignity is violated by this section, as it ignores and/or marginalises the persons incapable of providing genetic material legally required in terms of a surrogacy agreement and in doing so, offends their sense of self-worth.[979] Legislation that unjustifiably and unfairly prevents certain persons from achieving their goal to have children is tantamount to a violation of their right to have their dignity respected and protected.[980] Although the ostensible goal of section 294 is to prevent child trade, the commodification of babies and to promote a bond between the parents and the child (the latter in the child's best interests), there are other less restrictive means to achieve the same goal.[981] Van Niekerk hence contends that the limitation of the right to dignity is therefore not justified and it is unconstitutional.[982]

A further aspect of dignity is the question whether the lack of knowledge of a commissioned child regarding its biological origins, born as a result of donor sperm as part of a surrogacy arrangement, may violate such child's right to human dignity.[983] For Rosenberg, answering this question depends on a subjective investigation into

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974 *Dawood and Another v Minister of Home Affairs and others; Shalabi and Another v Minister of Home Affairs and others; Thomas and Another v Minister of Home Affairs and others* at par 35.

975 *Dawood and Another v Minister of Home Affairs and others; Shalabi and Another v Minister of Home Affairs and others; Thomas and Another v Minister of Home Affairs and others* at par 35.

976 Bonthuys and Broeders 2013 *SALJ* 490.

977 Van Niekerk 2015 *PELJ* 412.

978 Van Niekerk 2015 *PELJ* 412.

979 Van Niekerk 2015 *PELJ* 412-413.

980 Van Niekerk 2015 *PELJ* 413.

981 Van Niekerk 2015 *PELJ* 413.

982 Van Niekerk 2015 *PELJ* 413.

983 Rosenberg 2020 *TSAR* 732.

everyone's own experiences.[984] Importantly, dignity protects the right to knowledge of one's origins as dignity is at the core of a person's psychological well-being and a lack of knowledge of one's origins could possibly have an impact on one's psychological state.[985] In the case of the *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others*,[986] a situation-sensitive human rights approach is adopted, which requires a focus on the lived experiences of persons through the lens of equality:

> One of the great gains achieved by following a situation-sensitive human rights approach is that analysis focuses not on abstract categories, but on the lives as lived and the injuries as experienced by different groups in our society. The manner in which discrimination is experienced on grounds of race or sex or religion or disability varies considerably - there is difference in difference. The commonality that unites them all is the injury to dignity imposed upon people as a consequence of their belonging to certain groups. Dignity in the context of equality has to be understood in this light. The focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons. Such focus is in fact the guarantor of substantive as opposed to formal equality.[987]

2.3 The right to privacy

Section 14 of the Constitution provides that every person has the right to privacy, which includes the right to not have their person, home or property searched[988], their possessions seized[989] or the privacy of their communications infringed.[990] The Constitutional court describes privacy in the *National Coalition* case as follows:

> Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community.[991]

The right to privacy can be defined as the right of a person to be left alone or the right of a person to live his or her life as he or she wants.[992] For the Constitutional Court, private facts refer to those matters that the disclosure of which will cause mental distress and injury to anyone possessed of ordinary feelings and intelligence in the

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984 Rosenberg 2020 *TSAR* 732.
985 Rosenberg 2020 *TSAR* 732.
986 1999(1) SA 6 (CC).
987 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* at par 126.
988 Sec 14(a) and 14(b).
989 Sec 14(c).
990 Sec 14(d).
991 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* at par 32.
992 *NM and others v Smith and others (Freedom of expression institute as Amicus Curiae)* 2007 (5) SA 250 (CC) at par 32-33.

same circumstances and in respect of which there is a will to keep those matters private.[993] In another seminal constitutional case that dealt with the right to privacy, *NM and others v Smith and others (Freedom of expression institute as Amicus Curiae)*, the court remarks as follows on the interdependence between the rights to privacy and dignity:

> Underlying our Constitution is a recognition that, although as human beings we live in a community and are in a real sense both constituted by and constitutive of that community, we are nevertheless entitled to a personal sphere from which we may and do exclude that community. In that personal sphere, we establish and foster intimate human relationships and live our daily lives. This sphere in which to pursue our own ends and interests in our own ways, although often mundane, is intensely important to what makes human life meaningful. The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In so doing, it highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore inter-dependent and mutually reinforcing. We value privacy for this reason at least - that the constitutional conception of being a human being asserts and seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of a broader community. The protection of this autonomy, which flows from our recognition of individual human worth, presupposes personal space within which to live this life.[994]

It is important that we do not deny the right to privacy its importance in the new constitutional order at the cost of protecting the right to equality.[995] Sachs J stated that while recognising the unique value of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self.[996] The Constitution acknowledges that people live in their bodies, their communities, their cultures, their places and their times.[997] The court stated that respect for one's personal privacy does not require disrespect for social standards.[998]

Sachs J acknowledges that the law may continue to proscribe what is acceptable and what is unacceptable and that includes sexual expression of a person. Even in the sanctum of a person's home, the court may, within justifiable limits, penalise what is

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993 *NM and others v Smith and others (Freedom of expression institute as Amicus Curiae)* at par 34.

994 *NM and others v Smith and others (Freedom of expression institute as Amicus Curiae)* at par 130 – 131.

995 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* at par 32.

996 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* at par 117.

997 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* at par 117.

998 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* at par 119.

damaging and control what is offensive.[999] Thus, for present purposes, the limits that are established may not offend the Constitution.[1000] Although the matter of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* dealt with the unconstitutionality of the common-law offence of sodomy and certain other legal provisions, the statement above by Sachs J applies equally to other contexts, such as those of surrogacy and artificial fertilisation. The constitutionality of section 294 of the Children's Act will be explored in more detail below.

Respecting a single infertile woman's right to privacy by allowing her to enter into a surrogacy agreement is clearly not disrespecting of social standards or the *boni mores*. It constitutes a rightful affirmation of her right to dignity, self-determination and privacy, by allowing her to make her own decisions regarding reproduction without unjustifiable interference, and to have her own family in circumstances where she is unable to have her own child.

A further aspect of the right to privacy in the context of surrogacy relates to the right to know one's biological origins. A commissioning and adoptive parent (in the case of a child) have the right to decide to inform the child of his or her biological background. Although this right is not explicitly acknowledged in the Constitution, the concept of identity has been closely related to the right to privacy, based on the notion that it is necessary to have one's own autonomous identity.[1001]

With reference to the interpretation of the right to privacy, the rule that no right is to be considered absolute, implies that at the start of interpretation, each right is always already limited by every other right accruing to another citizen.[1002] Thus, looking at privacy, it would mean that it is only the inner sanctum of a person which is shielded from erosion by conflicting rights of the community.[1003] Further, privacy is recognised in the truly personal realm, but as a person moves into communal relations and

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999 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* at par 119.

1000 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* at par 119.

1001 *Bernstein and others v Bester and others NNO* 1996 (2) SA 751 (CC) at par 65.

1002 *Bernstein and others v Bester and others NNO* at par 67.

1003 *Bernstein and others v Bester and others NNO* at par 67. The Court gave the examples of inner sanctum of a person as his/her family life, sexual preference and home environment.

activities, for example business and social interaction, the scope of a person's personal space shrinks accordingly.[1004] Ackermann J explains this in the *Bernstein* case as follows:

> A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation.[1005]

In the *NM and others v Smith and others (Freedom of expression institute as Amicus Curiae)* case, referring to access to private medical information, the Constitutional court determined that the protection of privacy raises in every individual an expectation that he or she will not be interfered with.[1006] There must thus be an insistent social need for that expectation to be violated and the person's rights to privacy meddled with.[1007]

The interpretation of the right to privacy in section 14 of the Constitution in the context of surrogacy means that a person acting as a surrogate's right to privacy includes the right not to have her identity or the detail of the surrogate agreement disclosed and published without her consent, as well as those of the commissioning parents. Section 302 of the Children's Act further endorses the right to privacy by providing protection to the parties involved in a surrogacy agreement, including the right of the commissioned child by determining that the identity of the child may not be revealed.[1008] The proper protection of one's privacy depends in a significant way on it being respected by others.[1009] Every person's (as a party to a surrogate agreement) right to privacy be respected by the community as a whole and especially by third parties involved in (and during) the surrogacy process having access to the parties'

1004 *Bernstein and others v Bester and others NNO* at par 67.

1005 *Bernstein and others v Bester and others NNO* at par 77. *NM and others v Smith and others (Freedom of expression institute as Amicus Curiae)* at par 34.

1006 *NM and others v Smith and others (Freedom of expression institute as Amicus Curiae)* at par 45.

1007 *NM and others v Smith and others (Freedom of expression institute as Amicus Curiae)* at par 45. The court found that there was no such compelling public interest in the case.

1008 See par 3.5.11 for a discussion on sec 302.

1009 *NM and others v Smith and others (Freedom of expression institute as Amicus Curiae)* at par 132.

information. Each party must provide consent to make the facts regarding the surrogacy agreement known.

2.4 The right to equality

The Constitution provides in section 9(1) that "everyone is equal before the law and has the right to equal protection and benefit of the law", whereas section 9(4) prohibits the unfair (direct and indirect) discrimination on any of the grounds stated in section 9(3) of the Constitution.[1010]

In the case of the *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others*, the Constitutional court describes the purpose of equality jurisprudence as follows:

> At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group. The indignity and subordinate status may flow from institutionally imposed exclusion from the mainstream of society or else from powerlessness within the mainstream; they may also be derived from the location of difference as a problematic form of deviance in the disadvantaged group itself, as happens in the case of the disabled.[1011]

1010 Nicholson 2013 *SAJHR* 503. Nicholson pointed out that the section unambiguously sets out what is meant by equality. Sloth-Nielsen "Surrogacy in South Africa" 186. The writer points out that this clause prohibits discrimination on a wide range of bases which includes gender, marital status and sexual orientation. Van der Merwe v Road Accident Fund and another (Women's Legal Centre Trust as *Amicus Curiae*) 2006 (4) SA 230 (CC) at par 49. "It is so that laws rarely prescribe the same treatment for everyone. Yet it bears repetition that when a law elects to make differentiation between people or classes of people it will fall foul of the constitutional standard of equality if it is shown that the differentiation does not have a legitimate purpose or a rational relationship to the purpose advanced to validate it. Absent the pre-condition of a rational connection the impugned law infringes, at the outset, the right to equal protection and benefit of the law under s 9(1) of the Constitution. This is so because the legislative scheme confers benefits or imposes burdens unevenly and without a rational criterion or basis. That would be an arbitrary differentiation which neither promotes public good nor advances a legitimate public object. In this sense, the impugned law would be inconsistent with the equality norm that the Constitution imposes, inasmuch as it breaches the 'rational differentiation' standard set by s 9(1) thereof." *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at par 27. The Court pointed out that "At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected and whether the discrimination has impaired the human dignity of the victim."

1011 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* at par 129.

The World Health Organisation defines infertility as a disability.[1012] South Africa's legal understanding of disability is very narrow, unfortunately, and infertility is also not specifically listed as one of the prohibited grounds of unfair discrimination in section 9(3) of the Constitution, despite "pregnancy" and "disability" being mentioned under this section. Infertility is also not listed as a ground on which a claim of unfair discrimination may be lodged under the Employment Equity Act.[1013] Infertility should be regarded as a form of disability under section 9(3), especially if read together with the other grounds of "pregnancy" and "disability". The impossibility or permanent incapacity to fall pregnant or to conceive constitutes an impairment that affects functioning to the detriment of those affected.

Had infertility been considered a disability under South African law, it would, for example, be expected of employers to reasonably accommodate infertile employees, which would also include the obligation to provide appropriate leave for infertile employees to comply with the requirements of the surrogacy agreement. It is submitted that infertility is, however, a disability that may be alleviated through the advancements in medical technologies, including surrogacy and artificial fertilisation. There should be no distinction between "conception infertile" and "pregnancy infertile" persons, as both should be regarded as forms of disability that pose physical and psychological consequences for the infertile persons.

Some of the grounds listed in section 9(3) of the Constitution, such as gender, marital status and sexual orientation are relevant in the context of surrogacy.[1014] Meyerson argues that section 294 of the Children's Act (which denies infertile persons unable to provide a genetic link to the commissioned child access to surrogacy) infringes the right to equality because the distinction it draws between fertile and infertile persons is not rationally connected to the legitimate goal of protecting the best interests of children, as well as because it successfully serves an illegitimate goal, one of forcibly imposing a contested bio-normative conception of the family on people who reasonably

1012 WHO/International Classification of Functioning, Disability and Health (ICF) (2018); accessed from: https://www.who.int/classifications/international-classification-of-functioning-disability-and-health (date of access: 19 July 2022).
1013 55 of 1998.
1014 Sloth-Nielsen "Surrogacy in South Africa" 186.

disagree.[1015] Persons who are unable to provide the genetic material, as is a mandatory requirement in terms of section 294 of the Children's Act, find themselves in this position because of a biological abnormality or inability.[1016] Thus, section 294 differentiates between the persons who are able to provide genetic material for surrogacy and those who are unable to which constitutes discrimination.[1017] Section 294 may be said to unfairly discriminates against a particular group of persons, which constitutes unfair discrimination.[1018] Although the purpose behind section 294 might be honourable, the nature of the infringement suffered by a particular group of infertile persons serves only to reinforce their feelings of inadequacy at being unable to procreate.[1019] This then has the result of furthermore impairing their human dignity in an equally serious manner.[1020]

Turning again to the case of *National Coalition v Minister of Justice*,[1021] Sachs J explains that equality recognises difference in people in that it means equal concern and respect across difference.[1022] Equality does not presuppose that difference be eliminated or suppressed.[1023] Thus, by respecting human rights, the 'self' is affirmed instead of denied.[1024] Equality does not imply a levelling or homogenisation of behaviour but rather an acknowledgment and acceptance of difference.[1025] The court concludes by stating that:

> At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society.[1026]

1015 Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 341.
1016 Van Niekerk 2015 *PELJ* 409.
1017 Van Niekerk 2015 *PELJ* 409-410.
1018 Van Niekerk 2015 *PELJ* 411.
1019 Van Niekerk 2015 *PELJ* 411.
1020 Van Niekerk 2015 *PELJ* 411.
1021 1999(1) SA 6 (CC).
1022 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* at par 132.
1023 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* at par 132.
1024 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* at par 132.
1025 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* at par 132.
1026 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* at par 132.

The judgment emphasises that the function of the court is to recognise the sphere which each person inhabits and not to force one person into the sphere of the other.[1027] The law will legitimately acknowledge a diversity of strongly held opinions on matters of great public controversy as long as there is no prejudice to the fundamental rights of any person or group.[1028] Further, it is the function of the Constitution and of the law to counter unfair discrimination against a minority:[1029]

> The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.[1030]

A minority of single women are "pregnancy- and conception infertile". The example of *AB and another v Minister of Social Development* is a case in point, as *AB* found herself in that position because she was unable to provide a gamete and maintain a pregnancy. It would have been impossible for her to have a child that is genetically linked to her.

Sachs J, in the judgment above, underlines the importance of both the Constitution and the law to protect a minority from unfair discrimination. I submit that to remedy this situation and obviate unfair discrimination, an amendment to section 294 of the Children's Act is necessary; one that does not provide the requirement of a genetic link between the commissioned child and the commissioning parents. Further, it is submitted that the construction of section 9 of the Constitution supports the conclusion that surrogacy must be treated equally to any other form of conception. Part of this assertion flows from the logical inference that surrogacy agreements must be drafted in a manner that ensures that commissioning mothers are treated equally and fairly in all respects. Thus, commissioning mothers should be treated no differently from other

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1027 *Minister of Home Affairs and another v Fourie and another (Doctors for Life International and others Amici Curiae); Lesbian and Gay Equality project and others v Minister of Home Affairs and others* 2006 (1) SA 524 (CC) at par 94.

1028 *Minister of Home Affairs and another v Fourie and another (Doctors for Life International and others Amici Curiae); Lesbian and Gay Equality project and others v Minister of Home Affairs and others* at par 94.

1029 *Minister of Home Affairs and another v Fourie and another (Doctors for Life International and others Amici Curiae); Lesbian and Gay Equality project and others v Minister of Home Affairs and others* at par 94. "The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom."

1030 *Minister v Fourie* at par 95.

mothers who are able to conceive naturally without artificial assistance. The same conclusion would apply to children born as a result of surrogacy agreements, compared to naturally conceived children born from biological mothers. That is why all the parties', including the commissioned child's, rights must be protected.

2.5 The right to reproductive health care

Section 27(1) of the Constitution determines that every person has the right to have access to health care services, including reproductive health care.[1031] Reproductive rights have traditionally focussed on the rights of a person to access contraceptives and sterilisation procedures, together with termination of a pregnancy as per the time frames stipulated by legislation.[1032] As a result of the increase in the use of assisted reproductive technologies, the focus has turned to the rights of a person to reproduce non-coitally, including the scope of their reproductive freedom.[1033] Van Niekerk describes reproductive rights as follows, explaining that reproductive rights may be inferred from other rights already in existence:

> Reproductive rights embrace certain human rights that are already recognised in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free from discrimination, coercion and violence, as expressed in human rights documents.[1034]

Carstens and Pearmain argue that there are at least two possible reasons for the express inclusion of reproductive health care in section 27, depending on whether the reference to reproductive health care was intended to widen the concept of health care services to include services which would not ordinarily be regarded as such or whether it is a subset of health care services that was intentionally highlighted to emphasise health care for women in the area of reproduction.[1035] An example of health care services which would not be regarded as such generally, is the artificial fertilisation of

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1031 Sec 27(1)(a).
1032 Van Niekerk 2017 *PELJ* 2.
1033 Van Niekerk 2017 *PELJ* 2.
1034 Van Niekerk 2017 *PELJ* 9. The existing rights include the right to make decisions regarding reproduction, the right to non-discrimination and equal treatment, the right to information and the right to the highest standard of health.
1035 Carstens and Pearmain *Foundational Principles* 176.

a fertile healthy woman with the sperm of a donor because her husband is infertile.[1036] This procedure is clearly not designed to cure or remedy the husband's infertility and it cannot really be seen as a health care service to the wife as there is nothing wrong with her.[1037] Thus, in human rights terms, it is a medical procedure, which is assisting the couple to exercise their reproductive rights.[1038] The writers rightfully state that reproductive rights are not gender-specific and that these rights are of fundamental importance to both women and men.[1039]

In the Constitutional Court judgment of *Soobramoney v Minister of Health (KwaZulu-Natal),*[1040] the focus was on section 27(3) of the Constitution, 1996, and the right not to be refused medical treatment.[1041] For Chaskalson J, it was apparent from the provisions in section 27 that the right of access to health care services is dependent upon the resources that are available for such purpose.[1042] The corresponding right, however, is limited as a result of lack of resources.[1043] Emergency medical treatment may not be denied to a person and the section requires that necessary and available remedial treatment be given to a person to prevent harm.[1044]

The appellant in this matter, who suffered from chronic renal failure, was dependent on kidney dialysis two to three times a week in order to stay alive.[1045] Chaskalson J correctly observes that section 27(3) (which provides for the right not to be refused emergency medical treatment) did not apply to the facts as the appellant's ongoing renal failure was as a result of the deterioration of incurable renal function.[1046] Sections 27(1) and 27(2) entitle a person to have access to health care services provided by the

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1036 Carstens and Pearmain *Foundational Principles* 176.
1037 Carstens and Pearmain *Foundational Principles* 176.
1038 Carstens and Pearmain *Foundational Principles* 176.
1039 Carstens and Pearmain *Foundational Principles* 178.
1040 (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696. (Hereinafter "*Soobramoney v Minister of Health*").
1041 *Soobramoney v Minister of Health* at par 7. At par 38 Madala J explained that the provision of sec 27(3) envisages a dramatic, sudden situation or event which is of a passing nature in terms of time and "there is some suddenness and at times even an element of unexpectedness in the concept of "emergency medical treatment"".
1042 *Soobramoney v Minister of Health* at par 11. The court also referred to sec 26 which dealt with the right to housing.
1043 *Soobramoney v Minister of Health* at par 11.
1044 *Soobramoney v Minister of Health* at par 20.
1045 *Soobramoney v Minister of Health* at par 21.
1046 *Soobramoney v Minister of Health* at par 21.

state and which are within the state's available resources.[1047] The state however has to manage its limited resources in order to address the aspect of access to housing, food and water, employment opportunities and social security, all aspects of the right to human life.[1048] Madala J emphasises that the state has a strong interest in protecting and preserving its citizens life and health and thus must do all in its power to protect and preserve life."[1049] In addition, the court explains as follows:

> The Constitution is forward-looking and guarantees to every citizen fundamental rights in such a manner that the ordinary person-in-the-street, who is aware of these guarantees, immediately claims them without further ado and assumes that every right so guaranteed is available to him or her on demand. Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise, in some cases, and an indication of what a democratic society aiming to salvage lost dignity, freedom and equality should embark upon. They are values which the Constitution seeks to provide, nurture and protect for a future South Africa.[1050]

The guarantees set out in the Constitution are not absolute and may be limited in one way or another.[1051] Unfortunately, one of the limiting factors in the fulfilment of the Constitution's guarantees is that of limited or scarce resources.[1052] Sachs J describes the dilemma as follows:

> The inescapable fact is that if governments were unable to confer any benefit on any person unless it conferred an identical benefit on all, the only viable option would be to confer no benefit on anybody.[1053]

The decisions involving the rationing of health care resources are likely to place treatment for infertility somewhere at the bottom of the hierarchy of health care services that must be provided.[1054] It is for this reason that assisted reproduction techniques such as artificial fertilisation and *in vitro* fertilisation are not often considered part of the standard package of health care services in either the public or the private health sectors, although they are readily available in the private health sector.[1055]

The judgment of the Constitutional Court in the matter of the *Minister of Health and others v Treatment Action Campaign and others*[1056] provides some explanation in that

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1047 *Soobramoney v Minister of Health* at par 22.
1048 *Soobramoney v Minister of Health* at par 31.
1049 *Soobramoney v Minister of Health* at par 39.
1050 *Soobramoney v Minister of Health* at par 42.
1051 *Soobramoney v Minister of Health* at par 43.
1052 *Soobramoney v Minister of Health* at par 43.
1053 *Soobramoney v Minister of Health* at par 53.
1054 Carstens and Pearmain *Foundational Principles* 180.
1055 Carstens and Pearmain *Foundational Principles* 180.
1056 (No 2) 2002 (5) SA 721 (CC).

the court made it clear that the socio-economic rights in the Constitution should not be interpreted as entitling everyone to demand that the minimum care be provided to them.[1057] The state is not obliged to go beyond the available resources or to realise these rights immediately.[1058] This is succinctly explained by the court in the case of the *Minister of Health and others v Treatment Action Campaign and others:*

> There is, accordingly, a distinction between the self-standing rights in ss 26(1) and 27(1), to which everyone is entitled, and which in terms of s 7(2) of the Constitution '*(t)*he State must respect, protect, promote and fulfil', and the independent obligations imposed on the State by ss 26(2) and 27(2). This minimum core might not be easy to define, but includes at least the minimum decencies of life consistent with human dignity. No one should be condemned to a life below the basic level of dignified human existence.[1059]

It would be impossible for the state to provide everyone access even to a "core" package of services immediately.[1060] Thus, as per the *Minister of Health and others v Treatment Action Campaign and others* judgment, all that can be expected from the state is that the state acts reasonably to provide access to the socio-economic rights identified in both sections 26 and 27, *on a progressive basis*.[1061] It was also held in this judgment that section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable regardless of the considerations mentioned in section 27(2).[1062] It is important to read sections 27(1) and 27(2) together, as such a reading would define the scope of the positive rights that every person has, together with the corresponding obligations on the state to respect, protect, promote and fulfil such rights.[1063]

The rights conferred by sections 26(1) and 27(1) are for a person to have access to the services that the state is obliged to provide in terms of sections 26(2) and 27(2).[1064] It has long been recognised that public health services in South Africa are over extended and that the state already faces massive demands in respect of access to education, land, housing, health care, food, water and social security.[1065] However, despite this, the state is obliged to take reasonable and legislative measures to achieve

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1057 *Minister of Health and others v Treatment Action Campaign and others* at par 34.
1058 *Minister of Health and others v Treatment Action Campaign and others* at par 32.
1059 *Minister of Health and others v Treatment Action Campaign and others* at par 28.
1060 *Minister of Health and others v Treatment Action Campaign and others* at par 35.
1061 *Minister of Health and others v Treatment Action Campaign and others* at par 35.
1062 *Minister of Health and others v Treatment Action Campaign and others* at par 39.
1063 *Minister of Health and others v Treatment Action Campaign and others* at par 39.
1064 *Minister of Health and others v Treatment Action Campaign and others* at par 39.
1065 *Minister of Health and others v Treatment Action Campaign and others* at par 93-94.

the progressive realisation of each of these socio-economic rights as they are entrenched in the Constitution.[1066] It is important to understand that the measures taken by the state only need to be *within its available resources*.[1067]

The judgments referred to in this section support the conclusion that reproductive health care would not fall within the ambit of the 'core' services, as it is not a type of treatment that can save a life, despite its ability to enable new life because of medical technology. The submission by Carstens and Pearmain that fertility treatment will be at the bottom of the hierarchy of priorities, is correct. The many competing demands on the state's health care resources are already completely inadequate to provide in the needs of those who are seriously ill or continuously dependent on the state to provide them with the necessary treatment.

2.6 Children's rights and the protection of children

Artificial fertilisation concerns not only the desire to conceive a child, but more importantly the conception of a new person whose interests need to be protected:

> In participating in the process of procreation, the doctor is performing an act which is not morally neutral. Even if the principal objective of DI is to satisfy the desire for a child, thought has to be given to the child who is the end result; most would hold that the child's interests should be considered paramount – and that this holds throughout the spectrum of assisted reproduction.[1068]

Section 28 of the Constitution protects the rights of children in different sub-sections.[1069] The most relevant rights regarding children for the purpose of this chapter are the right of children to: a name and a nationality from birth;[1070] to family care or parental care, or to appropriate alternative care when removed from the family environment;[1071] to basic nutrition, shelter, basic health care services and social

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1066 *Minister of Health and others v Treatment Action Campaign and others* at par 94.
1067 *Minister of Health and others v Treatment Action Campaign and others* at par 94.
1068 Mason, McCall Smith and Laurie *Law and Medical Ethics* 78.
1069 The Constitution. A child is a person under the age of 18 years. *Ex parte Applications for Confirmation of Surrogate Motherhood Agreements* [2014 JOL 32134 (GSJ)] at para 16.
1070 Sec 28(1)(a).
1071 Sec 28(1)(b). Du Toit and another v Minister of Welfare and population development and others (Lesbian and gay equality project as *Amicus Curiae*) 2003 (2) SA 198 (CC) (hereinafter "*Du Toit v Minister*") at par 18. It was recognised that many children are not brought up by their biological parents.

services;[1072] and to be protected from maltreatment, neglect, abuse or degradation.[1073] Most importantly, a child's best interests are of paramount importance in every matter concerning the child.[1074]

The Constitutional Court has emphasised the right of a child to proper parental care.[1075] The obligation to ensure that a child is properly cared for is an obligation imposed by the Constitution on the child's parents. The inverse of this is an obligation placed on the state to create the necessary environment for parents to do so.[1076] In the case of *S v M*, Sachs J, with reference to South Africa's status as a State party to the United Nations Convention on the Rights of the Child (UNCRC) and the four primary principles of the UNCRC (survival, development, participation and protection) that guide all policy in South Africa relating to children, observes as follows:

> What unites these principles, and lies at the heart of s 28, I believe, is the right of a child to be a child and enjoy special care. Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.[1077]

It is difficult to pinpoint or identify the best interests of a child that will be born as a result of a surrogacy agreement because such an exercise would need to consider the competing rights and obligations of all the parties to the agreement, including a range of ethical and moral issues and choices relating to unborn children.[1078] Decisions that have consequences for children should be well considered by all the parties to ensure that decisions made do not adversely affect the child's health and well-being.[1079]

Differing views on how to unpack the 'best interest' standard regarding children exist. Sachs J alludes to this by lamenting the fact that the very extent of the paramountcy

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1072 Sec 28(1)(c).

1073 Sec 28(1)(d).

1074 Sec 28(2). *Bannatyne v Bannatyne* (Commission for gender equality, as *Amicus Curiae)* 2003 (2) SA 363 (CC) at par 17 and 24. Sec 28(2) enjoins a court to give paramountcy to the best interests of the child in every matter concerning the child; *Du Toit v Minister* at par 20. The Court stated that both international law and the domestic law of many countries have affirmed the paramountcy of the best interests of the child.

1075 *Bannatyne v Bannatyne* at par 24.

1076 *Bannatyne v Bannatyne* at par 24.

1077 *S v M* at par 17 – 18.

1078 Oluwaseyi and Oladimeji 2021 *Obiter* 27.

1079 Oluwaseyi and Oladimeji 2021 *Obiter* 27. The authors point out the importance of the intending (commissioning) parents to be appropriately examined so that their willingness and commitment to safeguarding their children's rights are confirmed. Thus, failure to make investigations concerning the background of the commissioning parents undermines the best interests principle.

principle creates the risk of appearing to promise everything in general, but actually delivering little in particular.[1080] The concept of the best interests is often criticised for being fundamentally indeterminate and for providing little guidance to those who are given the task to apply it.[1081] Some authors argue that the best interests of a child are protected by the prohibition of commercial surrogacy.[1082] For Nicholson, legislative provisions that prohibit certain types of surrogacy infringe upon an infertile person's reproductive rights, the right to dignity and the right to privacy.[1083] She further argues that it may also violate the surrogate's right to an improved life, her right to freedom and control of her body and her right to choose a trade, occupation or profession.[1084] The Constitutional Court in the case of *S v M*[1085] cautions that the list of factors to be considered the most important regarding a child's best interests may be endless, yet should not be seen as a problem, as a truly "principled child-centered approach" requires an individualised and contextualised examination of the lived experience and situation of the child in question:

> Furthermore '(t)he list of factors competing for the core of best interests [of the child] is almost endless and will depend on each particular factual situation'. Viewed in this light, indeterminacy of outcome is not a weakness. A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.[1086]

Louw, on the other hand, maintains that the child-centred approach is not possible as it is generally agreed that the determination of an existing child's best interests cannot be determined in the abstract or in advance.[1087] She further asserts that the only

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1080 *S v M* at par 23.
1081 *S v M* at par 23.
1082 Bonthuys and Broeders 2013 *SALJ* 490.
1083 Nicholson 2013 *SAJHR* 503.
1084 Nicholson 2013 *SAJHR* 503. Nicholson pointed out that fully informed adults should be able to make any arrangement regarding their bodies and reproduction that they wish, provided that their decision do not harm the children born as a result of the arrangement. She argues that the practice may lead to desperate women entering into surrogacy agreements for very little financial consideration and rendering them vulnerable to the type of exploitation that the statute seeks to avoid. The writer argues that the pervasive poverty that prevails in South Africa makes for an environment which compromises the ability of destitute women to forego an opportunity to make some money, exposing them to exploitation by the wealthy. This could compromise the surrogate's dignity and, in extreme cases, amount to her engaging in a form of forced labour or slavery. On the other hand, if carrying a child for another is an altruistic labour of love, there should be no objection to the surrogate's actions and they should be encouraged.
1085 2008 (3) SA 232 (CC).
1086 *S v M* at par 24.
1087 Louw 2013 *THRHR* 573. The checklist of factors set out in the Children's Act to provide guidance in such cases cannot be applied.

practical way in which to determine the best interests of a resultant child (the child to be born), is to ensure that the surrogate mother and the commissioning parent(s) are suitable persons to assume their respective roles, and that all reasonably foreseeable eventualities have been provided for in the agreement.[1088] Thus, the test to determine the best interests of the child to be born is also child-centred, but in an adapted way.[1089] For Louw, courts should not deny people their right to make procreative choices based on what the legislator or the court presumes would be in the best interests of the child born as a result of such choices.[1090]

Sloth-Nielson views the language of section 28 of the Constitution as comprehensive and emphatic,[1091] and that statutes dealing with children must be interpreted (and the common law developed) in a way that favours the protection and advancement of children's interests.[1092] The best interests of a child is a constitutional right, a rule of procedure and a principle.[1093] Since section 28(2) of the Constitution mandates a court to ensure that the best interests of a child is protected, it is imperative that the court must have sufficient information at its disposal to enable it to understand the impact of its decision on the child(ren).[1094] Thus, according to Sloth-Nielson, the 'best interests' safeguards children's rights against arguments based purely on legal technicalities and which do not take into account the children's individual circumstances.[1095] She concludes that although the courts have repeatedly stated that "best interest" is not a trump over all rights, "it remains a right which is accorded a degree of privilege in the balancing of rights".[1096]

1088 Louw 2013 *THRHR* 573. The writer indicates that consideration must be given to, for example, what is to happen in the case of the death, divorce or separation of the commissioning couple or where the child is born with disabilities.

1089 Louw 2013 *THRHR* 573. The writer concludes by stating that the court should endeavour to ensure that when the child is eventually born, his or her interests were protected as far as was reasonably possible at the time of confirmation of the agreement given the information available to the court.

1090 Louw 2013 *THRHR* 573.

1091 Sloth-Nielsen, J "Children's rights Jurisprudence in South Africa – a 20 year retrospective" 2019 *De Jure Law Journal* 52 510.

1092 Sloth-Nielsen 2019 *De Jure* 510-511. The author states that this has continued to occur and she gave the example of where the genetic link requirement was uphold for the confirmation of a valid surrogacy agreement on the ground of children's rights, and more specifically the rights of the unborn child.

1093 Sloth-Nielsen 2019 *De Jure* 516.

1094 Sloth-Nielsen 2019 *De Jure* 516.

1095 Sloth-Nielsen 2019 *De Jure* 516.

1096 Sloth-Nielsen 2019 *De Jure* 517.

The paramountcy principle relating to the best-interest standard raises a concern to which Sachs J alludes in *S v M*. If the paramountcy principle is spread too thin, it risks being converted from an effective instrument of child protection into an empty rhetorical phrase of weak application which means that the objective of section 28(2) will be defeated and not promoted.[1097] The 'how to' apply the paramountcy principle in a meaningful way, without unduly destroying other valuable and constitutionally protected interests, can be seen as a challenge.[1098]

Turning now to the right to a legal identity in the context of section 28(1)(a), Rosenberg reminds us that the right to a legal identity is an extension of the right to human dignity and that the right to an identity has important psychological and emotional substance in that a name connects a child to his or her family.[1099] Thus, for Rosenberg, the lack of knowledge of one's origins does not necessarily deprive one of a legal identity as legal identity is not necessarily biological identity.[1100] The court in *AB and another v Minister of Social Development*[1101] had to determine what is in the best interests of the child in terms of section 28(2) of the Constitution.[1102] The court asserts that section 294 of the Children's Act protects the child by ensuring that a genetic link exists when that child is conceived.[1103] Rosenberg regards this as a recognition by the court that the child's right to knowledge of his or her genetic origins is in the child's best interests.[1104] She further contends that the right in section 28(2) of the Constitution stands separately from the other rights in section 28(1) and thus serves as a standard against which all law and conduct affecting children should be tested.[1105]

2.7 Miscellaneous constitutional arguments relating to artificial fertilisation and surrogate agreements

1097 *S v M* at par 25.
1098 *S v M* at par 25.
1099 Rosenberg 2020 *TSAR* 733.
1100 Rosenberg 2020 *TSAR* 724.
1101 (CCT155/15) [2016] ZACC 43; 2017 (3) BCLR 267 (CC); 2017 (3) SA 570 (CC).
1102 The case will be discussed in detail below.
1103 *AB and another v Minister of Social Development* at par 294.
1104 Rosenberg 2020 *TSAR* 735. At 736 the author stated that if it is not proven that not knowing one's genetic origins to cause psychological harm to a child, it is submitted that there is no infringement of the best interests of the child in not knowing his or her genetic origins.
1105 Rosenberg 2020 *TSAR* 735.

Carstens and Pearmain aver that, constitutionally speaking, a single woman who wants to have a child without being involved in a sexual relationship, has a constitutional right to artificial fertilisation, provided that she can afford the procedure and that the donation of the sperm is in conformity with legal provisions concerning the control of human tissue and gametes.[1106] Thus, the right to reproduce attaches to individuals and not only to pairs of individuals, and is based on the constitutional right to freedom and security of the person, which is a very personal and private right in terms of its exercise.[1107]

If one considers the definition of what a surrogate mother is, thinking about surrogate motherhood in constitutional terms, may be construed as the exercise of the right to freedom and security of the person for the benefit of a third party.[1108] Carstens and Pearmain raise the interesting question whether a surrogacy agreement would be valid to the extent that surrogate motherhood constitutes a waiver of the surrogate's right to freedom and security of the person (this depends on the terms of the agreement as she may agree to give up some of her rights to make decisions concerning her pregnancy).[1109] It was submitted by the writers that the question of whether a person can agree to waive, or more appropriately, limit their constitutional rights and freedoms, depends very much on the values promoted by the Constitution and public policy.[1110] It further depends on the nature and extent of the limitation and the nature of the right.[1111] The authors furthermore conclude that:

> In the final analysis surrogate motherhood is about the deployment of existing technologies in a manner which impacts upon social values and public policy rather than the utilisation of developing technologies to artificially create a human being.[1112]

Surrogate motherhood is also not about reproductive care but rather the extent of reproductive rights.[1113] The same authors argue that surrogate motherhood is best situated within the context of section 12 of the Constitution.[1114] It is further argued that,

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1106 Carstens and Pearmain *Foundational Principles* 182.
1107 Carstens and Pearmain *Foundational Principles* 182.
1108 Carstens and Pearmain *Foundational Principles* 182.
1109 Carstens and Pearmain *Foundational Principles* 183.
1110 Carstens and Pearmain *Foundational Principles* 183. This was a general question posed by the writers relating to the possibility of waiver of a person's constitutional rights rather than being related to surrogate motherhood specifically.
1111 Carstens and Pearmain *Foundational Principles* 183.
1112 Carstens and Pearmain *Foundational Principles* 184.
1113 Carstens and Pearmain *Foundational Principles* 185.
1114 Carstens and Pearmain *Foundational Principles* 185.

as a legal topic, surrogate motherhood does not fall within the scope of reproductive health care services, since a pregnant mother, as a rights holder, is in any event entitled to reproductive care in terms of the Constitution and whether she is a surrogate or not is irrelevant.[1115]

Assisted reproductive techniques used in surrogacy, such as AID and *in vitro* fertilisation, for example, are also more suited to discussions of section 12-rights than section 27-rights. Should they fall within the ambit of section 12-rights, it follows logically that they must in principle be included within the scope of the rights of access to reproductive health care, bearing in mind the internal limitation in section 27(2) of the Constitution which refers to the progressive realisation of rights within the scope of available state resources.[1116]

2.8 The constitutionality of selected provisions in chapter 19 of the Children's Act

It has been argued that the state's legitimate interest in the regulation of surrogate agreements is adequately compelling to suggest that most aspects of chapter 19 will survive constitutional scrutiny.[1117] Two possible exceptions are section 294, which is the genetic link requirement, and section 297(1)(b) which makes provision for the surrogate mother to hand over the child to the commissioning parent(s) as soon as reasonably possible.[1118]

The genetic link requirement, as alluded to earlier in the thesis, refers to the use of the gametes of only the commissioning parent(s) for the artificial fertilisation of the surrogate mother.[1119] Thus, for a valid surrogate agreement, the gametes can be from either one or both of the commissioning parents and in the case of a single person, from that person.[1120] The result of this provision is that if the commissioning parents, or in the case of a single person, that person, are biologically or medically unable to use their gametes, they would not be able to enter into a valid surrogate agreement.[1121]

1115 Carstens and Pearmain *Foundational Principles* 185.
1116 Carstens and Pearmain *Foundational Principles* 185.
1117 LexisNexis *Bill of Rights Compendium* at par 3E28.
1118 LexisNexis *Bill of Rights Compendium* at par 3E28.
1119 LexisNexis *Bill of Rights Compendium* at par 3E28.
1120 LexisNexis *Bill of Rights Compendium* at par 3E28.
1121 LexisNexis *Bill of Rights Compendium* at par 3E28.

The constitutionality of section 294 was challenged in the High Court case of *AB Surrogacy Advisory Group v Minister of Social Development*[1122] on the ground that it unjustifiably infringes upon the constitutional rights to equality, dignity, reproductive autonomy, privacy and access to health care of persons.[1123] Section 294 was further challenged in the matter of *KB v Minister of Social Development*[1124] on the ground that the provision does not provide for a genetic link between siblings, but only requires a genetic link with one or both of the parents.

Section 40 of the Children's Act was recently challenged in the High Court case of *EJ and others v Haupt NO*[1125] on the basis that sections 40(1) and 40(3)(b) unfairly discriminate against a same-sex female couple.[1126] Section 40 was furthermore successfully challenged in the unreported judgment of *VVJ v Minister of Social Development*[1127] on the ground that it excludes all unmarried life partners.

Although section 297 provides that the surrogate mother must hand the child over to the commissioning parent(s) as soon as reasonably possible, it has been argued that it is unlikely that a court would be able to enforce such an obligation without risking violating the right to dignity of the child and the right to privacy of the surrogate mother.[1128]

The next section will explore, in more detail, the Constitutional Court judgment in the matter of *AB Surrogacy Advisory Group v Minister of Social Development.*

2.8.1 *AB and another v Minister of Social Development*[1129]

1122 Case no 40658/2013.

1123 *AB and another v Minister of Social Development* at par 12. LexisNexis *Bill of Rights Compendium* at par 3E28.

1124 Mpumalanga High Court, Mbombela case no 966/2022. (At the time of writing the thesis the judgment was not yet available.)

1125 2022 (1) SA 514 (GP).

1126 *EJ and others v Haupt NO* at par 42.

1127 Unreported case, North Gauteng High Court, Pretoria, case no 27706/2021.

1128 LexisNexis *Bill of Rights Compendium* at par 3E28.

1129 2017 (3) SA 570 CC; (2017 (3) BCLR 267; [2016] ZACC 43). High Court case reference [2015] ZAGPPHC 580; [2015] 4 All SA 24 (GP); 2015 (10) BCLR 1228 (GP); 2016 (2) SA 27 (GP) (12 August 2015).

AB, the first applicant ("AB"), an adult female, wished to have a child of her own by entering into a surrogacy agreement.[1130] She underwent 18 unsuccessful *in vitro fertilisation* cycles (IVF).[1131] She is permanently and irreversibly infertile in two different ways. Firstly, she is unable to contribute her own gametes for the conception and artificial fertilisation process, and secondly, she is unable to carry a pregnancy to term.[1132] Thus, the only way for AB to proceed with surrogacy was to use both donor ova and donor sperm.[1133] She was, however, made aware of the requirement in section 294 of the Children's Act that, as a single woman, she would need to provide her own gamete for a valid surrogacy agreement to be concluded.[1134] Thus, as a result of the fact that she was unable to donate a gamete, she was also unable to enter into a valid surrogacy agreement.[1135] As a result of her inability to conclude a surrogacy agreement, she brought an application in the High Court of South Africa, Gauteng Division, Pretoria, seeking an order declaring section 294 of the Children's Act inconsistent with the Constitution and thus invalid.[1136] AB's constitutional challenge (together with that of the Surrogacy Advisory Group) was based on the argument that section 294 violates the rule of law, as well as the rights to equality, human dignity, reproductive autonomy, privacy and the right of access to health care services of the surrogate mother.[1137] The Minister, as respondent, opposed the application on the following grounds: (a) the prospective child has the right to know its genetic origins; (b) South Africa's adoption process already caters for AB's need to have a child; (c) and to allow a single infertile person to create a child with no genetic link to her would result in the creation of a designer child, which would not be in the public interest; and, finally, that (d) commercial surrogacy is prevented by section 294.[1138]

1130 *AB and another v Minister of Social Development* at par 5.

1131 At par 8. Term is discussed in ch 1 at par 1.2.5. *AB and another v Minister of Social Development* at par 242. 16 of the IVF cycles were done with embryos that had no genetic link to her and 14 used both male and female anonymous donor gametes. SALRC Project 140 89.

1132 *AB and another v Minister of Social Development* at par 5, 8 and par 18. Conception infertile and pregnancy infertile is discussed in par 2.1. Rautenbach 2017 *TSAR* 352.

1133 *AB and another v Minister of Social Development* at par 9.

1134 *AB and another v Minister of Social Development* par 9, par 10 and par 242. Thaldar 2018 *De Rebus* 28.

1135 At par 10.

1136 *AB and another v Minister of Social Development* at par 11 Thaldar 2018 *De Rebus* 29. Boniface 2017 *TSAR* 193.

1137 *AB and another v Minister of Social Development* at par 12. Rautenbach 2017 *TSAR* 352.

1138 *AB and another v Minister of Social Development* par 12. The Surrogacy Group sought an order declaring sec 294 inconsistent with the Constitution and thus invalid as it asserted that none of the grounds mentioned by the Minister offered sufficient justification for the retention of the offending provision.

The High Court hearing this matter concluded that section 294 of the Children's Act unjustifiably violates AB's rights to equality, human dignity, reproductive autonomy, privacy and access to health care,[1139] and declared section 294 constitutionally invalid.[1140] The matter was thereafter heard by the Constitutional Court on 1 March 2016. Considering the importance of the Constitutional Court judgment and the different aspects dealt with by the court, the judgment will be discussed in some detail. The minority judgment by Khampepe J (with Cameron J, Froneman J and Madlanga J)[1141] is discussed first, followed by the majority judgment by Nkabinde J (with Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Jafta J, Mhlanta J and Zondo J).

2.8.1.1 The minority judgment

The minority decision identified the pertinent issues as the following:[1142] (a) the historical and legislative framework of surrogacy and the effect and purpose of section 294 placed within that framework; (b) whether section 294 (on proper interpretation) limits AB's rights to psychological integrity, human dignity, equality, privacy and access to reproductive health care;[1143] and (c) if so, whether it has been shown that section 294 constitutes a reasonable and justifiable limitation of AB's rights; and (d) if not, what the appropriate remedy would be.

Looking at the historical legislative framework, the court observes that surrogacy was not expressly regulated by any legislation in South Africa before the enactment of chapter 19 of the Children's Act,[1144] despite the fact that surrogacy is not new.[1145]

1139 *AB and another v Minister of Social Development* par 15. SALRC Project 140 90.

1140 *AB and another v Minister of Social Development* par 15. SALRC Project 140 89. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 249.

1141 At par 4 Khampepe J pointed out that at the heart of this matter lies the question of the extent to which the state may regulate the reproductive opportunities available to those who are unable to have children of their own because they are conception and pregnancy infertile.

1142 *AB and another v Minister of Social Development* par 33.

1143 Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 250.

1144 *AB and another v Minister of Social Development* par 34.

1145 *AB and another v Minister of Social Development* par 35. The court gave the example of the story of Abram, Sarai and Hagar where Hagar, as Abram and Sarai's servant, was used to bear Sarai's children as Sarai was unable to bear her own child. The other example is of Jacob and his wives Rachel and Leah. Rachel could not bear her own children and she told Jacob to sleep with Bilhah,

Khampepe J, considering whether section 294 limits constitutional rights, begins by examining the constitutional values as interpretative aids through which the meaning of the constitutional rights may be better understood.[1146]

With reference to the value of freedom, the court states that one of the constitutional values in section 1 of the Constitution includes the advancement of human rights and freedoms.[1147] To be autonomous is to be socially and politically connected rather than be an agent of unfettered individual choice.[1148] Autonomy is a necessary but socially embedded part of the value of freedom.[1149] The value of freedom is animated by the recognition of each person's distinctive aptitude to understand and act on their own desires and beliefs.[1150] By exercising our capacity to assess our own socially-rooted situations, we define our nature, give meaning and coherence to our lives and take responsibility for the kind of people that we are:[1151]

> Our Constitution actively seeks to free the potential of each person; a goal which can only be achieved through a deep respect for the choices each of us makes.[1152]

Discussing the right of freedom and security of a person, Khampepe J explains that the freedom protected by the right is not coextensive with autonomy.[1153] She further explains that the court has adopted a purposive and contextual approach to interpreting the Constitution and in doing so, the court is enjoined to provide a broad and generous reading in determining the ambit of constitutionally protected rights.[1154] Section 12(1) provides a general right to freedom grounded in bodily security whereas sections 12(2) and 12(2)(a) provide for a new, freestanding and definitionally-

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the servant, to bear children for her. SALRC Project 140 80 and 177. Oluwaseyi and Oladimeji 2021 *Obiter* 20. Iannacci, B.R "Why New York should legalize surrogacy: A comparison of surrogacy legislation in other states with current proposed surrogacy legislation in New York" 2018 *Touro Law Review* 34(4) 1244.

1146 *AB and another v Minister of Social Development* at par 49.

1147 *AB and another v Minister of Social Development* at par 50.

1148 *AB and another v Minister of Social Development* at par 51.

1149 *AB and another v Minister of Social Development* at par 51.

1150 *AB and another v Minister of Social Development* at par 52. "The value recognises the inherent worth of our capacity to assess our own socially-rooted situations and make decisions on this basis."

1151 *AB and another v Minister of Social Development* at par 52.

1152 *AB and another v Minister of Social Development* at par 52.

1153 *AB and another v Minister of Social Development* at par 53.

1154 *AB and another v Minister of Social Development* at par 54. Further, because of the inclusion of sec 36 limitation clause, rights should not be interpreted in a miserly fashion.

proscribed freedom right.[1155] Section 12 is consequently an amalgam of freedom and security rights, brought together because both sets protect persons' ability to lead their lives without being subject to certain constitutionally prohibited impediments.[1156] Section 12(2)(a) should be given as broad a reading similar to other rights, despite it forming part of the general entitlement to freedom and security of the person.[1157]

Whereas section 12(1) protects specific physical freedoms along with a residual right to freedom and by contrast, section 12(2) is a freestanding freedom right that should be interpreted broadly on its own terms.[1158] A close connection exists between the freedoms protected by the Constitution and integrity, as we are actively turning away from indifference and moving towards respect, empathy and compassion as a result of the Constitution.[1159] The section 12(2) protection is grounded in these ideals.[1160] The right to protection of bodily and psychological integrity is especially important for women who may, for example, decide to terminate a pregnancy in appropriate circumstances.[1161] Section 12(2)(c) protects an individual against medical or scientific experiments without informed consent and this proposes that section 12(2) should be interpreted generously to cover all instances where the bodily or psychological integrity of a person is damaged or compromised.[1162] Thus, the emphasis in section 12(2) is on whether a law or a conduct deprives a person of freedom or security, broadly understood.[1163]

1155 *AB and another v Minister of Social Development* at par 59. Sec 12(2) introduces a new freedom right akin to those enumerated elsewhere in the Bill of Rights.

1156 *AB and another v Minister of Social Development* at par 61.

1157 *AB and another v Minister of Social Development* at par 62.

1158 *AB and another v Minister of Social Development* at par 63. At par 64 it is further stated that sec 12(1) principally provides procedural and substantive protection for any deprivation of physical liberty.

1159 *AB and another v Minister of Social Development* at par 65.

1160 *AB and another v Minister of Social Development* at par 66. When we interpret the provisions of the Constitution, it is incumbent on us to enhance the integrity of those who seek to rely on it.

1161 *AB and another v Minister of Social Development* at par 66.

1162 *AB and another v Minister of Social Development* at par 66.

1163 *AB and another v Minister of Social Development* at par 66. At 67 Khampepe J states that the change in language illustrates a shift in emphasis towards one which acknowledges the multifaceted lives people may choose to live by providing for a more expansive range of bodily and psychological protections. Further, the Constitution enjoins us to develop a new understanding of 'freedom and security of the person' that demonstrates respect and attentiveness to the decisions of others. The inclusion of sec 12(2) is one facet of this new approach.

Section 12(2)(a) protects the right to make decisions concerning reproduction.[1164] A person relying on this right only needs to show that his or her inability to make the decision which is the result of a law or conduct, has at least caused psychological harm.[1165] Section 12(2)(b) protects *security in* and *control ove*r one's body, which, although often mutually supporting, remain independently enforceable.[1166] The decision concerning reproduction and the possible physical implications of the choices are crucial to a person's wellbeing.[1167] AB is a single woman who was unable to donate a gamete of her own.[1168] Since the process of surrogacy has no physical implications for her, the court acknowledged that the constitutional challenge of section 294 is grounded in section 12(2)(a).[1169]

The result of the section 294 prohibition for the court to confirm a surrogate agreement-where there is no genetic link between one of the commissioning parents and the child-is that the prospective parent, who is both conception and pregnancy infertile and who is also a single person, is precluded from considering surrogacy as a possibility to have his/her own child.[1170] Khampepe J pointed out that the capacity to decide is an implication of what is physically possible in the world and that it has nothing to do with any positive act by the state.[1171] In circumstances where the state forecloses a reproductive option of a person where this essentially impacts upon a person's ability to make his/her own reproductive decisions, this would be protected by section 12(2)(a) of the Constitution.[1172] The effect of section 294 is that it removes one option of reproduction that would have been available to a person and this limits the affected

1164 *AB and another v Minister of Social Development* at par 70.
1165 *AB and another v Minister of Social Development* at par 70.
1166 *AB and another v Minister of Social Development* at par 70.
1167 *AB and another v Minister of Social Development* at par 70.
1168 *AB and another v Minister of Social Development* at par 71 and 72.
1169 *AB and another v Minister of Social Development* at par 71 and 72. The court stated that it falls to be determined whether sec 294 objectively prevents a person from making a decision regarding reproduction in a manner which is detrimental to their psychological integrity in terms of sec 12(2)(a) and the inquiry encompasses of three parts, namely (a) Does the impugned law or conduct prevent or inhibit a person or group of persons from making a decision?; (b) If the answer is yes, does the decision concern reproduction?; (c) If the answer to (b) is yes, does preventing or inhibiting the decision detrimentally affect the psychological integrity of the person or persons concerned?
1170 *AB and another v Minister of Social Development* at par 73.
1171 *AB and another v Minister of Social Development* at par 74.
1172 *AB and another v Minister of Social Development* at par 74.

person's ability to make his/her own decisions.[1173] The fact that adoption remains an alternative does not remedy this limitation.

A plain reading of the word "reproduction", according to the court, suggests that it incorporates all matters to do with the process of producing new individuals of the same species by some form of generation.[1174] This process can occur when a surrogate is bearing a child for a single commissioning parent who cannot donate a gamete.[1175] The decision itself does not result in physical implications for the affected person but it does have a reproductive outcome in the form of the conception and the birth of the child.[1176] The court concludes that this is a reproductive act.[1177]

Furthermore, the effect of section 294 on an aggrieved person's psychological integrity must be seen within the context of their infertility,[1178] which is as much a social as well as a physical condition.[1179] The state should avoid standing in the way of decisions that a person takes to mitigate the socio-psychological harm of this condition.[1180] This includes reproductive decisions on how to have a child using the modern reproductive technologies.[1181] As chapter 19 unambiguously recognises that because infertility puts people in a position that is harmful to their psychological integrity, they should be allowed to pursue surrogacy as a means of having a child of their own.[1182] Section 294,

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1173 *AB and another v Minister of Social Development* at par 74. The court answers the first leg of the section 12(2)(a) test in the affirmative.

1174 *AB and another v Minister of Social Development* at par 75. The court further stated that it is alluring in this regard to restrict matters regarding reproduction to a person's own physical reproductive capacities and to do so would not be in line with the generous approach to rights adopted by the court.

1175 *AB and another v Minister of Social Development* at par 75.

1176 *AB and another v Minister of Social Development* at par 75.

1177 *AB and another v Minister of Social Development* at par 75. As the decision is one concerning reproduction the answer to the second question is also in the affirmative.

1178 *AB and another v Minister of Social Development* at par 83. At par 84 the court quoted the following: "[t]he emotional and psychological devastation wrought by the recognition or diagnosis of infertility cannot be overstated. Numerous studies have reported that the inability to reproduce takes a severe toll on both men and women." The court stated that the psychological harm is especially damaging for women.

1179 *AB and another v Minister of Social Development* at par 86.

1180 *AB and another v Minister of Social Development* at par 86.

1181 *AB and another v Minister of Social Development* at par 86. At par 87: "Understood in this manner, infertility affects the psychological integrity of a person by placing them in a socially precarious situation. Being able to choose to have a child is almost universally accepted as central to "identity and meaning in life". Stripping a person of this choice has far-reaching personal and social ramifications. Infertility is thus harmful partly because it removes the ability to elect to have a child; a decision almost universally considered important."

1182 *AB and another v Minister of Social Development* at par 91. Rautenbach 2017 *TSAR* 361.

in the view of the court, unfortunately prevents a segment of this same class of people from accessing surrogacy to their psychological detriment.[1183] The section also imposes and compounds psychological harm for a vulnerable constituency and it does so by limiting their ability to make reproductive decisions.[1184] This limitation is seen as a violation of section 12(2)(a) as a result of the impact which section 294 has on the psychological integrity of conception and pregnancy infertile people:[1185]

> Section 294 takes the option of surrogacy away, and thus becomes the cause of continuing psychological trauma: if the provision did not exist, then a conception and pregnancy infertile person could choose to use surrogacy in order to have a child.[1186]

One cannot defend a law which is prejudicial on the basis that other forms of family life are open to an affected person as it is not appropriate for courts to interfere in this decision-making process of an individual.[1187] Section 294 hence objectively limits the right to psychological integrity by preventing AB and others from making decisions concerning reproduction in terms of section 12(2)(a) of the Constitution.[1188]

The applicants' challenge on the ground of the right to equality rests on two arguments:[1189] Firstly, the argument is that section 294 differentiates between persons who are capable of contributing a gamete to the conception of a child and those who are not.[1190] This can be seen as differentiation on the basis of conception infertility.[1191] Secondly, section 294 differentiates between persons who are unable to contribute a gamete to the conception of a child and intend to use IVF, and those who are unable

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1183 *AB and another v Minister of Social Development* at par 91. Further see at par 110. The removal of the choice limits the ability of those persons to construct their reproductive lives in a manner that adheres to their own conscience and convictions and prevents society from enjoying what may be a beneficial new form of family life.

1184 *AB and another v Minister of Social Development* at par 91.

1185 *AB and another v Minister of Social Development* at par 91 - 92. The court explained that sec 294 prevents a conception and pregnancy infertile person from moderating the harmful consequences of their infertility by using surrogacy to have a child of their own. At par 93. Thus, the section creates a legal barrier between a conception and pregnancy infertile person and the use of surrogacy. At par 94 the court stated that because sec 294 has the effect of preventing a person from making a decision concerning reproduction, it constitutes a rights infringement.

1186 *AB and another v Minister of Social Development* at par 93.

1187 *AB and another v Minister of Social Development* at par 96.

1188 *AB and another v Minister of Social Development* at par 97.

1189 *AB and another v Minister of Social Development* at par 98.

1190 *AB and another v Minister of Social Development* at par 98.

1191 *AB and another v Minister of Social Development* at par 98. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 318.

to contribute a gamete to the conception of a child and intend to use a surrogate.[1192] This can be seen as differentiation on the basis of pregnancy infertility.[1193]

The intended effect of section 294 is thus that those who are able to contribute a gamete are permitted to conceive a child using a surrogate while those who cannot, may not.[1194] The differential treatment is further explained by the prohibition in section 294 of the use of both male and female donor gametes of the commissioning parent or the parents' choice in the conception process.[1195] The surrogacy regime requires that the parent or parents of a child to be conceived donate a gamete, whilst the IVF regime does not.[1196]

In order to determine whether the law or conduct in question violates the right to equality, the court applied the multi-stage approach adopted in the case of *Harksen v Lane NO*.[1197] The first stage of that process is to establish whether the impugned law or conduct differentiates between people or categories of people.[1198] If differentiation is then established, it must next be determined whether the differentiation bears a rational connection to a legitimate government purpose.[1199] If the law or conduct does not bear a rational connection to a legitimate government purpose, the conclusion is that it violates section 9(1) of the Constitution.[1200]

The question that should be asked is whether the means that the government chose in this section are rationally connected to the purpose as opposed to being arbitrary or capricious.[1201] The purpose of section 294 is primarily to ensure that the best interests

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1192 *AB and another v Minister of Social Development* at par 98. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 319.

1193 *AB and another v Minister of Social Development* at par 98. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 319.

1194 *AB and another v Minister of Social Development* at par 99.

1195 *AB and another v Minister of Social Development* at par 101.

1196 *AB and another v Minister of Social Development* at par 101. Boniface 2017 *TSAR* 194.

1197 *AB and another v Minister of Social Development* at par 102. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 322.

1198 *AB and another v Minister of Social Development* at par 102.

1199 *AB and another v Minister of Social Development* at par 102.

1200 *AB and another v Minister of Social Development* at par 103.

1201 *AB and another v Minister of Social Development* at par 104.

of the child to be born are protected.[1202] The commissioning parent does not carry the child, as is the case with surrogacy, which is different where conception is realised through IVF treatment of one of the commissioning parents.[1203] In the court's view, the differentiation is not arbitrary or capricious and section 294 is therefore not constitutionally invalid on the basis of section 9(1).[1204]

Next considered, was the issue whether the differentiation amounts to discrimination and if the differentiation is on a ground listed in section 9(3), it would by implication be discriminatory.[1205] Since conception infertility is not a listed ground under section 9(3),[1206] it must be determined if differentiation on the basis of conception infertility has the capacity to impair the fundamental dignity of those who are both conception and pregnancy infertile, or if it adversely affects them in a comparably serious manner.[1207] Differentiation to the level of discrimination is raised as those who are pregnancy infertile, but not conception infertile, can use surrogacy to ameliorate the psychological harms of infertility, however, those who are both conception and pregnancy infertile cannot.[1208] For the court, the harm to psychological integrity that is caused by infertility and which results in discriminatory treatment is strengthened by our dignity jurisprudence:[1209]

> Thus, our Constitution acknowledges that protecting and promoting diversity of thought and action is a requirement for human flourishing, and for community building. It is only by accepting that the opinions and decisions of each individual should be respected and encouraged that dignity is ensured. The right to dignity "requires us to acknowledge the value and worth of all individuals in a society.[1210]

1202 *AB and another v Minister of Social Development* at par 104. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 326.

1203 *AB and another v Minister of Social Development* at par 104.

1204 *AB and another v Minister of Social Development* at par 104. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 336. With reference to section 294 and the no-double-donor requirement, Meyerson argues that the requirement bears no relationship to the purpose of promoting more loving and stable families (if this is what sec 294 is intended to achieve) as it fails to satisfy the rational connection test under section 9(1) of the Constitution.

1205 *AB and another v Minister of Social Development* at par 105.

1206 *AB and another v Minister of Social Development* at par 105. The court pointed out that determining whether there has been discrimination is an objective question, independent of the intentions of the legislator.

1207 *AB and another v Minister of Social Development* at par 106.

1208 *AB and another v Minister of Social Development* at par 106.

1209 *AB and another v Minister of Social Development* at par 107.

1210 *AB and another v Minister of Social Development* at par 108.

Section 294 exists as a result of a biological condition and the suspected consequences thereof.[1211] For Khampepe J, the effect of section 294 is to assume without the support of evidence, that the state is in a better position to make reproductive decisions than the parent who will raise the child.[1212] This, in her view, is a flagrant violation of dignity, especially where the consequences are an increase in stigma, and an endorsement of homogeneity over difference.[1213] Section 294 has the effect of disregarding the impact of new technologies on the ambit of rights.[1214] The state has a negative duty to avoid standing in the way of advances in technology that can drastically alter someone's life for the better.[1215]

Returning to the question whether section 294 passes constitutional muster, a determination must be made whether the section violates constitutional rights, including the prohibition of unfair discrimination.[1216] Thus, in establishing to what extent one kind of family life is privileged over another, is a factor to consider in determining whether section 294 is constitutionally valid.[1217] Khampepe J finds that section 294 affects both the dignity of prospective parents, the families with adopted children and our society as a whole.[1218] She further concludes that the second differentiation further demeans the dignity of the conception and pregnancy infertile by compelling them to accept that the law does not deem it necessary to police the implications of the choices of people who elect to use IVF, but does where surrogacy is used.[1219] It is discriminatory to require a genetic link in only one of the two scenarios and if all children must have a genetic link to at least one of their parents in order to have a worthwhile

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1211 *AB and another v Minister of Social Development* at par 111. The section is targeted at prospective parents who are unable to contribute a gamete to a surrogate agreement.

1212 *AB and another v Minister of Social Development* at par 112.

1213 *AB and another v Minister of Social Development* at par 112.

1214 *AB and another v Minister of Social Development* at par 113.

1215 *AB and another v Minister of Social Development* at par 113.

1216 *AB and another v Minister of Social Development* at par 116.

1217 *AB and another v Minister of Social Development* at par 116. At par 117. The court pointed out that alternative forms of family life are valued by constitutional values. There is no one correct version of the family against which others can be assessed as a result of the diversity that characterises our society. There is no definition of what an acceptable family entails as it would be presumptuous and arbitrary.

1218 *AB and another v Minister of Social Development* at par 120.

1219 *AB and another v Minister of Social Development* at par 120. Persons who use IVF can actually decide to use two anonymous donor gametes but persons who choose to use surrogacy as a result of pregnancy infertility are prevented from doing the same. At par 121 the court pointed out that the only difference between the two scenarios is that in the case of the IVF treatment the one parent carries the child.

life, then surely this reasoning must also apply in the case of IVF.[1220] As a result of this, it can only be concluded that the differentiation is harmful to the affected person's dignity as potential users of surrogacy must live with the indignity of knowing that the law gives extra entitlements to those who are not pregnancy infertile.[1221] Thus, section 294 harms the dignity of those persons who are both conception and pregnancy infertile as it fails to consider all people as worthy of our mutual concern and respect.[1222]

The challenged law or conduct must also discriminate *unfairly* in order to violate section 9(3) of the Constitution.[1223] The impact of both the first and second differentiations on those persons who are both conception and pregnancy infertile is apparent, as they cannot choose to have a child through surrogacy.[1224] After finding that section 294 limits the rights to psychological integrity and equality, the court next had to consider whether the limitation is justifiable in terms of section 36(1) of the Constitution.[1225]
The Children's Act clearly endorses the use of surrogacy as a way of reproduction but it is regulated with the best interests of children in mind.[1226] Surrogate agreements are not made available to everyone as it is only available to persons who are pregnancy infertile.[1227] It was conceded by the Minister (respondent in the matter) that section 294 does not in any way ensure the non-proliferation of commercial surrogacy in a manner that the provisions already in place for that purpose do not.[1228] It was held that alleging

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1220 *AB and another v Minister of Social Development* at par 122.
1221 *AB and another v Minister of Social Development* at par 123.
1222 *AB and another v Minister of Social Development* at par 124. SALRC Project 140 101. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 324. It has a detrimental impact on conception infertile people by excluding them from access to surrogacy services.
1223 *AB and another v Minister of Social Development* at par 125. Unfairness is then determined by focussing on the impact of the discrimination on the complainant and others in his or her situation.
1224 *AB and another v Minister of Social Development* at par 127.
1225 *AB and another v Minister of Social Development* at par 129. The onus is on the Minister of Social Development to show that the limitation is justified.
1226 *AB and another v Minister of Social Development* at par 141. At par 142 the court stated that ch 19 was passed to ensure that surrogacy is practiced in a manner that considers primarily the wellbeing of children born of a surrogate agreement. Rautenbach 2017 *TSAR* 358.
1227 *AB and another v Minister of Social Development* at par 143.
1228 *AB and another v Minister of Social Development* at par 147. The court stated that the removal of sec 294 from the Children's Act will make no difference to the proliferation of commercial surrogacy as a practice. Other sections in ch 19 prevent commercial surrogacy and not sec 294. No evidence was placed before the court to show that sec 294 is aimed at restricting commercial surrogacy. SALRC Project 140 101.

that the purpose of section 294 is aimed at the prevention of creating designer children, seems to be contrived.[1229]

Responding to the argument that one of the purposes of section 294 is to ensure that children born as a result of a surrogate agreement may know their genetic origins, the court rightfully concludes that if this is true, it would then allow some children (e.g those born of surrogacy) to know, partially or fully, their genetic origins, but would at the same time mean that children born of double-donor IVF are completely barred from knowing their genetic origins.[1230] Sections 41(2) and 294 of the Children's Act thus seem to be contradictory instead of complementary, which is problematic for the following reasons:[1231] Firstly, it suggests that there are two different best interests of the child standards, one for children born as a result of surrogacy and another for children born from double-donor IVF.[1232] Secondly, it suggests that genetic origins matter less if one is born from double-donor IVF, presumably because there is a gestational link between mother and child even if there is no genetic tie.[1233] Gestational link has no bearing on genetic identity.[1234] The main purpose of section 294, as proposed by the Minister, is simply to ensure that surrogacy is only used in order to have a child that is genetically related to a commissioning parent.[1235]

Khampepe J, however, advances the argument that the purpose of section 294 is preventing the circumvention of the adoption process. This purpose is in line with a plain reading of the section, as well as its legislative context.[1236] Section 294 may consequently be seen as a regulative provision that seeks to limit the ambit of surrogacy agreements that can be lawfully pursued.[1237] By creating this legal barrier, the section infringes upon protected rights and as such, the purpose of the limitation is

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1229 *AB and another v Minister of Social Development* at par 152. SALRC Project 140 101.

1230 *AB and another v Minister of Social Development* at par 163. Rautenbach 2017 *TSAR* 358 and 362. The writer argues that in times to come, the right to know one's origin might become so important that the constitutionality of sec 41(2) could come under scrutiny.

1231 *AB and another v Minister of Social Development* at par 163-164.

1232 *AB and another v Minister of Social Development* at par 164. The court stated that this is impermissible and inconsistent with a plain understanding of the phrase "best interests".

1233 *AB and another v Minister of Social Development* at par 164.

1234 *AB and another v Minister of Social Development* at par 164.

1235 *AB and another v Minister of Social Development* at par 168.

1236 *AB and another v Minister of Social Development* at par 171. At par 173 the court stated that the chief goal of sec 294 is to prevent a child from being born as a result of a surrogate agreement without being genetically related to at least one of the commissioning parents.

1237 *AB and another v Minister of Social Development* at par 172.

conterminous with the purpose of the provision.[1238] The purpose of section 294 and thus also the purpose of the rights limitation, is to discourage the use of surrogacy where other adequately similar avenues are available.[1239] Further, the importance of the purpose of section 294 depends on whether adopting a child is suitably similar to having a genetically unrelated child by way of surrogacy to render the limitation of AB's rights reasonable and justifiable.[1240] The court concludes that it is misguided to premise the limitation of rights on this purpose, as adoption and surrogacy are essentially different.[1241]

The court found it necessary to address the value judgment of whether being unable to determine one's genetic parents results in such extensive a harm as to rationalise the view that it is better never to have been born.[1242] In terms of the Children's Act, this is a determination that the High Court is mandated to do by virtue of section 295(e) of the Act when the court has to confirm a surrogate agreement.[1243] Thus, the court must engage with the value judgment of whether it would be in the best interests of the child to be born when deciding to confirm the agreement.[1244] The facts of each particular case will determine what is in the child's best interests, as this is a flexible inquiry.[1245] Section 294 enables a commissioned child to know his or her genetic origins above any of her other interests, including life itself.[1246] However, in discussing this, the court observes that section 294 contradicts section 7(1) of the Children's Act.[1247] Section 294 privileges one factor out of the factors set out in section 7, to the exclusion of all other factors by making it possible that a child brought into a loving and stable family environment which would enable the child's physical, intellectual and emotional, social

1238 *AB and another v Minister of Social Development* at par 172. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 322.
1239 *AB and another v Minister of Social Development* at par 173.
1240 *AB and another v Minister of Social Development* at par 175. SALRC Project 140 102.
1241 *AB and another v Minister of Social Development* at par 185. Thaldar 2018 *De Rebus* 29.
1242 *AB and another v Minister of Social Development* at par 191.
1243 *AB and another v Minister of Social Development* at par 192.
1244 *AB and another v Minister of Social Development* at par 192.
1245 *AB and another v Minister of Social Development* at par 193.
1246 *AB and another v Minister of Social Development* at par 194. It can be inferred from sec 294 superseding sec 295(e) that it will never be in any child's best interests to be born of a surrogate agreement if he/she will not be genetically related to a commissioning parent.
1247 *AB and Another v Minister of Social Development* at par 195.

and cultural development, would be prevented from being born purely because she could never know the identity of her genetic parents.[1248]

Section 294 results in an absolute block to the use of surrogacy as a means of reproduction in cases where a gamete is not provided by at least one commissioning parent.[1249] Such limitation of rights is far-reaching as there is no comparable alternative to double-donor surrogacy for the people who are unable to provide a gamete in order to have a child.[1250] For the court, the ultimate and quintessential question that lies at the heart of the matter is whether section 294, as it stands, serves a purpose which is so fundamental as to outweigh and justify the corresponding limitations of the rights in question.[1251] The court justifiably concludes that it is of the view that section 294 is an extensive and unjustifiable intrusion into a central part of the lives of those persons who are both conception and pregnancy infertile, which violates the rights to psychological integrity and equality in an unjustifiable manner.[1252] Thus, section 172(1(a) of the Constitution obliges the court to declare that section 294 is inconsistent with the Constitution and invalid.[1253]

The central reason for the court's finding that section 294 is constitutionally invalid, is the effect that it has on the people who are both conception- and pregnancy infertile.[1254] The scheme of chapter 19 will be upset should section 294 be struck.[1255]

1248 *AB and another v Minister of Social Development* at par 195-196. At par 196 the court refers to the 2007 judgment of *AD v DW* and said "…child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case". The court found that sec 294 has this maximalist effect. Thaldar 2018 *De Rebus* 29. It was pointed out that the psychological expert opinion during the hearing was that all agreed that a child's psychological wellbeing is not negatively affected by being donor-conceived.

1249 *AB and another v Minister of Social Development* at par 208.

1250 *AB and another v Minister of Social Development* at par 209.

1251 *AB and another v Minister of Social Development* at par 213. The court referred to the *Bhulwana* case where it stated: "the court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be."

1252 *AB and another v Minister of Social Development* at par 213. Rautenbach 2017 *TSAR* 352.

1253 *AB and another v Minister of Social Development* at par 214.

1254 *AB and another v Minister of Social Development* at par 223.

1255 *AB and another v Minister of Social Development* at par 223. It is explained that sec 295(a) requires that would-be commissioning parents be pregnancy infertile. Sec 294 creates a further hierarchy which, as explained, obliges the use of the gametes of both commissioning parents where possible. Should this not be possible for biological, medical or other valid reasons, sec 294 permits the use of the gamete of one of the two commissioning parents and if the commissioning parent is single, the gamete of that person should be used.

The minority judgment in this case was that the order of the High Court was confirmed, the declaration of invalidity was suspended for 18 months and the Minister was to bear the applicant's costs.[1256] Because of the fundamental constitutional issues that emerge from this case, the majority judgment by Nkabinde J with Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Jaftha J, Mhlantla J and Zondo J concurring, also needs to be discussed in more detail.

2.8.1.2 The majority judgment

The majority judgments acknowledges that this case touches on delicate issues cutting across cultures for both genders,[1257] which at its core, concerns the power of the state to regulate the assistive reproductive opportunities available to those who are conception and pregnancy infertile, and to have children of their own.[1258] The issues trigger sympathy for those persons who are conception and pregnancy infertile.[1259]

With reference to the minority judgment above, Nkabinde J stated that she is in agreement with the remarks regarding the effects of a woman's inability to have a child of her own and with the exposition of the background facts as well as its conclusion regarding the costs.[1260] However, she is not in agreement with the declaration of invalidity of section 294 as she believes that none of the implicated rights are violated.[1261] It was against the legal historical background (as discussed in chapter 2

1256 *AB and another v Minister of Social Development* at par 236. SALRC Project 140 101.

1257 *AB and another v Minister of Social Development* at par 237. The issues are infertility and the inability to conceive a child or to produce a gamete, in order to meet the legal requirement to enter into a surrogate motherhood agreement.

1258 *AB and another v Minister of Social Development* at par 237. The issues further raise complicated legal and ethical questions that definitely have an impact on many people who are unable to give birth to their own children.

1259 *AB and another v Minister of Social Development* at par 237.

1260 *AB and another v Minister of Social Development* at par 240.

1261 *AB and another v Minister of Social Development* at par 240. Thaldar 2018 *De Rebus* 29. The writer concludes that the majority of the Constitutional Court simply rejected all of the psychological evidence out of hand, without any critical engagement. And this effectively means that the majority judges are of the opinion that when considering the psychology of donor-conceived children, that they cannot be assisted by the opinions of qualified psychologists who have studied the wellbeing of donor-conceived children over many years. The rule of law demands that judgments be based on evidence properly before the court and by simply disregarding evidence out of hand without even considering it, and then by replacing it with the judges' own conceptions, are antithetical to the rule of law. The objective facts were placed before the court but were then unabashedly ignored by the court.

of this thesis) and the constitutional provisions and the legislative scheme, that the issues before the court need to be considered.[1262]

The majority judgment next turns to the applicants' argument in the High Court that the genetic link requirement assigns special value to genetic lineage in the context of establishing a family through surrogacy.[1263] The applicants contended that the genetic link criterion in section 294 impacted on both the following: (a) the rights of all members of the class of persons by prohibiting them from electing to use donor gametes for the conception of their child-to-be[1264] and (b) on the right of the sub-class by prohibiting them from using surrogacy.[1265] It was further submitted by the applicants that the prospective parents' right to human dignity and reproductive autonomy as guaranteed by section 12(2)(a) of the Constitution was violated.[1266] The respondent, on the other hand, argued that the constitutional right of a child (as guaranteed in section 28(2) of the Constitution) would be compromised if the genetic link requirement is to be removed.[1267]

The court, approaching the matter by analysing the legal conception of what constitutes a family,[1268] held that the genetic link requirement is irrational in terms of section 9(1) of the Constitution and that it infringes AB's or the sub-class's right.[1269]

1262 The history is broadly discussed in ch 2 above. Nkabinde J's comments are also included in the abovementioned discussion. The constitutional provisions and legislative scheme are set out and discussed above in ch 3.

1263 *AB and another v Minister of Social Development* at par 258. The central challenge in the court was thus based on the infringement of the right to equality.

1264 *AB and another v Minister of Social Development* at par 259. It was submitted that the genetic link requirement violated AB's right to equality as it causes a certain category of persons to be treated differently. They cannot enjoy equal protection and benefit of the law in terms of sec 9(1) of the Constitution. The applicants contented that social marginalisation of infertile people is perpetuated and the negative consequence of infertility is strengthened.

1265 *AB and another v Minister of Social Development* at par 258 and 260. The applicants relied on sec 9(3) and sec 27(1) of the Constitution. It was said that the genetic link requirement imposed on the Subclass is particularly "noxious" and it constitutes unfair discrimination. It was further said that surrogacy is a form of reproductive health care and thus, the genetic link requirement violates AB's right to reproductive health care.

1266 *AB and another v Minister of Social Development* at par 261. Thus, the prospective parent's right to choose whether to use her own gametes or through IVF make use of donor gametes was allegedly infringed. Autonomy is a core element of human dignity as argued by the applicants.

1267 *AB and another v Minister of Social Development* at par 262.

1268 *AB and another v Minister of Social Development* at par 263. The court stated that the Legislature should take cognisance of the advances in fertility and reproductive technology and the obligation to redefine the traditional view of the family.

1269 *AB and another v Minister of Social Development* at par 263. The infringement is (i) by unfairly discriminating on the basis of infertility whereas under the IVF regulations parents are free to use double-donor gametes in terms of sec 9(3) of the Constitution; (ii) to her human dignity in terms

The court accepts that the procedures of IVF and surrogacy are fundamentally different but concludes that it does not offer a justification for the fact that in law a differentiation is drawn between the two procedures and allowing infertile people to become parents.[1270] Also, the court is not convinced that there is no persuasive evidence before the court that information relating to the child's genetic origin is necessarily in the best interests of the child.[1271]

The majority judgment also emphasises that the issue before the court is the validity of section 294 of the Children's Act and not about whether the genetic link requirement in section 294 has relevance to the legal conception of a family.[1272] The issue to be determined is whether the order of the High Court should be confirmed and in deciding the question, regard must be had to the text of the impugned provision to determine its legislative objectives.[1273] Thus, the court has to consider whether: (a) the impugned legislation is irrational in terms of section 9(1) of the Constitution; (b) AB's implicated rights to equality, dignity, bodily integrity (including the right to make decisions concerning reproduction), access to reproductive health care and privacy are limited by the genetic link requirement in terms of section 294, and if so; (c) whether the limitation of the rights is justifiable in terms of section 36(1) of the Constitution.[1274]

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of sec 10 of the Constitution; (iii) to her reproductive autonomy in terms of sec 12(2)(a) of the Constitution; (iv) to her access to health care services in terms of sec 27 of the Constitution. It is to be noted that it was held that the genetic link requirement infringes human dignity and the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction. The Court's remarks were based on the fact (at par 268) that gamete donor selection and double-donor selection is recognised as a legal right in the context of IVF. SALRC Project 140 92. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 341. Sec 294 is infringing sec 9(3) in that it unfairly discriminates against commissioning parents who would like to enter into a surrogacy agreement but is unable to contribute genetic material.

1270 *AB and another v Minister of Social Development* at par 266.

1271 *AB and another v Minister of Social Development* at par 267. As per sec 28 of the Constitution.

1272 *AB and another v Minister of Social Development* at par 273. SALRC Project 140 91.

1273 *AB and another v Minister of Social Development* at par 273. The court held that that entails an interpretive process limited to what the text of the impugned provision is reasonably capable of meaning.

1274 *AB and another v Minister of Social Development* at par 273. The court pointed out at 274 that in determining whether the declaration of invalidity should be confirmed, the starting point is to delineate the correct approach to statutory interpretation. Thus, words in legislation must be given their ordinary meaning unless doing so would result in absurdity and statutes must be interpreted purposively, regarding the context of the statute as a whole.

Section 294 favours infertile commissioning parent(s) as it disqualifies the fertile commissioning parent(s) who can conceive without the assistance of surrogacy.[1275] Thus, the prohibition in this challenged provision relates to the conclusion of a surrogacy agreement in the case where the gametes of the commissioning parent(s) are not used.[1276]

For the majority of the judges, a consideration of the regulatory scheme in chapter 19 in the context of the Children's Act as a whole is necessary.[1277] Although the Children's Act seeks to protect other rights in the Constitution, its main objective is to give effect to the constitutional rights of children.[1278] The importance of the best interests of the commissioned child is confirmed in section 295(e), read with section 9 of the Act.[1279] In deciding if section 294 is irrational,[1280] the court has to determine whether there is a rational connection between the means chosen and the objective sought to be achieved, as a mere differentiation does not render a legislative measure irrational.[1281] There are differences in the objectives of the Children's Act and the NHA and therefore

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1275 *AB and another v Minister of Social Development* at par 277.

1276 *AB and another v Minister of Social Development* at par 278. Thus, the commissioning parents will be disqualified if both are unable to contribute gametes for procreation and if a single commissioning parent cannot contribute gametes for that purpose, that person will also be disqualified.

1277 *AB and another v Minister of Social Development* at par 279. SALRC Project 140 92.

1278 *AB and another v Minister of Social Development* at par 279. In terms of sec 2 of the Children's Act. The legislative scheme under Ch 19 and, especially sec 294, also protects the child by ensuring that a genetic link exists when that child is conceived. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 251.

1279 *AB and another v Minister of Social Development* at par 280. Sec 295(e) determines that the personal circumstances and family situations of all the parties concerned must be considered when confirming the agreement. Sec 28(2) of the Constitution declares the paramountcy of the best interests of the child in every matter concerning the child. It is to be noted at 281 that the court stated sec 28(2), like the other rights in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with sec 36 of the Constitution and it thus follows that children's rights do not trump other rights.

1280 *AB and another v Minister of Social Development* at par 283. It is determined by answering the following questions: (a) when is the differentiation permissible and (b) under what circumstances is the differentiation a limitation of the equality right in section 9(1) and thus unconstitutional? The court held that rationality is an incident of the rule of law and when enacting laws, the legislator is constrained to act rationally and not capriciously or arbitrarily.

1281 *AB and another v Minister of Social Development* at par 284. It was stated that legislation or provisions within legislation becomes invalid for being inconsistent on its own terms with the Constitution. At par 285. The court pointed out that the differentiation must be arbitrary or must manifest "naked preferences" that serve no legitimate governmental purpose for it to render the measure irrational. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 251.

obvious differences between IVF and surrogacy.[1282] A statutory provision cannot be measured against regulations under different legislation to decide whether it is rational or consistent with the Constitution.[1283]

The requirement of donor gamete(s) within the context of surrogacy serves a rational purpose of creating a bond between the child and the commissioning parent(s).[1284] The court argues that the creation of a bond is designed to protect the best interests of the child-to-be born so that the child has a genetic link with its parent(s) and therefore, a rational connection exists.[1285] Although AB is disqualified from concluding a surrogate agreement as a result of her biological, medical or other reasons, she is not left without a legal option in that she could bring herself within the ambit of section 294 by entering into a partnership relationship with someone whose gamete may be used for the conception of the child as intended in the agreement.[1286] The legislative measure

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1282 *AB and another v Minister of Social Development* at par 286. SALRC Project 140 93.

1283 *AB and another v Minister of Social Development* at par 286. It is when the regulatory measure does not serve a legitimate government purpose that it can fall foul of sec 9(1) of the Constitution. Sloth-Nielsen "Surrogacy in South Africa" 189. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 252.

1284 *AB and another v Minister of Social Development* at par 287. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 252.

1285 *AB and another v Minister of Social Development* at par 287. The court further pointed out at par 288 that the disqualification of AB or of other people similarly placed is rational in that it safeguards the genetic origin of the child as contemplated in the surrogacy agreement for the child's best interests. SALRC Project 140 104. Rautenbach 2017 *TSAR* 358. Sloth-Nielsen "Surrogacy in South Africa" 189.

1286 *AB and another v Minister of Social Development* at par 288. At par 289 the court explains the difference between IVF and surrogacy. With IVF the "host mother" may not necessarily be the genetic mother of the child but she holds a gestational link to the child as she is carrying the child. With surrogacy, a genetic link is created between the child-to-be and the commissioning parent(s). At par 290 the court said that the applicants did not dispute that the clarity of origin may be important to a self-identity and self-respect of the child SALRC Project 140 104. It is explained that "origin" of a child relates to how the child was conceived and by whom and who gave birth to the child. Clarity, on the other hand, could mean that the child is entitled to know his or her genetic origins not only as it relates to the commissioning parent, but also of the donor and the surrogate mother. Rautenbach 2017 *TSAR* 358. Sloth-Nielsen "Surrogacy in South Africa" 189. The writer states that the suggestion that the infertile applicant find a fertile partner for the purposes of conception with non-donor gametes does not seem judicious and it smacks of a different form of baby shopping. She points out that the finding of the Constitutional Court lead to a South African Law Commission investigation into the rights of the children to know their biological origins more generally. An Issue paper "The right to know one's own biological origins" was released in 2017. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 252. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 323 and 326. Meyerson correctly argues that for AB to enter into

chosen by the legislature in section 294 is rationally related to the public good sought to be achieved by government.[1287] The importance of the genetic link requirement is further confirmed in the adage "*ngwana ga se wa ga ka otla ke wa ga katsola*" (a child belongs not to the one who provides but to the one who gives birth to the child) and therefore clarity regarding the origin of a child is important to the self-identity and self-respect of the child.[1288] According to the court, the rationality challenge must fail, as

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a surrogacy agreement, she would have needed to find an intimate partner with whom she wanted to share her life; her feelings would have had to be shared and the partner would have had to be both fertile and willing to enter into a surrogacy agreement. Further correctly stated is that it is difficult to see how these variables can be said to have been under AB's control, such that her failure to be in a relationship with a person with all these characteristics can be ascribed to her personal preferences. The author gave the example of a married couple who cannot contribute a gamete for conception and thus, they are disqualified by sec 294 to enter into a surrogacy agreement. Their only option would be to enter into separate surrogacy agreements if they were to dissolve their relationship and find a fertile partner. Would anyone take the view that if the couple refuse to avail themselves of this option that they can only blame themselves? She concludes this argument by stating that even radically neoliberal views, which are willing to ascribe many forms of disadvantage to people's choices, would not be so hyper-voluntarist. People who do not suffer from conception infertility are not required to find or change partners in order to have a child through the surrogacy process.

1287 *AB and another v Minister of Social Development* at par 292. We cannot therefore interfere with the lawfully chosen measure on the ground that the legislature should have taken other considerations into account or that it should have considered a different decision that is preferable. The purpose of the enquiry is to determine whether the means selected are rationally related to the objective sought to be achieved Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 252.

1288 *AB and another v Minister of Social Development* at par 293. SALRC Project 140 95 and 105. Florescu, S and Sloth-Nielsen, J "Visions on surrogacy – From North to South: The approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin" 2017 *International Survey of Family Law* 2017 253. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 318. At 330 the author explains why she disagrees with the majority's finding in this regard by using the example of where the commissioning parents have only contributed one gamete: Here, she points out, the law does not impose a duty on the commissioning parents or anyone else to inform the child about the fact that a donor gamete was used in his or her conception. Further, there is no provision that requires this to be recorded on the child's birth certificate. Importantly, even if the commissioning parents inform the child that a donor gamete was used in his or her conception, sec 41(2) of the Children's Act would prevent the child from finding out the identity of the donor. The author states that in light of these, two scenarios can arise (the child knows that he or she does not know one of her genetic parents or the child falsely believes that he or she is related to both of his or her genetic parents) and in neither of the scenarios will the child have the knowledge of his or her origins required to satisfy his or her hypothesised identity needs. At 331 Meyerson argues that it is difficult to see how the purpose of sec 294 can be to serve children's interests in constructing their self-identity around knowledge of their genetic parents. If it was that the legislature had really sought to protect these putative interests, it surely would not have allowed commissioning parents to contribute only one gamete for the conception while at the same time preventing the child from learning the identity of the donor of the other gamete (used for his or her conception) and allowing the existence of the donor to be kept a secret. Thus, making it possible for children born as a result of a surrogacy agreement to be deceived about their genetic origins and to construct a spurious sense of identity build on an illusion. At 332 the author states that the legislature's purpose in enacting sec 294 could thus not have been to serve the children's identity needs because there are other restrictions and permissions which is

there is a rational nexus between the purpose of the legislative scheme, including section 294, that provides a framework within which persons are able to have children and become parents in circumstances where they would otherwise not have been.[1289] The right to equality provides a tool to achieve substantive equality, which, unlike formal equality that presumes that all people are equal, tolerates difference.[1290] A two-stage enquiry regarding the categories of discrimination is important and the court refers to the following extract from *Harksen v Lane NO*:[1291]

> Where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of section 8(2). Other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner, may well constitute a breach of section 8(2) as well.[1292]

The question whether there has been differentiation on a specified or an unspecified ground must be answered objectively.[1293] Differentiation will amount to discrimination if the challenged provision authorises unequal treatment of people based on certain attributes and characteristics attaching to them.[1294] Hence, equality will mean nothing if it does not recognise a person's equal worth as a human being.[1295]

AB is disqualified from using surrogacy as a result of biological, medical or other reasons as contemplated in section 294.[1296] Section 294 neither creates nor compounds infertility.[1297] Thus, the challenged provision does not disqualify

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contained in the Children's Act that undermine the construction as a matter of statutory interpretation.

1289 *AB and another v Minister of Social Development* at par 294. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 328.

1290 *AB and another v Minister of Social Development* at par 296.

1291 1998 (1) SA 300 (CC).

1292 *AB and another v Minister of Social Development* at par 297. "There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or affect them adversely in a comparably serious manner."

1293 *AB and another v Minister of Social Development* at par 297.

1294 *AB and another v Minister of Social Development* at par 298. Sec 294 regulates the conclusion of a valid surrogate agreement and it does not confer a right to conclude an agreement. SALRC Project 140 96.

1295 *AB and another v Minister of Social Development* at par 299.

1296 *AB and another v Minister of Social Development* at par 299.

1297 *AB and another v Minister of Social Development* at par 301. Rautenbach 2017 *TSAR* 359 - 360. The writer states that the question to be answered is what the concrete effect of the exclusion of the applicant from concluding a surrogacy agreement was on the interests of the applicant. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 322. Meyerson explains that although sec 294 as a legal barrier is reasonable, it is still a legal barrier. Further, it is likewise the law, not their

commissioning parent(s) because they are infertile, it affords the infertile commissioning parent(s) the opportunity to have children of their own by contributing gametes for the conception of the child intended in the surrogate agreement.[1298]

The majority decision concludes that the challenged provision does not unfairly discriminate against AB or members of the sub-class.[1299] The differentiation can only be unfair if the differentiation results in AB or the sub-class being treated differently in a way which impairs their fundamental dignity as human beings or which affects them adversely in a comparably serious manner.[1300]

The next question to be answered is whether section 294 limits AB's right to reproductive autonomy. The court fails to see how section 294 constitutes a limitation of AB's rights to dignity and reproductive autonomy (as guaranteed by section 12(2)(a) of the Constitution).[1301] For the court, section 12(2)'s inclusion of a reproductive autonomy right in section 12(2)(a) is combined with the right to security in and control over a person's body in section 12(2)(b) and to be free from medical experimentation without informed consent in section 12(2)(c).[1302] The right to bodily integrity as set out in section 12(2) is held to be a universally accepted fundamental right.[1303] The right

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medical condition, which prevents the conception infertile parents from having a child through surrogacy.

1298 *AB and another v Minister of Social Development* at par 302. If the parent(s) cannot contribute a gamete, the parent still has available options afforded by the law: a single parent has the choice to conclude a permanent relationship with a fertile parent, thereby qualifying the parent for surrogacy. But, if the infertile commissioning parent(s) decide not to use the available legal options, they have to live with the choices they make. SALRC Project 140 96.

1299 *AB and another v Minister of Social Development* at par 303. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 321. The author argues that the majority's understanding of the right to equality under the Constitution is unattractively cramped. It failed to recognise sec 294's differential treatment of prospective parents who are conception infertile is unfair discrimination. Further, in being unwilling to interrogate the legitimacy of the state's purpose, the majority gave us an ungenerous version of the constitutional principle of equality in the service of a dubious legislative goal.

1300 *AB and another v Minister of Social Development* at par 304. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 318.

1301 *AB and another v Minister of Social Development* at par 306. Sec 12(2) recognises that each physical body is of equal worth and gives protection to the construction regarding their bodies. At 309 the Court stated that the primary purpose of the right was to ensure that the physical integrity of every person was protected. Rautenbach 2017 *TSAR* 360. The writer argues that all rights in the bill of rights empowers one to choose freely the way in which one performs the actions and protects and promotes the interests protected by the right and not every limitation of other rights amounts to violation of human dignity.

1302 *AB and another v Minister of Social Development* at par 310.

1303 *AB and another v Minister of Social Development* at par 311.

relating to reproductive autonomy in section 12(2)(a) directly addresses the fact that many women do not enjoy security in and control over their own bodies.[1304] Thus, the focus is on the individual woman's own body and not a body of another woman.[1305] After considering comparable judgments in other jurisdictions which show that security of the person encompasses personal autonomy involving control over a person's bodily integrity,[1306] the majority concludes that the applicant's argument that the donor gametes decision entails a decision regarding AB's reproduction is misconceived.[1307] The court argues that although the donor gamete decision is an important exercise of a prospective parent's autonomy, it does not entail a decision regarding the commissioning parent's bodily integrity, but one regarding the body of a surrogate or "host" mother.[1308]

The court's argument was that it can hardly be argued that section 294 is invalid because it is not in line with the constitutional value of self-autonomy, encapsulated in the maxim *pacta sunt servanda*,[1309] as section 294 does not prevent AB from regulating her own affairs.[1310] Section 293 strengthens the view that the legislative scheme favours infertile commissioning parents.[1311] The decision allowing the creation of a child without a genetic link between the commissioning parent(s) and the commissioned child will not accord with the object of the legislation that also favours the commissioning parent(s).[1312] Thus, in the view of the majority, the challenge regarding section 294 based on section 12(2)(a) must fail.[1313]

1304 *AB and another v Minister of Social Development* at par 313.

1305 *AB and another v Minister of Social Development* at par 313. SALRC Project 140 99. Rautenbach 2017 *TSAR* 360. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 319.

1306 *AB and another v Minister of Social Development* at par 314.

1307 *AB and another v Minister of Social Development* at par 314.

1308 *AB and another v Minister of Social Development* at par 315. The court acknowledged the need to respect the autonomy of commissioning parents in relation to the choices they make for the purposes of concluding surrogacy agreements. Sec 12(2)(a) however does not give anyone the right to bodily integrity in respect of another person's body. SALRC Project 140 99.

1309 *AB and another v Minister of Social Development* at par 316. The Children's Act regulates the right to conclude a surrogacy agreement.

1310 *AB and another v Minister of Social Development* at par 316. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 319.

1311 *AB and another v Minister of Social Development* at par 317.

1312 *AB and another v Minister of Social Development* at par 317.

1313 *AB and another v Minister of Social Development* at par 318.

With reference to AB's right of access to health care, the court observes that section 27(1) of the Constitution does not give rise to a self-standing and independent positive right that is immediately enforceable.[1314] Consequently, as per Nkabinde J, based on the facts of the case and on deliberations regarding the challenged provision in relation to the position of the infertile commissioning parent(s), the court is unable to conclude that the genetic link requirement prevents AB and members of the sub-class from enjoying the right to have access to health care services, including reproductive health care.[1315] Hence, it cannot be said that the guaranteed rights in section 27(1) of the Constitution are limited by virtue of the genetic link requirement in section 294 of the Children's Act.[1316]

Moreover, also the applicants' challenge based on AB's right to privacy in terms of section 14 of the Constitution should fail, as this right is not limited by the genetic link requirement in section 294 of the Children's Act.[1317] The right to make autonomous decisions in respect of intensely significant aspects of one's personal life falls within the ambit of the right to privacy but it does not suggest an independent right to autonomy.[1318] Thus, the challenged provision does not limit AB's right to privacy.[1319] The issue regarding limitation of rights consequently does not arise.[1320]

Thus, as per the majority judgment, it was held that the order of constitutional invalidity in respect of section 294 of the Children's Act 39 of 2005 made by the High Court of South Africa, Gauteng Division, Pretoria, is not confirmed.[1321]

I agree with the contentions raised and argued by the minority judgment. Section 294 does distinguish between the different forms of infertility and consequently, unfair

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1314 *AB and another v Minister of Social Development* at par 320. The court found it difficult to understand the applicants' constitutional challenge based on the right to have access to reproductive health care in terms of sec 27(1).

1315 *AB and another v Minister of Social Development* at par 322.

1316 *AB and another v Minister of Social Development* at par 322.

1317 *AB and another v Minister of Social Development* at par 322. Meyerson, D "Surrogacy, Geneticism and Equality: The case of AB Minister of Social Development" 2019 *Constitutional Court Review* 9 319.

1318 *AB and another v Minister of Social Development* at par 323. The court referred to *S v Jordan* 2002 (11) BCLR 1117 (CC). SALRC Project 140 101.

1319 *AB and another v Minister of Social Development* at par 323.

1320 *AB and another v Minister of Social Development* at par 324.

1321 *AB and another v Minister of Social Development* at par 330. SALRC Project 140 101.

discrimination against women that are pregnancy infertile, especially compared to the IVF scenario, does exist. It is unacceptable to say that children will experience happier lives just because there is a genetic link with one or both of his/her parents. Allowing commissioning parent(s) to use surrogacy, although there will be no genetic link with the commissioned child, will not cause commercial surrogacy. It is important to look at each application objectively and decide on the facts and circumstances relevant to the specific applicants if there are grounds on which the court can allow the commissioning parent(s) to use surrogacy in circumstances where he/she/they cannot be genetically linked to the commissioned child. AB had no alternative than to use surrogacy as a means of having her own child and that is clear from the fact that she underwent 18 unsuccessful IVF treatments, which in my view, must have been emotionally and physically traumatic.

2.8.2 EJ and others v Haupt NO[1322]

This judgment was discussed fully in chapter 3 above. The matter dealt with the applicants challenging section 40 of the Children's Act on the ground that the provisions of sections 40(1) and section 40(3)(b) discriminate against same-sex female couples. The court held that it does have a discretion to raise a constitutional issue *mero motu* and the discretion should be used sparingly and only in circumstances where the legislation cannot be read inclusively and where it is restrictive in its interpretation.[1323]

Neukircher J found that no declaration of invalidity or unconstitutionality is required in this application.[1324] Both the spouses automatically acquired rights and responsibilities in respect of the child born from artificial fertilisation although the second applicant does not share a genetic link with the child.[1325] Same-sex female couples are clearly included in section 40(1) and the court could thus not find that the section is unconstitutional.[1326]

1322 2022 (1) SA 514 (GP).
1323 *EJ and others v Haupt NO* at par 48.
1324 *EJ and others v Haupt NO* at par 75.
1325 *EJ and others v Haupt NO* at par 73.
1326 *EJ and others v Haupt NO* at par 73 and 75.

2.8.3 KB and another v Minister of Social Development[1327]

In the above matter, an application was brought in terms of High Court Rule 16(A)(a) in that the genetic link requirement in section 294 must be expanded to include that a genetic link between siblings will also satisfy this requirement.

The argument advanced by the applicants is that section 294, which makes no provision or does not require a genetic link between siblings, is irrational and that the provision should be amended to include "or where the genetic origin of the child is the same as that of any of her siblings". The applicants further argue that section 294 is unconstitutional on the ground that it offends against the principle of the paramountcy of the best interests of a child which is constitutionally protected, by denying surrogacy where the commissioned child will be genetically linked to his/her sibling.[1328] The section further unjustifiably limits the commissioned child's rights to dignity and equality.[1329] Further, the current provision impacts on the right to have a family with siblings that are genetically linked to him. The proposed amended section 294, according to the applicants, should read as follows:

> No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or where the commissioning parent is a single person, the gamete of that person or where the genetic origin of the child is the same as that of any of her siblings.[1330]

The Constitutional Court dismissed the application for direct access and an application was brought in the Mbombela High Court.[1331] Sibuyi AJ concluded that the only question was whether the prohibition contained in section 294 of the Act, which has the effect of denying the minor child a genetically related sibling, passes constitutional

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1327 (966/2022) [2023] ZAMPMBHC 12 (20 February 2023).

1328 *KB and another v Minister of Social Development* at par 28.

1329 *KB and another v Minister of Social Development* at par 9. The applicants have a child that was born from them through the use of donor gametes. The first applicant however lost her uterus and their second baby (at six months) as a result of complications. The applicants have three embryos left which they want to use through a surrogate but in light of the fact that the embryo is as a result of donor gametes, the commissioned child will not be genetically linked to either of the applicants. The commissioned child will however be genetically linked to the first child born of the applicants. It was further argued by the applicants that it is important that the child is given a full biological sibling for in case of possible illness later in life, a biological sibling could be a potential match for bone marrow, tissue or organs should there be a need.

1330 *KB and another v Minister of Social Development* at par 7.

1331 *KB and another v Minister of Social Development* at par 1.

muster.[1332] The court made reference to the Constitutional Court judgement in *AB and another v Minister of Social Development* and concluded that the court cannot interfere with a lawfully chosen measure (in terms of section 294 of the Act) as there is factually and legally nothing new in this application to justify interference.[1333] The court reiterated that the purpose of section 294 is to protect the child by ensuring that a genetic link exists when the child is conceived.[1334] Section 294 of the Act, however, has nothing to do with the right of a minor child to have a sibling with the same genetic link.[1335]

The court held that a determination of the constitutional validity must be made against the legislative history of chapter 19 of the Act.[1336] The court further concluded that the removal of the genetic link prerequisite from section 294 of the Act or the creation of an exception thereto would in principle constitute a fundamental departure from the lawfully chosen policy position.[1337] Thus, the principle of separation of powers will be violated should the court grant the relief sought by the applicants and further, the lawfully chosen measure by the legislature will be interfered with.[1338] The application failed as there was no finding that section 294 of the Act is unconstitutional and there could thus be no reading-in as requested by the applicants.[1339]

2.8.4 VVJ and another v Minister of Social Development and another[1340]

The applicants who have been in a lesbian permanent life partnership since January 2019, are considered as a permanent couple by their respective families, friends and the broader community where they live.[1341] The applicants intend to use artificial fertilisation to conceive a child. The first applicant's ovum will be used and the second

1332 *KB and another v Minister of Social Development* at par 30.
1333 *KB and another v Minister of Social Development* at par 40.
1334 *KB and another v Minister of Social Development* at par 40. The court further pointed out that sec 294 is to ensure the need for a genetic link between a child and at least one of the parents so that there is clarity regarding the child's origin which is important to the self-identity and the self-respect of the child and to assist parent(s) who are conception or pregnancy infertile.
1335 *KB and another v Minister of Social Development* at par 40.
1336 *KB and another v Minister of Social Development* at par 41.
1337 *KB and another v Minister of Social Development* at par 41.
1338 *KB and another v Minister of Social Development* at par 41.
1339 *KB and another v Minister of Social Development* at par 42 and 43.
1340 Unreported judgment, North Gauteng High Court, Pretoria, case no 27706/2021.
1341 *VVJ and another v Minister of Social Development and another* at par 6.

applicant will be artificially fertilised with the first applicant's ovum and donor sperm.[1342] The main concern of the applicants was that the current legislation determines that only the second applicant will establish rights, responsibilities, duties or obligations regarding the child(ren) born through this arrangement.[1343] The *amicus* argued that it is not whether the provisions unfairly discriminate against persons on the ground of sexual orientation, but rather whether the exclusion of unmarried persons in a committed relationship is constitutionally justifiable.[1344]

Van Veenendaal AJ acknowledges that the Children's Act remains conservatively lagging in terms of artificial fertilisation and the subsequent recognition of partners as parents.[1345] For the court, one concern regarding a lifelong permanent relationship is the lack of formal indication of the intention to remain together.[1346] This remark is curious, as the formalisation of a relationship via marriage or a civil union is hardly a guarantee of the intention to remain together, if the high prevalence of divorce and separation are considered among married couples.

Van Veenendaal AJ concludes that section 40 of the Children's Act is indeed unconstitutional in that the provision unfairly discriminates on the basis of marital status in terms of its treatment of children born in or out of wedlock.[1347] Further, rights to equality and dignity of partners whose children were born as a result of artificial fertilisation, but whose relationship is not recognised, are violated by this section.[1348] The children's right to family and/or parental care is violated when they are born as a result of artificial fertilisation of unmarried parents.[1349] Also, the child's right to have

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1342 *VVJ and another v Minister of Social Development and another* at par 9.

1343 *VVJ and another v Minister of Social Development and another* at par 12. The applicants argued that sec 40 is unconstitutional in that it discriminates unfairly against the applicants. At par 1 and 2 it states that sec 40 does not include the words "or life partner" after the word "spouse" and "husband" wherever such words appear in the section.

1344 *VVJ and another v Minister of Social Development and another* at par 16.

1345 *VVJ and another v Minister of Social Development and another* at par 17. "However, the more murky side of recognizing contributing partners, whether as a nurturing parent or as a contributing donor of gametes, while in a committed relationship, albeit without a ceremony that constitutes some form of union or a registered contract, still presents a problem."

1346 *VVJ and another v Minister of Social Development and another* at par 18. The court pointed out that unions, civil unions, marriages and customary marriages also break down and the only difference is that through litigation and extension of the law, the parties and the children involved therein are protected.

1347 *VVJ and another v Minister of Social Development and another* at par 27.

1348 *VVJ and another v Minister of Social Development and another* at par 28. Inroads are being made to their right to a family life.

1349 *VVJ and another v Minister of Social Development and another* at par 29.

his/her best interests considered of paramount importance is violated.[1350] The rights to dignity and equality of the children born of such artificial fertilisation are furthermore impeded, together with the rights to dignity and equality of the parties to a lifelong permanent partnership.[1351] Section 40 of the Children's Act is thus declared inconsistent with the Constitution to the extent that the said section does not include the words "or permanent life partner" after the word "spouse" and "husband" wherever such words appear in section 40, "or permanent life partners" after the word "spouses" wherever such word appears in section 40.[1352]

There is no doubt that this judgment should be welcomed, as it will definitely bring about a positive change to the Children's Act in that persons involved in a permanent life partnership will be acknowledged as parents of a child born through artificial fertilisation.

2.8.5 Surrogacy Advisory Group v Minister of Health[1353]

In this Gauteng High Court judgment, Du Plessis AJ declared certain provisions of the 2012 Regulations Relating to the Artificial Fertilisation of Persons and the 2012 Regulations Relating to the Use of Human Biological Material unconstitutional.[1354] These Regulations, promulgated in terms of the NHA,[1355] are regulations 7(j)(ii), 13 and 19 of Regulations Relating to the Artificial Fertilisation of Persons.[1356] The respondent argued that the application is premature as the Minister did publish draft regulations on 25 March 2021 which will address many of the issues that were raised by the applicant.[1357] It was argued by the applicants that their right to equality, privacy and bodily integrity is infringed by the said regulations.[1358] Regulation 7(j)(i) provides that a psychological evaluation of both the gamete donor and recipient is a requirement

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1350 *VVJ and another v Minister of Social Development and another* at par 30.
1351 *VVJ and another v Minister of Social Development and another* at par 33.
1352 *VVJ and another v Minister of Social Development and another* at par 36. The court referred section 40 to the parliament for reconsideration.
1353 (50683/2020) [2022] ZAGPPHC 558 (19 July 2022).
1354 *Surrogacy Advisory Group v Minister of Health* at par 1.
1355 61 of 2003. *Surrogacy Advisory Group v Minister of Health* at par 1.
1356 *Surrogacy Advisory Group v Minister of Health* at par 45. Reg 7(j)(ii) is the psychological evaluation requirement; Reg 13 is the sex selection prohibition; and Reg 19 is the prohibition of disclosure of certain facts.
1357 *Surrogacy Advisory Group v Minister of Health* at par 17-18.
1358 *Surrogacy Advisory Group v Minister of Health* at par 38.

for the removal or withdrawal of gametes in circumstances where the parties are known to each other.[1359] The applicants contended that there is no rationale for the parties to undergo a psychological evaluation where the gamete donor is the husband or partner of the recipient.[1360] This requirement thus infringes on the right to equality (section 9), the right to privacy (section 14) and the right of access to health care services (section 27(1)(a)).[1361] The applicants contended that the discrimination is based on disability in terms of section 9(3) of the Constitution.[1362] The applicants further argued that their right to privacy is infringed in that a psychological evaluation means an interview will be conducted by a clinical psychologist regarding their personal issues relating to their decisions to start a family through the process of artificial fertilisation.[1363] It was lastly stated that the applicants' right of access to health care is infringed in that the prerequisite for a psychological evaluation creates a financial and an emotional obstacle to their access to artificial fertilisation health care services.[1364] Section 27(1)(a) of the Constitution places a negative duty on the state to not limit access to health care:[1365]

> I accept that conceiving children through artificial fertilisation is an invasive and stressful procedure. It might involve risks and disappointment, which can impact the individuals and their relationships. Ensuring that parents who conceive children through artificial insemination is psychologically prepared is thus a legitimate government purpose and is not irrational or arbitrary.[1366]

Du Plessis AJ concluded that regulation 7(j)(i) infringes on the parties' right to equality on the ground that infertility is a disability and that the discrimination is presumed unfair.[1367] The respondent did not provide the court with information as to the policy or why it can be said that it is reasonable to limit the rights of the applicants (and people in the same circumstances).[1368]

> The decision of people in a relationship to conceive a child through artificial fertilisation is within the truly person "(sic)" realm. It is close to the core of privacy, the most protected end of the continuum. And while it might be good and advisable for people to ensure that they have phycological "(sic)" support through the process as it can be a roller coaster ride

1359 *Surrogacy Advisory Group v Minister of Health* at par 53.
1360 *Surrogacy Advisory Group v Minister of Health* at par 55.
1361 *Surrogacy Advisory Group v Minister of Health* at par 56.
1362 *Surrogacy Advisory Group v Minister of Health* at par 64.
1363 *Surrogacy Advisory Group v Minister of Health* at par 65.
1364 *Surrogacy Advisory Group v Minister of Health* at par 68.
1365 *Surrogacy Advisory Group v Minister of Health* at par 68.
1366 *Surrogacy Advisory Group v Minister of Health* at par 79.
1367 *Surrogacy Advisory Group v Minister of Health* at par 80-81.
1368 *Surrogacy Advisory Group v Minister of Health* at par 80.

> of unbounded hope and unmet expectations, a legal requirement to this effect is an infringement of their privacy.[1369]

The court further found that the regulation infringes on a person's right to privacy and it constitutes a limitation on health care.[1370] Regarding regulation 13, the court observed that sex selection should be understood as a part of reproductive autonomy and the decision if and how to have children.[1371]

For Du Plessis AJ, two competing rights concerned with women's rights exist, namely non-medical sex selection that may encourage or lead to sex discrimination against women, vis-à-vis a prohibition on non-medical sex selection which violates a woman's right to reproductive autonomy.[1372] The court next considered the interests of society as well as the interests of the child.[1373] Regarding the interests of children, the court's argument is that the complexity of future children's traits are reduced to their sex:[1374]

> In the case of sex selection, the moral issue is not only an individual moral issue but an issue that can impact society as a whole. It asks whether we as a society should allow people to choose the sex of their child and live with the possible consequences of such a choice (e.g. sex rations).[1375]

The court found that section 12(2)(a) of the Constitution does not reduce a women's reproductive choices to only when an embryo is inside her body and the prohibition in terms of regulation 13 is an infringement of this right.[1376] In respect of the right to privacy, the court found that the regulation does infringe the right.[1377] Although the state can limit the right to choose the sex of a child, the state did not provide reasons for this, and neither did it try to justify the limitation in terms of section 36 of the Constitution.[1378] The court concluded that the argument regarding an infringement on the right to equality must fail.[1379] Regulation 6 of the Regulations Relating to the use of

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1369 *Surrogacy Advisory Group v Minister of Health* at par 86.
1370 *Surrogacy Advisory Group v Minister of Health* at par 87 and 89.
1371 *Surrogacy Advisory Group v Minister of Health* at par 97 and 112. At par 113 "Preimplantation and prenatal testing for selecting the sex of a child is prohibited except in the case of a [sic] serious sex linked or sex-limited genetic conditions."
1372 *Surrogacy Advisory Group v Minister of Health* at par 103.
1373 *Surrogacy Advisory Group v Minister of Health* at par 105 – 108.
1374 *Surrogacy Advisory Group v Minister of Health* at par 108.
1375 *Surrogacy Advisory Group v Minister of Health* at par 153.
1376 *Surrogacy Advisory Group v Minister of Health* at par 158-159.
1377 *Surrogacy Advisory Group v Minister of Health* at par 165.
1378 *Surrogacy Advisory Group v Minister of Health* at par 165.
1379 *Surrogacy Advisory Group v Minister of Health* at par 166.

Human Biological Material, which also deals with pre-implantation and prenatal testing for sex selection, was also declared unconstitutional and invalid.[1380]

With reference to regulation 19, the court pointed out that the regulation puts a blanket ban on the disclosure of personal information by any persons involved in the surrogacy arrangement, including information relating to the gamete donor.[1381] The applicants argued that this regulation infringes on the right to privacy and the right to freedom of expression of the parties concerned.[1382] The court found that, insofar as it bars the parties involved in artificial fertilisation from sharing their experiences with family and friends, the prohibition is unconstitutional.[1383]

> Freedom of expression serves two important functions. Firstly, it is vital for the establishment of a democratic society. But it is also, secondly, an essential aspect of what it is to be human. It empowers individuals, gives them agency, and helps with informed decision-making. It has been regarded as a *sine qua non* for a person's right to realise their potential as a human being, which is important for every individual's empowerment to autonomous self-development. [1384]

The court concluded that regulation 19 does in fact infringe on the right to privacy and the right to freedom of expression.[1385] The court's conclusion has to be supported, especially in respect of regulations 7(j)(i) and 19. The court's "reading in" in terms of regulation 7(j)(i) of "except where such donor and recipient are a couple that is married or in a permanent domestic life-partnership"[1386] is accurate, as the couple in question would have taken an informed decision before approaching a fertility clinic. Requiring these parties to undergo psychological evaluation before proceeding with the artificial fertilisation procedure is pointless and an infringing on the privacy of and autonomy of their personal lives.

In respect of regulation 19, the court found that a reading down of the provision is the best remedy.[1387]

1380 *Surrogacy Advisory Group v Minister of Health* at par 195.
1381 *Surrogacy Advisory Group v Minister of Health* at par 170. At par 169 "No person shall disclose the identity of any person who donated a gamete or received a gamete, or any matter related to the artificial fertilisation of such gametes, or reproduction resulting from such artificial fertilisation except where a law provides otherwise or a court so orders."
1382 *Surrogacy Advisory Group v Minister of Health* at par 171.
1383 *Surrogacy Advisory Group v Minister of Health* at par 178.
1384 *Surrogacy Advisory Group v Minister of Health* at par 180.
1385 *Surrogacy Advisory Group v Minister of Health* at par 181.
1386 *Surrogacy Advisory Group v Minister of Health* at par 201.
1387 *Surrogacy Advisory Group v Minister of Health* at par 199.

> Therefore, interpreting "no person" to exclude the persons who undergo, donate towards, or result from artificial fertilisation themselves, would save it from unconstitutionality.[1388]

There can be no doubt that this is correct, as it is each person's choice when and with whom he or she would like to share his or her experience, especially where a couple is undergoing artificial fertilisation. Because it is not only a physical experience but also involves many sensitive emotions, a couple or individual could always share their/his/her experience during the process with friends and family to enable them to receive the necessary support when they most need it. Draft regulations in terms of the NHA relating to artificial fertilisation of persons were published in 2016, March 2021 and November 2021.[1389] To date, the only regulations in force are the 2012 Regulations Relating to Artificial Fertilisation of Persons.

The framework of international and regional human rights will be briefly explored next, as these instruments may have a direct bearing on the Constitution and the interpretation of the rights pertaining to the parties to a surrogate agreement, not to mention the paramountcy of the best interests of a child.

3. THE INTERNATIONAL AND REGIONAL HUMAN RIGHTS FRAMEWORK RELEVANT TO SURROGATE MOTHERHOOD AND ARTIFICIAL FERTILISATION

The section below provides a brief overview of the most important human rights instruments relevant to surrogacy and artificial fertilisation. Although South Africa has pledged commitments to a range of international human rights instruments, two instruments that stand out because of their direct relevance to children, are the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child (ACRWC). The discussion will first briefly explore the relevance of the Convention for the regulation of surrogacy in South Africa. The preamble of the Convention on the Rights of the Child aptly states that:

> The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.[1390]

1388 *Surrogacy Advisory Group v Minister of Health* at par 199.
1389 The different draft regulations will be discussed in ch 5 of the thesis.
1390 United Nations Convention on the Rights of a Child, Preamble.

3.1 The United Nations Convention on the Rights of the Child (UNCRC)[1391]

South Africa signed the United Convention on the Rights of the Child charter in 1993 and thereafter ratified it on 16 June 1995.[1392] This is the world's most ratified treaty which became the first legally binding international convention to confirm that all children are human rights bearers.[1393] The UNCRC considers it important that a child should be fully prepared to live an individual life in society and be brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and more specifically, in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.[1394] As the UNCRC was the first legally binding international convention that declared human rights for all children,[1395] its aim can be described as setting out certain rights of children and reiterating the vulnerability of children.[1396]

Rights that are provided for in the UNCRC are civil, political, economic, social and cultural rights.[1397] Article 1 defines a child as every human being below the age of

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1391 Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990 and in accordance with article 49. See *C and Others v Department of Health and Social Development, Gauteng and Others* (CCT 55/11) [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) at par 25.

1392 See *C and Others v Department of Health and Social Development, Gauteng and Others* (CCT 55/11) [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) at par 25. Fast facts- United Nations Convention on the Right of the Child found on https://www.parliament.gov.za/storage/app/media/Pages/2019/november/19-11-2019_30_Year_Commemoration_of_the_United_Nations_Convention_on_the_Rights_of_the_Child/docs/FAST_FACTS_UNCRC_draft_2_19_November_2019final.pdf (last visited 30 September 2022). Labuschaigne M, Mahomed S, and Dhai, A. "Evolving capacity of children and their best interests in the context of health research in South Africa: An ethico-legal position" 2022 *Developing World Bioethics* 3-4.

1393 Fast facts- United Nations Convention on the Right of the Child found on https://www.parliament.gov.za/storage/app/media/Pages/2019/november/19-11-2019_30_Year_Commemoration_of_the_United_Nations_Convention_on_the_Rights_of_the_Child/docs/FAST_FACTS_UNCRC_draft_2_19_November_2019final.pdf (last visited 30 September 2022). Labuschaigne M, Mahomed S, and Dhai, A. "Evolving capacity of children and their best interests in the context of health research in South Africa: An ethico-legal position" 2022 *Developing World Bioethics* 3-4.

1394 CRC preamble.

1395 Labuschaigne M, Mahomed S, and Dhai, A. "Evolving capacity of children and their best interests in the context of health research in South Africa: An ethico-legal position" 2022 *Developing World Bioethics* 3-4.

1396 Fast facts- United Nations Convention on the Right of the Child found on https://www.parliament.gov.za/storage/app/media/Pages/2019/november/19-11-2019_30_Year_Commemoration_of_the_United_Nations_Convention_on_the_Rights_of_the_Child/docs/FAST_FACTS_UNCRC_draft_2_19_November_2019final.pdf (last visited 30 September 2022).

1397 Fast facts- United Nations Convention on the Right of the Child found on https://www.parliament.gov.za/storage/app/media/Pages/2019/november/19-11-2019_30_Year_Commemoration_of_the_United_Nations_Convention_on_the_Rights_of_the_

eighteen years unless under the law applicable to the child, majority is attained earlier.[1398] A child's rights, as provided for in the Convention, must be respected and ensured without any form of discrimination.[1399] The rights apply to all children, regardless of the child's, his or her parents' or his or her legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.[1400] The best interests of a child shall be a primary consideration in all actions taken regarding children.[1401]

Protection and care of a child must be ensured, which are essential for his or her well-being.[1402] Importantly, the child has a right to be registered immediately after birth.[1403] He or she shall have a right to a name (from birth), a right to acquire a nationality and, as far as it is possible, the right to know and be cared for by his or her parents.[1404] Each child has the right to have his or her identity preserved and this includes nationality, name and family relations as recognised by law without unlawful interference.[1405] A child shall not be exposed to arbitrary or unlawful interference with his or her privacy, family, home or correspondence.[1406] Further, a child shall not be exposed to unlawful attacks on his or her honour and reputation.[1407] The child has a right to protection of the law against any such interference or attack.[1408] Every child has the right to a standard of living that is adequate for his or her physical, mental, spiritual, moral and social development.[1409]

Child/docs/FAST_FACTS_UNCRC_draft_2_19_November_2019final.pdf (last visited 30 September 2022).

1398 Article 1 of CRC.

1399 Article 2(1) of CRC.

1400 Article 2(1) of CRC.

1401 Article 3(1) of CRC.

1402 Article 3(2) of CRC. The rights and duties of the child's parents, legal guardian or other person legally responsible for him or her, must be taken into account, and to this end, State Parties shall take all appropriate legislative measure.

1403 Article 7(1) of CRC.

1404 Article 7(1) of CRC. Article 7(2) determines that the State Parties shall ensure that these rights are implemented in accordance with their national law and their obligations under the relevant international instruments in this field. This is also in particular where the child would otherwise be stateless. Skosana 2017 *Obiter* 267. Skosana argues that article 7(1) explicitly recognises a child's right to know its genetic origin.

1405 Article 8 of CRC.

1406 Article 16(1) of CRC.

1407 Article 16(1) of CRC.

1408 Article 16(2) of CRC.

1409 Article 27(1) of CRC. Article 27(2) provides that the parent(s) or other responsible person have the primary responsibility to secure, within their own financial means, the conditions of living necessary for the child's development.

These entrenched rights in the UNCRC resonate with the manner in which the courts have considered the best interests of children when faced with applications for the confirmation of surrogate motherhood agreements. It is especially the best interests of the child yardstick that has informed the relevant decisions by the courts. By carefully considering this yardstick, as well as the relevant rights of the children that would have been born following the conclusion of a surrogate agreement, the courts have tacitly given effect to the provisions of the UNCRC discussed above.

3.2 The African Charter on the Rights and Welfare of the Child (ACRWC)[1410]

The African Charter on the Rights and Welfare of the Child as the most important regional human rights instrument relevant to children, was adopted on 11 July 1990 and entered into force on 29 November 1999.[1411] South Africa signed the ACRWC on 10 October 1997 and thereafter ratified it on 7 January 2000.[1412] The ACRWC recognises that a child occupies a unique and privileged position in the African society and that for the full and harmonious development of his or her personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding and further, that due to the needs of a child's physical and mental development, he or she requires particular care with regard to health, physical, mental, moral and social development and he or she requires legal protection in conditions of freedom, dignity and security.[1413]

A child is defined as a human being below the age of eighteen years.[1414] A child is entitled to enjoyment of the rights and freedoms that are recognised and guaranteed in the Charter.[1415] The "child's or his or her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social

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1410 OAU Doc.CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999. See *C and Others v Department of Health and Social Development, Gauteng and Others* (CCT 55/11) [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) at par 25.

1411 OAU Doc.CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999. See *C and Others v Department of Health and Social Development, Gauteng and Others* (CCT 55/11) [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) at par 25.

1412 OAU Doc.CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999. See *C and Others v Department of Health and Social Development, Gauteng and Others* (CCT 55/11) [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) at par 25.

1413 ACRWC preamble.

1414 Article 1 of ACRWC.

1415 Article 3 of ACRWC.

origin, fortune, birth or other status" does not have a bearing on the child's rights.[1416] The best interest of a child shall be the primary consideration in all actions undertaken regarding the child.[1417]

A child has the right to privacy. Article 10 provides that no child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence.[1418] A child must not be subjected to attacks upon his honour or reputation, although his or her parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of the child.[1419] The child has the right to protection of the law against any such interference or attack.[1420]

A notable difference between the UNCRC and the ACRWC is that the UNCRC regards a child's best interests as 'a' primary consideration, whereas the ACRWC considers it 'the' primary consideration in all actions taken regarding children. Whilst the UNCRC regards the best interests of a child as an important consideration, the ACRWC considers it to be *the most important* consideration. In surrogacy matters, the commissioned child's best interests should be *the* primary consideration, especially because the *child* is the primary reason for the existence of the surrogacy process. The court must be satisfied of the nature and scope of the child's rights and future circumstances before the surrogacy process can be proceeded with. The use of the surrogacy process is built on the foundation of the child to be born. If the commissioning parent(s) did not have the need or the longing for a child, surrogacy should not be an option for him/her/them. The emphasis in the ACRWC on the child's best interests as *the* primary consideration rings true for surrogacy arrangements, including artificial fertilisation procedures.

A comparison of the protections afforded to children by the UNCRC, the ACRWC and the South African Constitution, shows that whilst the UNCRC protects a child against discrimination in article 2(1), the South African Constitution provides similar protection

1416 Article 3 of ACRWC.
1417 Article 4 of ACRWC.
1418 Article 10 of ACRWC.
1419 Article 10 of ACRWC.
1420 Article 10 of ACRWC.

in section 9(1) and the ACRWC protects the child against discrimination in article 26.3. The UNCRC protects the liberty of a child in article 37, which is similarly protected in the South African Constitution in section 12(2)(b) and article 5, respectively. The Constitution makes specific reference to bodily and psychological integrity. The ACRWC entrenches the liberty of the child in article 17.2.

The right to a family is guaranteed by the UNCRC in article 8 and in the SA Constitution in section 28(1)(b), whereas the ACRWC provides in article 19.1 that a child is entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. Interestingly, it is only the ACRWC that refers to the responsibility of a child towards his or her family and society (article 31). A child's right to privacy is protected in terms of section 14 of the Constitution, article 8 of the UNCRC and article 10 of the ACRWC. Finally, the principle of the best interests of a child is protected in section 28(2) of the Constitution, article 3.1 of the UNCRC and article 4 of the ACRWC.

The protection of children's rights in South Africa is strengthened by the similar provisions mirrored in the above-mentioned instruments. It is hoped that this strong international and legal framework will continue to guide South African courts in the interpretation of the rights of children in surrogacy arrangements and artificial fertilisation.

4. CONCLUSION

This chapter's focus on the constitutionality of some of the provisions in the Children's Act that have a bearing on children in surrogacy arrangements, including the international and regional human rights backdrop, reveals several shortcomings in the Children's Act and NHA that require revision.

The constitutional challenges to section 294 of the Children's Act in both *AB and another v Minister of Social Development* and *KB and another v Minister of Social Development* point to unfair discrimination against the pregnancy -and conception infertile persons who are excluded from concluding lawful surrogacy arrangements.

Establishing a genetical link to the commissioned child does not mean that it is and will be in that child's best interests. Refusing to expand the genetic link requirement of section 294 to include a genetic link between siblings is equally problematical. The High Court, in the case of *KB v Minister of Social Development*, could not find that section 294 of the Act is unconstitutional. The court further held that section 294 has nothing to do with the right of a minor child to have a sibling with the same genetic link and reiterated that the purpose of the section is to give clarity regarding the origin of a child.

A constitutional challenge to section 40 of the Children's Act happened twice in the Gauteng High Court—in the matter of *EJ and others v Haupt NO* and *VVJ and another v Minister of Social Development and another*. In the matter of *EJ and others v Haupt N.O*, the court concluded that section 40(1) is not unconstitutional as same-sex couples are included in the provisions of the section, whereas in the last-mentioned matter, section 40 was declared unconstitutional to the extent that it does not provide for a permanent life partner. As I have argued earlier, it is imperative that the provisions of the Children's Act accommodate the different forms of family that exist in present times.

Some medico-legal aspects relating to the regulation of surrogacy will be discussed in the next chapter. The discussion will turn more closely to infertility and the biological ability to reproduce, the advances in biotechnology and the different artificial fertilisation procedures. The difference between surrogacy and adoption will also be considered, as well as relevant ethical, social and religious issues. The interesting impact of epigenetics on the topic will also be explored.

CHAPTER 5

MEDICO-LEGAL ASPECTS RELATING TO THE REGULATION OF SURROGATE MOTHERHOOD

> Medicine has made extraordinary advances in responding to the desire of women (and their partners) to have a child. These advances, as it may be imagined, have not been free from moral and legal difficulties.[1421]

1. INTRODUCTION

Medical technological advances create moral, legal and ethical dilemmas that have a real impact on the society.[1422] The advances in obstetrics and gynaecology have created unexpected and unprecedented public interest in certain aspects of human reproduction, together with dilemmas not encountered before.[1423] Furthermore, the medical advances in treating infertility and in providing children to previously childless people, have brought together with the joy and happiness of parenting, thorny challenges regarding society's deeply held notions of what it means 'to parent' a child.[1424]

This chapter focuses on the salient medico-legal issues relating to surrogate motherhood, turning first to relevant medical and clinical aspects of assisted reproduction, their key role in surrogacy, as well as legal aspects related to the clinical aspects. Although the private-law consequences of surrogate motherhood are primarily regulated by chapter 19 of the Children's Act, the artificial fertilisation of the surrogate mother, which is a medical or clinical procedure, is governed by the NHA and relevant regulations, discussed in this chapter.

1421 Kennedy and Grubb *Medical Law* 758.

1422 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 423. Skosana 2017 *Obiter* 261. The author states that medical and technological advancements often create new legal minefields which require the law to develop at the same level and pace as the medical and/or technological advancements.

1423 Dada and McQuoid-Mason *Introduction to Medico-Legal Practice* 65.

1424 Dada and McQuoid-Mason *Introduction to Medico-Legal Practice* 65.

As alluded to elsewhere in this thesis, the acceptance of novel medical technology to facilitate reproduction hinges on societal beliefs of, and expectations regarding parenthood. Surrogacy is part of social changes that invoke a different view of the modern family.[1425] As Nicholson explains, the modern family is no longer characterised by the narrow traditional view of family as a married heterosexual couple with a child or children, as society recognises that families may take an entirely new form, encompassing, amongst others, same sex couples.[1426] The notion of the family has developed to embrace the right of all individuals to reproduce and to draw upon the medical technologies to assist them to reproduce.[1427] Different kinds of family life that are constitutionally protected have altered over time as a result of change in social practices and traditions.[1428] The introduction of IVF and the benefits associated with it, meant that for the law, advances in technology vis-à-vis the protection of rights associated with reproduction have been extended beyond its previous range.[1429] The protection of fundamental rights is impacted by developments in technology, even more so where the state has sanctioned the technological development.[1430]

1425 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 424. Dada and McQuoid-Mason *Introduction to Medico-Legal Practice* 65. The authors argue that because of the ethical implications raised by creating and manipulating human embryos, legal responses to reproductive technologies are especially difficult. Some of the ethical issues raised are the type of assisted reproduction technology available; the disposal of abandoned embryos; what it means to be a parent and who should become one; the use of foetal oocytes in assisted reproduction etcetera.

1426 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 424. Sloth-Nielson, J and van Heerden, B "The constitutional family developments in South African child and family law 2003-2013" 2014 *International Journal of Law, Policy and the Family* 28(1) 115. The authors state that the legal recognition of surrogate families entails a further step towards the diminution of biological connections as being the sole basis for constituting a family.

1427 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 424 Sloth-Nielson, J and van Heerden, B "The constitutional family developments in South African child and family law 2003-2013" 2014 *International Journal of Law, Policy and the Family* 28(1) 115. The authors further argues that once we accept that the law provides a framework for an alternative where biology dictates that the members of the family unit cannot themselves reproduce, the definition of 'a family' can no longer be pegged to biological, adoptive or kinship bonds. Thus, the prior diagnostic tools for the identification of 'family life' are no longer appropriate.

1428 *AB and Another v Minister of Social Development* at par 115.

1429 *AB and Another v Minister of Social Development* at par 113. At par 114. Technological advancements make surrogacy a viable option for those who are both conception and pregnancy infertile and who could only have children by means of adoption. Sec 294 thus take this right to make a reproductive decision away.

1430 *AB and Another v Minister of Social Development* at par 114. At par 126 the court pointed out that while surrogacy to have children is an ancient phenomenon, modern reproductive technologies have only recently enabled it to occur in the manner now governed by ch 19.

Even though in surrogacy, parentage and parenthood are shared by many for a period, the law has remained stuck on the very traditional understanding of legal parentage. As I have argued in the previous chapter, this understanding of parenthood is primarily based on the genetic relationship between a parent and a child:[1431]

> The requirement for a genetic link in surrogacy sits uneasily alongside provisions that recognise increasing diversity in family life and that emphasise the importance of social or psychological parentage ahead of the genetic connection.[1432]

Artificial fertilisation is a form of assisted reproduction that was made possible by the medical technological advances. Surrogacy as a form of assisted reproductive technology is increasingly used to overcome infertility,[1433] despite prior views by the medical profession that surrogacy should be an exceptional measure, considered as a last resort in view of all the medical, psychological and legal consequences associated with it.[1434] As defined in chapter 1 of this thesis, artificial fertilisation is a non-therapeutic procedure which bypasses the sterility of the male and the female without curing the cause of the sterility.[1435] As discussed in chapter 2, prior to the enactment of the NHA, the procedure was lawful, provided that the provisions of the now repealed Human Tissue Act and the applicable regulations at the time were adhered to.[1436] The Human Tissue Act controlled the removal and use of gametes and those obtained by removal or withdrawal was only allowed to be used for medical purposes or for artificial fertilisation.[1437] As stated already, the procedure is currently regulated by the NHA[1438] and the Regulations.[1439]

1431 Bracken, L "Surrogacy and the Genetic Link" 2020 *Child and Family Law Quarterly* 32(3) 303.

1432 Bracken, L "Surrogacy and the Genetic Link" 2020 *Child and Family Law Quarterly* 32(3) 303.

1433 Van Niekerk 2015 *PELJ* 398.

1434 SALC Project 65 at par 7.6.3 and par 8.2.1.

1435 LexisNexis *Family Law service* at par J107. SALRC Project 140 iii (summary of issue paper). Carstens and Pearmain *Foundational Principles* 181. The authors explain that assisted reproduction refer to fertility treatments which enhance the natural fertility of a person or cure their infertility and which is only one way of addressing difficulties with reproduction. The more extreme methods include AIH, AID and surrogate motherhood.

1436 SALC Project 65 at par 4.2.1.

1437 Sec 19 of Human Tissue Act. LexisNexis *Family Law service* at par J107.

1438 61 of 2003. Van Niekerk C "Strange (and incompatible) bedfellows: The relationship between the National Health Act and the regulations relating to artificial fertilisation of persons, and its impact on individuals engaged in assisted reproduction" 2017 *South African Journal of Bioethics and Law* 10(1) 32. The author points out that the Act and regulations has been characterised as 'flawed law'.

1439 Regulations relating to artificial fertilisation of persons 2012. Van Niekerk 2017 *SAJBL* 33-35. Van Niekerk, referring to the Regulations Relating to Artificial Fertilisation of Persons (GN R1165 GG 40312) of 30 September 2016, argues that several flaws exist in the regulations which raises some concern for the use of assisted reproduction. One such flaw relates to reg 17 of the regulations. (The wording of reg 17 wording is similar to the wording of reg 17 of the 2012 regulations). It is assumed that reg 17 refers to instances where donor gametes have been used.

Despite initial objection to artificial fertilisation in the 1960s, it has become morally acceptable as a means of assisted reproduction in South Africa over the past five decades.[1440] An evolution in medical technology relating to artificial insemination over the past few decades has led to surrogacy becoming an option for infertile couples.[1441]

2. INFERTILITY AND THE BIOLOGICAL ABILITY TO REPRODUCE

2.1 Introduction

The inability of a couple to conceive a child may be because of failure to conceive or failure to carry an embryo to a viable physical state. Either of these can be ascribed to a number of physiological and psychological factors that causes infertility.[1442] Infertility is described by the World Health Organisation as a "disease" of the male or female reproductive system, defined by the failure to fall pregnant after twelve months or more

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The purpose of the notification of defects and illnesses in this regulation is unclear and raises the important question of whether liability will ensue, and if so, who will be held liable. The author mentioned a few other flaws as well as inconsistencies between the NHA and the Children's Act. She states that whilst the inconsistencies are not fatal as far as assisted reproduction is concerned, they unfortunately do suggest an incompatibility in the existing legislative framework. It has the potential to frustrate the persons who engage in this form of reproduction. Jordaan, DW "A Constitutional critique on the regulations relating to artificial fertilisation of persons" 2017 *South African Journal of Bioethics and Law* 10(1) 30. Jordaan, referring to the Regulations Relating to Artificial Fertilisation of Persons (GN R1165 GG 40312) of 30 September 2016, maintains that the way in which the regulations deal with the aspect of artificial fertilisation treat the different types of artificial insemination with gamete donation differently. The author further argues that gamete donation by a known donor and sperm donation are examples of over-medicalisation. As a competent person must be involved in the process of artificial fertilisation, although it is possible for a woman to inseminate at herself at home, the author regards the regulations as obstructing the right of persons who use artificial fertilisation to establish a family. He provides the example of where a lesbian couple obtaining the semen from a friend inseminate one of the women at home. Both will technically be liable to be prosecuted in terms of reg 21 because a competent person was not involved in either the fertilisation or the donation. The author also avers that medical influence and supervision over artificial fertilisation and gamete donation is legally enforced without a good and constitutionally aligned reason.

1440 Carstens and Pearmain *Foundational Principles* 181-182. Skosana 2017 *Obiter* 263. Artificial insemination and surrogacy are the two recognised forms of artificial fertilisation in the Children's Act and the NHA.

1441 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 424.

1442 Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 43. Infertility can be attributed to male causes, cervical causes, uterine causes, tubal and peritoneal causes and ovarian causes for example. It is also possible that infertility is of multiple etiology. Nosarka and Kruger 2005 *SAMJ* 942-943. It is explained that the most common absolute indications are patients with an absent uterus, congenital uterine abnormality, an inoperable scarred uterus and previous total abdominal hysterectomy. SALRC Project 140 14 and 106.

of regular unprotected sexual intercourse.[1443] Primary infertility is ascribed to a problem with the production of gametes or of the implantation of the embryo.[1444] Secondary infertility, on the other hand, occurs when at least one prior pregnancy has been achieved but is followed by the failure to fall pregnant.[1445]

Ovum or sperm donation then becomes the secondary treatment of childlessness due to unsuccessful treatment of the primary condition.[1446] A couple's ability to produce is dependent upon normal interaction of a number of factors.[1447] The man must produce a large number of healthy sperm, which must traverse his reproductive system and be discharged into the healthy reproductive system of the woman.[1448] The sperm must penetrate the cervical mucus after deposit and ascend through the uterus to the fallopian tubes where fertilisation normally takes place.[1449] The woman must have an intact hypothalamic pituitary thyroid-ovarian-axis (functioning endocrine system) and she must develop and release an ovum into a patent and freely mobile fallopian tube for fertilisation.[1450] After fertilisation, the blastocyst must travel to the endometrial cavity where nidation must occur in an endometrium properly conditioned by hormone activity.[1451] Unfortunately, a slight defect in any one of these basic events in either the man or the woman can lead to infertility.[1452]

Factors which influence the prevalence of infertility are, among others, trends towards childbearing later in life; environmental factors such as infection from sexually transmitted diseases and occupational exposure; medical treatments such as those used for high blood pressure, stomach ulcer and cancer, including non-therapeutic

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1443 The definition is referred to to in ch 1, par 7.21.
1444 The definition is referred to to in ch 1, par 7.21.
1445 The definition is referred to to in ch 1, par 7.21.
1446 Mason, McCall Smith and Laurie *Law and Medical Ethics* 68.
1447 Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 43.
1448 Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 43.
1449 Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 43.
1450 Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 43.
1451 Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 43.
1452 Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 43. Fortunately, many problems can be and are corrected surgically of by the administration of medications at 44. Artificial fertilisation and/or *in vitro* fertilisation can be used in cases that cannot be treated by the conventional means.

drugs such as narcotics, alcohol and tobacco.[1453] Infertility, however, may be present in one partner or both partners or it can be traced to biochemical or immunological incompatibility between partners.[1454] Most of female infertility is due to ovulation disorders; tubal blockage; endometriosis and other causes, including abnormalities of the vagina or cervix, and mucus incompatibilities with sperm.[1455] Female infertility can be treated and some of the treatments include hormone or drug therapy, surgery and medically assisted reproduction technologies.[1456] Male infertility, on the other hand, typically results from decreased numbers or an absence of sperm in the semen, abnormal motility and structural abnormalities and all of which prevent the normal fertilisation of an egg.[1457] In some cases, infertile couples can be treated by using their own genetic material and in other cases, the treatment will involve the use of donated material which can be sperm, eggs or embryos.[1458]

2.2 Advances in biotechnology

Numerous advances have taken place in the sphere of human reproductive technology, as stated already.[1459] Artificial fertilisation is one of these advances. What started out as an effort to assist the infertile has transformed into a field that surpasses ordinary human expectations.[1460] Artificial fertilisation, broadly defined in chapter 1 of the thesis, involves from a clinical perspective the introduction of male sperm into a female patient by way of an intrauterine, paracervical, intravaginal or cervical cup deposition of pre-collected semen.[1461] Assisted reproductive technologies have made it possible that a surrogate does not have to be biologically related to the embryo that

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1453 Kennedy and Grubb *Medical Law* 758.
1454 Kennedy and Grubb *Medical Law* 758.
1455 Kennedy and Grubb *Medical Law* 758-759.
1456 Kennedy and Grubb *Medical Law* 759.
1457 Kennedy and Grubb *Medical Law* 759.
1458 Kennedy and Grubb *Medical Law* 759. The authors point out that it was the development of IVF procedures which raised concerns about the practices of medically assisted reproduction and which led to a call for regulation thereof. South African Research Council: *Guidelines on Ethics for Medical Researc*h 2nd Book (Reproductive Biology and Genetic Research) 2002 3
1459 Quinn, CM "Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting" 2018 *Journal of the American Academy of Matrimonial Lawyers* 31(1) 176. Biko J and Nene Z "Ethics aspects of third-party reproduction" 2017 *Obstetrics & Gynaecology Forum* 3 12.
1460 Van Niekerk 2017 *PELJ* 3.
1461 Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 44.

she is carrying through gestational surrogacy.[1462] Yet, as discussed earlier in this thesis, different moral, legal and ethical controversies arise with respect to artificial fertilisation because the method of creating life is not entirely natural.[1463] ART's may require the use of reproductive resources, such as eggs, sperm or wombs from third parties who may not intend to play a role in the rearing of the child to be born.[1464]

Heterosexual and same-sex couples, as well as single persons, who seek to have biologically related children often turn to clinics and agencies for sperm -or egg donors and gestational services.[1465] Relying on collaborative reproduction mostly involves persons unknown by the recipients, although some couples do prefer the use of a known third party.[1466] Reproduction is no longer limited to sexual intercourse as the range of technological advancements in this field and the increasing rate of infertility have made noncoital reproduction a common occurrence.[1467] As such, both artificial fertilisation and surrogacy may also be regarded as forms of noncoital reproduction.[1468]

2.3 Assisted reproduction procedures

Chapter one of this thesis refers briefly to some of the procedures discussed in this chapter. Because of the complexities relating to these procedures, a clear understanding of these processes is necessary, as some of these clinical processes have related legal consequences that may impact on notions of legal parenthood in the context of surrogacy, not to mention those that may lead to medico-legal liability.

There is a difference between assisted reproductive technology (ART) and assisted reproduction procedures. ART specifically refers to fertility treatments in which eggs or

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1462 Canner, S "Navigating surrogacy law in the non-united states: Why all states should adopt a uniform surrogacy statute" 2019 *Journal of Civil Rights and Economic Development* 33(2) 138.

1463 Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 44.

1464 SALRC Project 140 15. The medically assisted reproduction using third parties is also known as collaborative reproduction and it is widely recognised in many countries.

1465 SALRC Project 140 15.

1466 SALRC Project 140 16. The person can be unrelated or related. Where a family member is used, it is termed intrafamilial medically assisted reproduction which raises various ethical issues and it controversial.

1467 Van Niekerk 2017 *PELJ* 3.

1468 Van Niekerk 2017 *PELJ* 19.

embryos are handled,[1469] whereas assisted reproduction procedures refer to the different forms of artificial fertilisation and surrogacy.[1470] There are six different procedures of artificial fertilisation,[1471] namely: artificial fertilisation of a wife using her husband's semen (AIH);[1472] artificial fertilisation of a wife using a donor's semen (AID);[1473] uniting of the male and female gametes outside of the human body in a test tube and placing the resulting embryo in the womb of a female person (IVF and ET);[1474] gamete intra-fallopian transfer (GIFT);[1475] peritoneal oocyte and sperm transfer (POST);[1476] vaginal intro-peritoneal sperm transfer (VISPER)[1477] and surrogacy.[1478]

2.3.1 Medical and legal risks

Performing IVF requires a degree of skill beyond that of the average specialist gynaecologist.[1479] The IVF[1480] and ET[1481] process is not without any risks as a laparoscopy is done to remove the required ova.[1482] This entails a risk of possible

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1469 See definition in par 7.4, ch 1.

1470 Carstens and Pearmain *Foundational Principles* 181.

1471 Sec 1 of the National Health Act definition of artificial fertilisation (see definition in par 7.3, ch 1 above) includes artificial insemination, *in vitro* fertilisation, gamete intrafallopian tube transfer, embryo intrafallopian transfer or intracytoplasmic sperm injection.

1472 See par 7.18, ch 1 above for definition.

1473 See par 7.19, ch 1 above for definition.

1474 See par 7.5, ch 1 for definition. Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 48. IVF is when immature ova (oocytes) are removed from the prospective mother and placed in a culture medium and fertilised with sperm until the conceptus has reached the blastocyst stage. It is thereafter transplanted into the female's uterus where normal gestation thereafter proceeds. SALRC Project 140 14. At 183 it is also referred to as a form of medically assisted reproduction and it is stated that by 2012 an estimated 5 million babies were born because of medically assisted reproduction.

1475 See par 7.20, ch 1 for definition. SALRC Project 140 14.

1476 See par 7.20, ch 1 for definition.

1477 See par 7.22, ch 1 above for definition.

1478 See par 7.13, ch 1 above for definition. LexisNexis *Family Law service* at par J105. This procedure is when a woman, other than a man's wife, is impregnated with the man's semen by way of artificial fertilisation or by way of IVF and ET.

1479 LexisNexis *Family Law service* at par J115. At present there is a limited number of gynaecologists worldwide who have acquired the necessary skill and have trained laboratory staff to assist them in conceiving a child *in vitro* and then successfully implanting the resulting blastocyst into the mother's uterus.

1480 Mason, McCall Smith and Laurie *Law and Medical Ethics* 84. IVF is the standard treatment for childlessness because of blockage of the fallopian tubes. SALRC Project 140 14 – 15. It is stated that the success and availability of IVF raised the hopes of many infertile couples who have not been able to conceive because of infertility ascribed to blocked or absent fallopian tubes and male infertility and many more causes.

1481 Mason, McCall Smith and Laurie *Law and Medical Ethics* 84. Embryo transfer is the implantation of an embryo which has no genetic relationship either to the recipient or to her husband.

1482 LexisNexis *Family Law service* at par J115. Mason, McCall Smith and Laurie *Law and Medical Ethics* 85.

medical complications, including infection.[1483] It is possible that the recipient could be injured in the process of transplanting the blastocyst or the child may be born with defects as a result of the technical manipulations performed on the ova, or because it was conceived from a defective egg or sperm.[1484] The involvement of the gynaecologist when the procedure is completed places an additional responsibility on him or her in that he or she must conduct careful and detailed tests on the foetus to make sure that it is developing normally.[1485] Should the gynaecologist fail to do this, his or her conduct could amount to negligence and render him liable to a claim for damages should the child born be defective.[1486]

2.3.2 AIH and AID

The use of AIH is medically indicated when the deposition of the husband's semen by coitus is prevented as a result of three possible factors: (i) anatomical or psychological problems; (ii) poor mobility, paucity or otherwise defective sperm cells; or (iii) too small a volume of ejaculate.[1487] The use of AID is medically indicated for psychologically fit, emotionally stable parents under circumstances of: (i) azoospermia (absolute male sterility); (ii) oligospermia (less than ten to fifteen million sperm per cubic centimetre semen with infertility of long duration); (iii) existence of some hereditary disease in the husband, which makes propagation inadvisable for eugenic reasons; and (iv) an Rh incompatibility which can be anticipated to cause an abnormal baby (when the incompatibility cannot be overcome by other techniques).[1488]

Donor insemination (AID) introduces two additional concepts into the management of infertility.[1489] Firstly, the procedure expands the confines of a private matter between two persons in a close emotional relationship as it involves a third party whose

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1483 LexisNexis *Family Law service* at par J115.
1484 LexisNexis *Family Law service* at par J115.
1485 LexisNexis *Family Law service* at par J115.
1486 LexisNexis *Family Law service* at par J115. It is also stated that an underqualified gynaecologist who attempts this technique will also expose himself to claims for damages. Nosarka and Kruger 2005 *SAMJ* 943. It is important to note that gynaecologists have no legal or moral obligation to partake in a surrogacy agreement.
1487 Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 45.
1488 Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 45.
1489 Mason, McCall Smith and Laurie *Law and Medical Ethics* 76.

contribution lies at the heart of the enterprise.[1490] Secondly, the sperm donation may result in the production of an excess of gametes and, therefore, to the creation of options for their storage and later use.[1491]

2.2.3 Conditions for performing in vitro fertilisation (IVF)

The 2012 Regulations relating to artificial fertilisation of persons defines a competent person as a person who is registered as such in terms of the Health Professions Act[1492] who is a medical practitioner who specialises in gynaecology with training in reproductive medicine, or a medical scientist, a medical technologist, and a clinical technologist with training in reproductive biology and related laboratory procedures.[1493] It is only a competent person that is allowed to remove or withdraw a gamete or cause a gamete to be removed or withdrawn from the body of the gamete donor for the purpose of artificial fertilisation.[1494] A donor of gametes may be compensated only for any reasonable expenses incurred by him or her in order to effect the donation.[1495] An electronic database shall be established by the Director-General where all the information regarding the donations of gametes and embryos will be kept.[1496]

In circumstances where a maximum of six children have been conceived by using the gametes of the donor for artificial fertilisation, the competent person may not further

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1490 Mason, McCall Smith and Laurie *Law and Medical Ethics* 76. At 77 the authors point out there are persons who object strongly to AID on the grounds that the basis of the marriage bond is compromised by the wife's pregnancy through involving another man. They explain that adultery could not be held to have taken place in light of the fact that there was not sexual contact between the wife and the donor. Further, AID without the consent of the husband may be taken as constituting cruel and unreasonable conduct for divorce proceedings. South African Research Council: *Guidelines on Ethics for Medical Researc*h 2nd Book (Reproductive Biology and Genetic Research) 2002 3. The concerns in respect of a third-party gametes are mainly due to potential psychological problems, the risk of transmitting serious genetic disorders and the danger of transmitting infectious diseases, especially AIDS.

1491 Mason, McCall Smith and Laurie *Law and Medical Ethics* 76.

1492 56 of 1974.

1493 Reg 1 of Regulations relating to artificial fertilisation of persons 2012.

1494 Reg 3(1) of Regulations relating to artificial fertilisation of persons 2012. Reg 3(2) determines that the removed gametes must be stored in a frozen state or cryopreserved.

1495 Reg 4 of Regulations relating to artificial fertilisation of persons 2012. Biko J and Nene Z "Ethics aspects of third-party reproduction" 2017 *Obstetrics & Gynaecology Forum* 3 13. The author points out that the South African society of Reproductive Medicine recommends that donors of eggs be paid a stipend for the discomfort of undergoing the donation process. Importantly, the author stated that it is immoral and unethical should gametes be treated as commodities that are available to the highest bidder as this will make gamete donation inaccessible to the average citizen who really needs it.

1496 Reg 5 of Regulations relating to artificial fertilisation of persons 2012.

remove or withdraw a gamete from that donor.[1497] In the event that the donor has conceived six children, the competent person shall inform the donor that he or she may not donate any further gametes.[1498] Gametes may not be removed or withdrawn from a donor if the competent person has not opened a gamete donor file (if one has not previously been opened for the donor);[1499] submitted the information obtained to the central data bank;[1500] and established from the central data bank that no more than six children have been conceived through artificial fertilisation of a person in using that donor's gametes (if it is a known donor).[1501] Further, the donor must provide a signed statement where he or she states whether he or she has previously made a donation of gametes.[1502] Informed consent must be obtained from the donor;[1503] the age of the donor must be determined[1504] and it must be established if the donor has undergone medical tests for sexually transmissible diseases and a semen analysis (male donor) on two occasions (not more than three months apart and one month prior to that donation of the gametes).[1505] The competent person must also ascertain if the female donor has undergone a gynaecological examination prior to stimulation for the withdrawal of the gametes;[1506] question the donor regarding his or her family history and any possible genetic conditions and mental illness[1507] and ensure that a written confirmation and a psychological evaluation of both parties are provided in the event that the donor and the recipient know each other.[1508]

1497 Reg 6(a) of Regulations relating to artificial fertilisation of persons 2012, Reg 6(c) determines that a competent person must immediately relay all the information in respect of that donor, the removal or withdrawal of a gamete and the artificial fertilisation to the central data bank.

1498 Reg 6(b) of Regulations relating to artificial fertilisation of persons 2012.

1499 Reg 7(a) of Regulations relating to artificial fertilisation of persons 2012. The competent person shall allocate a unique identification number in respect of the donor.

1500 Reg 7(b) of Regulations relating to artificial fertilisation of persons 2012.

1501 Reg 7(c) of Regulations relating to artificial fertilisation of persons 2012.

1502 Reg 7(d) of Regulations relating to artificial fertilisation of persons 2012. The donor must indicate where and when such donation took place.

1503 Reg 7(e) of Regulations relating to artificial fertilisation of persons 2012. The informed consent is in respect of a physical examination and questioning by a competent person, removal or withdrawal of a gamete for testing, analysing or other processing as may be deemed necessary by the competent person, the information as in terms of reg 8(1)(a)(ii), (iii) and (iv), (b), (c) and (f) must be made available to the recipient person and the competent person performing the artificial fertilisation, information as in terms of reg 8(2)(c) must be made available to the Director-General and the information as in terms of reg 8(2)(c) must be submitted to the central data bank.

1504 Reg 7(f) of Regulations relating to artificial fertilisation of persons 2012.

1505 Reg 7(g) of Regulations relating to artificial fertilisation of persons 2012.

1506 Reg 7(h) of Regulations relating to artificial fertilisation of persons 2012.

1507 Reg 7(i) of Regulations relating to artificial fertilisation of persons 2012. Information must be obtained regarding a possible genetic condition or carrier status thereof and mental illness in respect of any child, brother, sister, parent or grandparents of the donor.

1508 Reg 7(j) of Regulations relating to artificial fertilisation of persons 2012.

Apart from the above prerequisites for the removal or withdrawal of gametes in terms of regulation 7, similar prerequisites are set out for the artificial fertilisation and embryo transfer in regulation 11. Before effecting the artificial fertilisation or embryo transfer, the competent person must ensure that a recipient file is opened if such file is not opened yet,[1509] informed consent must be obtained from the recipient,[1510] it must be ensured that both the donor's and recipient's particulars and wishes are obeyed[1511] and that the recipient and donor is not a carrier of a serious genetic condition.[1512]

Regulation 12 determines that no more than three zygotes or embryos may be transferred to the recipient during an embryo transfer procedure except if a specific medical indication requires the contrary.[1513] Regulation 14 determines that the competent person must record the request of the recipient in respect of the population and the religious group of the donor whose gametes will be used for the artificial fertilisation.[1514] Regulation 17 provides for the testing on the child (born as a result of artificial fertilisation) by the authorised institution that effected the artificial fertilisation or embryo transfer if he or she displays any genetic disorder or suffers from a mental illness in order to ascertain whether the relevant disorder or mental illness results from the donor or the recipient.[1515] It is important that a parent who discovers a disorder or mental illness in his or her child born as a result of artificial fertilisation must report this to the authorised institution who effected the said artificial fertilisation.[1516]

1509 Reg 11(a) of Regulations relating to artificial fertilisation of persons 2012. The recipient shall have a unique identification number allocated to him or her.

1510 Reg 11(b) of Regulations relating to artificial fertilisation of persons 2012. The consent relates to the physical examination and questioning by the competent person, removal or withdrawal of a gamete from the donor's body for purposes of testing, analysing or other processing of the gamete by the competent person, artificial fertilisation of, or the embryo transfer to herself, and information as in terms of reg 13(2)(c) must be made available to the central data bank.

1511 Reg 11(c)(i) and (ii) of Regulations relating to artificial fertilisation of persons 2012.

1512 Reg 11(c)(iii) of Regulations relating to artificial fertilisation of persons 2012. In the event that the recipient or donor should be a carrier of a serious genetic condition, they are tested to determine whether they are such genetic carriers and should both be such carriers or the donor is a carrier, a gamete of the donor may not be used for the artificial fertilisation of or the embryo transfer to the recipient.

1513 Reg 12 of Regulations relating to artificial fertilisation of persons 2012.

1514 Reg 14(1)(a)(iii) of Regulations relating to artificial fertilisation of persons 2012.

1515 Reg 17(1)(a) of Regulations relating to artificial fertilisation of persons 2012. Reg 17(1)(b) determines that the authorised institution that effected the donation of the gametes should be notified in writing of the disorder or mental illness and any tests that was carried out regarding the disorder or mental illness together with the results of the tests and their view on the disorder or the mental illness should the defect be traced back to the donor.

1516 Reg 17(2) of Regulations relating to artificial fertilisation of persons 2012.

Consent must be obtained before the gametes required for the artificial fertilisation, may be removed from the body of a living person.[1517] In providing informed consent, such person from whom gametes are removed should have full knowledge and appreciation of the techniques, risks and consequences involved.[1518]

2.2.4 Prohibitions and offences

The NHA and Regulations provides for the control of and use of gametes and more specifically for artificial fertilisation of persons. Regulation 21 determines that it is an offence should any person contravene or fail to comply with any provision of the regulations.

Section 56 of the NHA determines that gametes may not be removed from a mentally ill person or a minor for any medical purpose.[1519] Further, no gamete from a donor younger than eighteen years old may be used for artificial fertilisation.[1520] Disclosing the identity of any donor or any recipient or any matter related to the artificial fertilisation of such gametes or any reproduction that resulted from the artificial fertilisation, except in circumstances where a law provides otherwise or where a court so orders, is prohibited.[1521]

Not only are the suitably qualified medical practitioners involved with artificial fertilisation obliged to comply with the relevant provisions of the NHA and Regulations, but they must obtain their patients' informed consent before the insemination is carried out, otherwise it could, among others, be regarded as unprivileged touching.[1522] Full informed consent requires that the medical practitioner must advise the couple of the medical risks and chances for success involved and the possibilities that an abnormal

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1517 Sec 55(a) of the National Health Act (Previously sec 18 of the Human Tissue Act 65 of 1983).

1518 LexisNexis *Family Law service* at par J106. There is a rebuttable presumption that both persons gave their consent in this regard Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 46.

1519 Sec 56(2)(i) and (iii).

1520 Reg 10(1)(c) of Regulations relating to artificial fertilisation of persons 2012. The gamete of a minor donor may only be used for artificial fertilisation in the case of a medical indication.

1521 Reg 19 of Regulations relating to artificial fertilisation of persons 2012.

1522 Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 46. The husband's consent to the AID is often the deciding factor in legal battles over custody and support should divorce follow the birth of the child.

child might be born despite all the precautions taken in selecting the donor and performing the procedure.[1523] Further, the couple should be advised of potential psychological effects which might affect them, the child or the marital and familial relationships.[1524] Couples who have doubts regarding the legal status of the child to be born and other legal complications which might result, are advised to consult an attorney that specialises in this field.[1525] Finally, should a medical practitioner artificially fertilises a woman without her consent, and the artificial fertilisation is carried out in secret, it will constitute an invasion of her bodily integrity and therefore amounts to assault.[1526] Such action will also constitute a violation of the woman's constitutional and common law personality rights, which could lead to a claim for damages.[1527] In the event that a medical practitioner is negligent in the selection of semen causing a defective child to be born, the medical practitioner could possibly also face an action for wrongful life.[1528]

2.2.5 The donor

A gamete donor is defined as a living person from whose body a gamete or gametes are removed or withdrawn for the purpose of artificial fertilisation.[1529] The competent person[1530] must, before removal or withdrawal of a gamete, ascertain the age of the donor;[1531] that the donor has undergone medical tests for sexually transmissible diseases; a semen analysis (male donor);[1532] and a female donor has undergone a gynaecological examination prior to stimulation for the withdrawal of gametes.[1533]

1523 Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 46.

1524 Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 46.

1525 Palm MT and Hirsch HL "Infertility and sterility: Legal implications of artificial conception" 1982 *Medicine and Law* 1 46.

1526 LexisNexis *Family Law service* at par J119. Dhai and McQuoid-Mason *Bioethics, Human Rights and Health Law* 144. The medical practitioner can be charged with sexual assault under the Sexual Offences and Related Matters Amendment Act 32 of 2007.

1527 Dhai and McQuoid-Mason *Bioethics, Human Rights and Health Law* 144.

1528 Dhai and McQuoid-Mason *Bioethics, Human Rights and Health Law* 144. The authors use the examples of obtaining semen from a donor who suffers from venereal disease or where the donor is too closely related to the recipient.

1529 Reg 1 of Regulations relating to artificial fertilisation of persons 2012.

1530 See definition in par 5.4.3 above.

1531 Reg 7(f) of Regulations relating to artificial fertilisation of persons 2012.

1532 Reg 7(g)(i) and (ii) of Regulations relating to artificial fertilisation of persons 2012.

1533 Reg 7(h) of Regulations relating to artificial fertilisation of persons 2012.

Further, the competent person must enquire about the donor's family history and regarding possible genetic conditions.[1534]

Where the donor and the recipient are known to each other, the competent person must ensure that a written confirmation is received by both the persons and a psychological evaluation is done involving both of them.[1535] The recording of the information is important and the necessary information, as determined by regulation 8(1)(a) to 8(g), must be recorded and the relevant documentation must be in the donor's file before a gamete is withdrawn or removed from the donor.[1536] Certain particulars must be made available to the recipient and the competent person who will perform the artificial fertilisation.[1537] The competent person is not allowed to make the gamete donor file, or any information contained therein, available to any person except someone acting under his or her supervision and except in terms of legislation or a court order.[1538]

2.2.6 The recipient

The regulations relating to the artificial fertilisation of persons define a recipient as:

> a female person in whose reproductive organs a male gamete or gametes are to be introduced by other than natural means; or in whose uterus/womb or fallopian tubes a zygote or embryo is to be placed for the purpose of human reproduction.[1539]

Regulations 11 and 14 sets out the provisions in respect of the recipient. The recipient must provide the competent person with informed consent in respect of a physical examination; the removal or withdrawal of gametes for testing; to undergo the artificial fertilisation or embryo transfer; and that her information may be made available to the central data bank.[1540] As stated already, a maximum of three zygotes or embryos may

1534 Reg 7(i) of Regulations relating to artificial fertilisation of persons 2012.
1535 Reg 7(j)(i) and (ii) of Regulations relating to artificial fertilisation of persons 2012.
1536 Reg 8(1) of Regulations relating to artificial fertilisation of persons 2012.
1537 Reg 8(2)(b) of Regulations relating to artificial fertilisation of persons 2012. Particulars in terms of reg 8(1)(a)(ii), (iii) and (iv), (b), (c) and (f); and the identification number (reg 7(a)).
1538 Reg 8(2)(d) of Regulations relating to artificial fertilisation of persons 2012.
1539 Reg 1 of Regulations relating to artificial fertilisation of persons 2012.
1540 Reg 11(b)(i) to (iv) of Regulations relating to artificial fertilisation of persons 2012.

be transferred to the recipient during an embryo transfer procedure, except in circumstances where there is a specific medical indication to the contrary.[1541]

3. SURROGACY VERSUS ADOPTION

Surrogacy provides a would-be parent with an opportunity to have a child that is biologically linked to him or her. Although another woman will carry the child for the commissioning mother, surrogacy remains a means through which the commissioning parent(s) can have a family that includes a child who is biologically related to them.[1542] Children conceived by artificial fertilisation in a surrogacy arrangement are described as children who are brought into a loving and caring environment.[1543] Further, these children are more likely to be better adjusted than the children conceived normally and born unwanted into an undesirable environment.[1544] In surrogacy, "life is not cheapened by this process, it is created and cherished."[1545]

Adoption, on the other hand, is a juristic process through which parental authority over a child is terminated and it is vested in the adoptive parents.[1546] Adoption has been suggested as an alternative to surrogacy for those persons who do not meet the genetic prerequisite of section 294.[1547] Adoption, in contrast to surrogacy, is subject to age restrictions, not to mention the fact that the supply of babies for adoption is far outstripped by the demand.[1548] As a result of the adoption process having limitations of its own, it may exclude certain persons from becoming parents, which suggests that adoption may not provide a possibility for certain infertile persons.[1549] Adoption is different from surrogacy in that surrogacy agreements are concluded prior to the child's birth, whereas adoption in most cases happens after the child's birth.[1550] Thus, in surrogacy the commissioning parents are guaranteed a new-born child compared to

1541 Reg 12 of Regulations relating to artificial fertilisation of persons 2012.
1542 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 424.
1543 SALC Project 65 at par 2.3.1.
1544 SALC Project 65 at par 2.3.1.
1545 SALC Project 65 at par 2.3.1. The SALC referred to this quote from Eaton.
1546 Report of the Ad Hoc Committee 9.
1547 Van Niekerk 2015 *PELJ* 414.
1548 Nicholson 2013 *SAJHR* 497. Louw 2013 *THRHR* 571.
1549 Van Niekerk 2015 *PELJ* 415.
1550 Van Niekerk 2015 *PELJ* 415.

adoption where a new-born child is not a guarantee.[1551] Van Niekerk describes the most important difference between adoption and surrogacy as follows: with adoption, the issue is "how best to care for the adoptive child now that the birth family cannot", whereas with surrogacy it is "how best to bring a child into the world and into a family that desires a child".[1552] The notion that one is an alternative for the other is a huge misconception given the differences between the processes.[1553]

There are thus clear and important psychological differences between becoming a parent through adoption and having a child through surrogacy.[1554] In the case of *AB and another v Minister of Social Development*, Khampepe J rightly observes that:

> While the end result of both processes is that a person becomes the parent of a child genetically unrelated to them, the nature of the relationship between parent and child is substantially different.[1555]

It was accepted in the matter of *AB and another v Minister of Social Development*[1556] that an emotionally significant parent-child bond may develop between the commissioning parent and the child during the pregnancy.[1557] Thus, this difference in process may have implications for how the commissioning parent and the child relate to one another once the child is born, a difference that goes beyond the superficial similarity that both processes result in a commissioning parent(s) having a child that is not genetically related to them.[1558] Moreover, with adoption, the infertile couple are placed on a long waiting list after going through a complex selection process,[1559] whereas in the case of surrogacy, the couple may only need to wait the nine months of normal gestation in the event of a successful surrogacy agreement.[1560]

1551 Van Niekerk 2015 *PELJ* 415.
1552 Van Niekerk 2015 *PELJ* 415.
1553 Van Niekerk 2015 *PELJ* 415.
1554 *AB and another v Minister of Social Development* at par 180.
1555 *AB and another v Minister of Social Development* at par 180. At par 181-182 the court explained the difference between adoption and surrogacy and stated that the difference is especially important against the backdrop of infertility. Expert evidence shows that the choices made during the surrogacy process often have a strong psychological healing function that ameliorates the negative psychological effects of infertility. The second difference is that the commissioning parents are often intimately involved in the surrogate's pregnancy process.
1556 2017 (3) BCLR 267 (CC); 2017 (3) SA 570 (CC).
1557 *AB and another v Minister of Social Development* at par 184.
1558 *AB and another v Minister of Social Development* at par 184-185.
1559 SALC Project 65 at par 2.3.2.
1560 SALC Project 65 at par 2.3.2. It was argued that adoption provides a solution for a situation that already exist whereas surrogacy creates a situation that is prone to all kinds of problems.

There might be different reasons for different persons for wanting to use a surrogate mother. This thesis has already explained that surrogacy has become a possible option for the growing number of infertile couples and individual persons who wish to have children of their own.[1561] Surrogacy provides the commissioning parent(s) with the chance to experience the pregnancy with the surrogate and to make sure that the baby receives the appropriate prenatal care.[1562] In contrast to adoption, surrogacy intentionally brings into the world a child whose genealogy (pedigree) is blurred.[1563] It is clear from the provisions of section 295(a) of the Children's Act that there is no closed list for what the possible causes of the inability to give birth must be, just as long as the condition is permanent and irreversible,[1564] for example, where a woman does not have a uterus;[1565] has a structural abnormality to her uterus or has fibroids or scar tissue inside the uterus; or has no ova (eggs) or unhealthy ova.[1566] The question arises whether a commissioning mother who is fertile but who suffers from a permanent illness, would fall under this provision. Other examples are where the mother has a medical condition that would make pregnancy dangerous, for example, severe heart disease; kidney disease; diabetes; severe preeclampsia or a history of breast cancer.[1567] In the judgment of *APP and another v NKP,*[1568] Bozalek J concludes that a narrow interpretation of section 295(a) would be at odds with the apparent purpose of chapter 19 which were designed to provide an opportunity to persons who would not otherwise be able to have a child genetically related to them to do so through the use of surrogacy.[1569] The term 'not able to give birth' was interpreted as being unable to give birth without a significant medical risk to the health or the life of the mother.[1570] I agree with the interpretation of Bozalek J that section 295(a) must not be interpreted narrowly. It is simply unreasonable, unfair and unjustified to force a woman with a

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1561 SALRC Project 140 81. Iannacci, B.R "Why New York should legalize surrogacy: A comparison of surrogacy legislation in other states with current proposed surrogacy legislation in New York" 2018 *Touro Law Review* 34(4) 1242. Surrogacy is the only option for male couples should they want to have genetically linked children.

1562 Iannacci, B.R "Why New York should legalize surrogacy: A comparison of surrogacy legislation in other states with current proposed surrogacy legislation in New York" 2018 *Touro Law Review* 34(4) 1242.

1563 SALC Project 65 at par 2.3.2.

1564 Discussion in par 3.5.4 above.

1565 SALRC Project 140 81.

1566 SALRC Project 140 82.

1567 SALRC Project 140 82.

1568 2021 JDR 1650 (WCC)/(17962/2020) [2021] ZAWCHC 69 (11 March 2021). The case was discussed in detail in par 3.10.1 above.

1569 *APP and another v NKP* at par 24.

1570 *APP and another v NKP* at par 25.

permanent illness or medical condition to carry a baby to term and to give birth to that baby knowing the risks to both the woman and the baby. The husband and/or partner will be forced to face the risk of losing both the mother and the child. Regulations on this exact issue, namely of what constitutes a permanent inability to give birth is needed. In other words, is it a physical condition that is required, or another kind of risk with similar dire consequences?

4. ETHICAL, SOCIAL AND RELIGIOUS ISSUES

It is apt to start this section with the following quote from the Law Commission on the impact of surrogacy:

> Whereas different family patterns have developed over the centuries, surrogacy was thrust unexpectedly on humanity. The formulation of adequate policy and procedures to the benefit of those concerned and society is hampered by the rapidity of developments, the complicated impact of surrogacy on established values and the uncertainty with regard to human behaviour that emanate from the new developments.[1571]

Disagreements regarding the morality of aspects relating to surrogacy arrangements are thus very likely,[1572] as problems relating to reproductive health are regularly influenced by values, culture, traditions, social practices and laws.[1573]

Dhai and McQuoid-Mason regard reproductive health not just a health issue, but also an issue of development and human rights.[1574] As a diverse nation with different population and religious groups, ethical values for different groups in the community may differ sharply—values that are acceptable to one group may not be acceptable to another group.[1575] Pyrce explains that when surrogacy turns the traditional ideas of parentage upside down, countries struggle to find effective regulations that protect their own citizens while still recognising the increasingly global nature of modern society.[1576]

Biko and Nene discuss the dilemma that arises when patients have to abide by the rules of religions and faith, despite third party (donor-assisted) reproduction being

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1571 SALC Project 65 at par 6.4.2.
1572 SALC Project 65 at par 2.2.1
1573 Dhai and McQuoid-Mason *Bioethics, Human Rights and Health Law* 139.
1574 Dhai and McQuoid-Mason *Bioethics, Human Rights and Health Law* 139.
1575 SALC Project 65 at par 2.2.2.
1576 Pyrce, C "Surrogacy and citizenship: A conjunctive solution to a global problem" 2016 *Indiana Journal of Global Legal Studies* 23(2) 927.

permitted in law.[1577] Some religious beliefs proscribe the conception of a child through any means other than through sexual intercourse within a lawful marriage.[1578] ART, for example, is not accepted by the Vatican as an appropriate means of creating a family and they further do not accept third party reproduction.[1579] The Catholic Church (Catholicism) teaches that children are a gift from God and the child must be conceived and carried naturally by the married woman and her husband which means that the adding of a third party to the process is immoral.[1580] They believe that modern fertility procedures do harm to the dignity of a person and the institution of marriage.[1581]

The Anglican and Protestant faiths appear not to object to either assisted or third-party reproduction.[1582] Islamic law regards surrogacy as synonymous to adultery which means that the child born as a result thereof does not have a legal lineage.[1583] More modern Muslims, however, believe that the process of surrogacy and IVF can be

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1577 Biko J and Nene Z "Ethics aspects of third-party reproduction" 2017 *Obstetrics & Gynaecology Forum* 3 14. "Believes, religion and faith are not usually subjected to ethical principles but in secular countries like South Africa, patients have a choice to practice the faith or to reject it."

1578 SALC Project 65 at par 2.2.3. Biko J and Nene Z "Ethics aspects of third-party reproduction" 2017 *Obstetrics & Gynaecology Forum* 3 14.

1579 Biko J and Nene Z "Ethics aspects of third-party reproduction" 2017 *Obstetrics & Gynaecology Forum* 3 14. Deonandan, R "Thoughts on the ethics of gestational surrogacy: perspectives from religions, Western liberalism, and comparisons with adoption" 2020 *Journal of Assisted Reproduction and Genetics* 37 269–279.

1580 What does religion say about the morality of surrogacy? https://www.americansurrogacy.com/blog/what-does-religion-say-about-the-morality-of-surrogacy/#:~:text=Religious%20Views%20on%20Surrogacy&text=Instead%2C%20the%20Church%20teaches%20that,this%20process%20is%20considered%20immoral. (11 December 2017) (accessed on 5 January 2023). Sukhanova Anna (2019) "Surrogacy and religion" https://surrogacybypons.com/surrogacy-and-religion/ (accessed 5 January 2023).

1581 Deonandan, R "Thoughts on the ethics of gestational surrogacy: perspectives from religions, Western liberalism, and comparisons with adoption" 2020 *Journal of Assisted Reproduction and Genetics* 37 269–279.

1582 Biko J and Nene Z "Ethics aspects of third-party reproduction" 2017 *Obstetrics & Gynaecology Forum* 3 14.

1583 SALC Project 65 at par 2.2.8. Biko J and Nene Z "Ethics aspects of third-party reproduction" 2017 *Obstetrics & Gynaecology Forum* 3 14. Third party reproduction is completely outlawed in countries, such as Egypt and Saudi Arabia because the Sunni Muslims are in majority in those countries. In countries such as Iran and Lebanon third party reproduction are permissible and there, the Shi'ite Muslim are in majority. What does religion say about the morality of surrogacy? https://www.americansurrogacy.com/blog/what-does-religion-say-about-the-morality-of-surrogacy/#:~:text=Religious%20Views%20on%20Surrogacy&text=Instead%2C%20the%20Church%20teaches%20that,this%20process%20is%20considered%20immoral. (11 December 2017) (accessed on 5 January 2023). Deonandan, R "Thoughts on the ethics of gestational surrogacy: perspectives from religions, Western liberalism, and comparisons with adoption" 2020 *Journal of Assisted Reproduction and Genetics* 37 269–279.

allowed as long as the semen and the ovum come from a married couple.[1584] In general, Islam accepts ART but is opposed to surrogacy.[1585]

The liberal religious groups of the Jewish faith (Judaism) accepts ART and third-party reproduction, as Jewishness is seen to be conferred by the mother through the act of gestation and giving birth to the child.[1586] The conservative Jewish groups, on the other hand, do not approve of the process of surrogacy.[1587] Views differ regarding the use of donor sperm and legitimacy remains an issue.[1588] It would seem that their belief is that the commissioning parents are excluded from recognised parentage if they have no genetic link and no physical role in the arrival of the child into the world.[1589]

Buddhism accepts the use of surrogacy because it does not regard procreation as a moral duty.[1590] The Buddhist societies appear to be liberal with regard to the aspect of

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1584 What does religion say about the morality of surrogacy? https://www.americansurrogacy.com/blog/what-does-religion-say-about-the-morality-of-surrogacy/#:~:text=Religious%20Views%20on%20Surrogacy&text=Instead%2C%20the%20Church%20teaches%20that,this%20process%20is%20considered%20immoral. (11 December 2017) (accessed on 5 January 2023). Sukhanova Anna (2019) "Surrogacy and religion" https://surrogacybypons.com/surrogacy-and-religion/ (accessed 5 January 2023).

1585 Deonandan, R "Thoughts on the ethics of gestational surrogacy: perspectives from religions, Western liberalism, and comparisons with adoption" 2020 *Journal of Assisted Reproduction and Genetics* 37 269–279.

1586 Biko J and Nene Z "Ethics aspects of third-party reproduction" 2017 *Obstetrics & Gynaecology Forum* 3 15. What does religion say about the morality of surrogacy? https://www.americansurrogacy.com/blog/what-does-religion-say-about-the-morality-of-surrogacy/#:~:text=Religious%20Views%20on%20Surrogacy&text=Instead%2C%20the%20Church%20teaches%20that,this%20process%20is%20considered%20immoral. (11 December 2017) (accessed on 5 January 2023).

1587 What does religion say about the morality of surrogacy? https://www.americansurrogacy.com/blog/what-does-religion-say-about-the-morality-of-surrogacy/#:~:text=Religious%20Views%20on%20Surrogacy&text=Instead%2C%20the%20Church%20teaches%20that,this%20process%20is%20considered%20immoral. (11 December 2017) (accessed on 5 January 2023). Sukhanova Anna (2019) "Surrogacy and religion" https://surrogacybypons.com/surrogacy-and-religion/ (accessed 5 January 2023).

1588 Deonandan, R "Thoughts on the ethics of gestational surrogacy: perspectives from religions, Western liberalism, and comparisons with adoption" 2020 *Journal of Assisted Reproduction and Genetics* 37 269–279.

1589 Deonandan, R "Thoughts on the ethics of gestational surrogacy: perspectives from religions, Western liberalism, and comparisons with adoption" 2020 *Journal of Assisted Reproduction and Genetics* 37 269–279.

1590 What does religion say about the morality of surrogacy? https://www.americansurrogacy.com/blog/what-does-religion-say-about-the-morality-of-surrogacy/#:~:text=Religious%20Views%20on%20Surrogacy&text=Instead%2C%20the%20Church%20teaches%20that,this%20process%20is%20considered%20immoral. (11 December 2017) (accessed on 5 January 2023). Sukhanova Anna (2019) "Surrogacy and religion" https://surrogacybypons.com/surrogacy-and-religion/ (accessed 5 January 2023).

ART.[1591] Christianity reveals a few examples of what can be referred to as "traditional surrogacy" deriving from the Bible, for example, Bilha (Jacob's sister-in-law) and Jacob and Hagar (the servant) and Abram.[1592] Today, the surrogate will be fertilised through IVF and not through the sexual act.[1593] Christianity believes that marriage is between two people and children should be born from that unity.[1594] It is believed that to have children is not a right but a gift from God and to use surrogacy because of arrogance against God, constitutes a sin. However, if surrogacy is used after seeking God's will and guidance, it will be seen as an acceptable alternative for the infertile person.[1595] Christianity thus generally accepts the process of ART but is in general opposed to surrogacy.[1596]

Surrogate motherhood and artificial fertilisation may also complicate the conventional parent-child arrangement. For example, a child born as a result of ART after using donated gametes and a surrogate, may have as many as five persons who could all be said to be the parents of that child: the intending rearing parents who are not genetically related to the child; the sperm donor, who is the biological father; the egg donor, who is the genetic mother; and the surrogate or gestational mother who will be carrying the child.[1597] In other instances, a three-parent IVF scenario is possible, in that

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1591 Deonandan, R "Thoughts on the ethics of gestational surrogacy: perspectives from religions, Western liberalism, and comparisons with adoption" 2020 *Journal of Assisted Reproduction and Genetics* 37 269–279.

1592 Sukhanova Anna (2019) Surrogacy and religion: https://surrogacybypons.com/surrogacy-and-religion/ (accessed 5 January 2023).

1593 Sukhanova, A (2019) Surrogacy and religion: https://surrogacybypons.com/surrogacy-and-religion/ (accessed 5 January 2023).

1594 What does the bible say about being or using a surrogate mother? (2022) https://www.gotquestions.org/surrogate-mother.html (accessed 5 January 2023).

1595 What does the bible say about being or using a surrogate mother? (2022) https://www.gotquestions.org/surrogate-mother.html (accessed 5 January 2023). Deonandan, R "Thoughts on the ethics of gestational surrogacy: perspectives from religions, Western liberalism, and comparisons with adoption" 2020 *Journal of Assisted Reproduction and Genetics* 37 269–279.

1596 Sukhanova, A (2019) "Surrogacy and religion" https://surrogacybypons.com/surrogacy-and-religion/ (accessed 5 January 2023). What does the bible say about being or using a surrogate mother? (2022) https://www.gotquestions.org/surrogate-mother.html (accessed 5 January 2023). Deonandan, R "Thoughts on the ethics of gestational surrogacy: perspectives from religions, Western liberalism, and comparisons with adoption" 2020 *Journal of Assisted Reproduction and Genetics* 37 269–279.

1597 SALC Project 65 at par 2.1.3. Pretorius *Surrogate motherhood* 17. SALRC Project 140 177. Dada and McQuoid-Mason *Introduction to Medico-Legal Practice* 66. The authors argue that as medical technologies have advanced, the legal and social definitions of parenthood have lagged behind. Further, until the introduction of advanced reproductive technologies, the law tended to provide a child with two parents, being a mother and a father in order to protect the best interests of the child.

the woman and her husband are the intending parents, with the donor as the genetic parent.[1598] Through gestational surrogacy, a woman and her husband may create an embryo using their own gametes, but another woman (the surrogate mother) carries and gives birth to the child.[1599] Here, the husband and wife are both the intending parents as well as the genetic parents, but the surrogate is the gestational parent, thus, again three different parents to the child.[1600] Nosarka and Kruger observe that surrogacy results in a child having biological connections with two women.[1601] As discussed in the introduction to this study, traditional definitions of 'mother' and 'father', whether in the legal, medical or sociological context, are no longer accurate in the context of surrogacy and artificial fertilisation.[1602]

Deonandan captures the ethical, social and legal dilemma very aptly as follows:

> As technologies become cheaper, more effective and efficient, legal, and ethical wrinkles are manifesting with increasing frequency. While traditional surrogacy has been part of the human story for some time, enriching to some extent our impressions of family, inheritance, and parentage, the advent of gestational surrogacy, has complicated this already tenuous understanding. Ethical issues abound, of course, and ancient modes of wisdom struggle to answer questions emerging from this new technology and mode of being. Uncertainties relevant to the gestational surrogacy phenomenon are manifold, and cover ground from whether paid surrogates is exploited, and whether commercial surrogacy is akin to baby selling, to whether ART is morally justifiable in a world with multitudes of orphans seeking parents and homes.
>
> Our new era of complicated reproductive rights separates motherhood from pregnancy, sex from reproduction, and introduces third and even fourth parties into a family creation process that was mostly the domain of private couples. Lineage and family identity have been mainstays throughout human history, regardless of social class, whether as practical guidelines for the cross-generational transmission of power and property or as qualitative context for developing personal identity. Parenthood has also been a fundamental aspect of the human life identity, with paeans to motherhood in particular immortalized in art, culture, and in how many people still view their roles, powers, and identities. The new reproductive technologies have complicated these identity mainstays, and ancient ways of thinking are inconstant in their capacities to navigate this new complexity.[1603]

Every person has the right to reproductive health, irrespective of their sexual orientation, fertility or marital status, which means that it would be unethical and

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1598 SALRC Project 140 177.

1599 SALRC Project 140 177.

1600 SALRC Project 140 177. Quinn, CM "Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting" 2018 *Journal of the American Academy of Matrimonial Lawyers* 31(1) 176 and 202. The involved parties by design or by choice decide that the child that they plan to create will have more than two parents. Thus, tri-parenting by design.

1601 Nosarka and Kruger 2005 *SAMJ* 944.

1602 SALC Project 65 at par 2.1.3.

1603 Deonandan, R "Thoughts on the ethics of gestational surrogacy: perspectives from religions, Western liberalism, and comparisons with adoption" 2020 *Journal of Assisted Reproduction and Genetics* 37 269–279.

unlawful to deny a patient a medical procedure because of his or her infertility or marital status or sexual orientation.[1604] In light of the fact that the WHO and the American Medical Association regard infertility as a disease, I firmly believe that it cannot be seen as harmful, immoral or unethical to treat this disease with donor gametes.[1605] The advancement in medical technology is there to assist society where assistance is needed. ART's, including artificial fertilisation, are there to assist the infertile person(s) where the infertility is clearly an incurable disease.

Reproductive health is a more critical issue for women as they have complex and vulnerable reproductive systems.[1606] Dhai and McQuoid-Mason argue that a major burden of disease in women is related to their reproductive potential and function and the societal treatment of women.[1607] The authors stated that a woman's human rights are often infringed, which compromises their reproductive health.[1608] On the other hand, it is important not to view a woman as a means in the process of reproduction and further as a target in the process of fertility control.[1609]

Forman argues that most of the debate regarding surrogacy has centred on the enforceability of the basic premise that a woman contractually binds herself to carry a

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1604 Section 12(2)(a) gives every person the right to bodily and psychological integrity which includes the right to make decisions concerning reproduction. Section 27(1) gives every person the right to access to health care which includes the right to reproductive health care. Biko J and Nene Z "Ethics aspects of third-party reproduction" 2017 *Obstetrics & Gynaecology Forum* 3 15.

1605 Biko J and Nene Z "Ethics aspects of third-party reproduction" 2017 *Obstetrics & Gynaecology Forum* 3 15. The authors further state that the infertility rate is in excess of 10% and it is therefore essential that the disease of infertility is treated to essentially save society from the negative impact of infertility for example, alcohol abuse, reckless behaviour, depression and suicide.

1606 Dhai and McQuoid-Mason *Bioethics, Human Rights and Health Law* 139. At 140 the authors provide a definition of reproductive health as per the United Nations as follows: "Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease and infirmity in all matters relating to the reproductive system and its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and child birth and provide couples with the best chance of having a healthy infant."

1607 Dhai and McQuoid-Mason *Bioethics, Human Rights and Health Law* 139. The social dysfunctions impact on a woman's physical, mental and social health.

1608 Dhai and McQuoid-Mason *Bioethics, Human Rights and Health Law* 139.

1609 Dhai and McQuoid-Mason *Bioethics, Human Rights and Health Law* 139.

child for another person(s).[1610] Surrogacy agreements contains (or may contain) provisions which regulates a range of eventualities and restrictions on the surrogate's behaviour and her decision-making authority.[1611] Termination of pregnancy is also addressed in the agreement and it most commonly foresees two potential scenarios.[1612] Firstly, when a foetus suffers from serious birth defects, and secondly, when multiple pregnancy arises and where foetal reduction may be recommended to improve the outcome for the remaining foetus(es).[1613] Surrogacy agreements usually contain a related clause that restricts the surrogate's ability to terminate the pregnancy without the intended parent's consent unless the surrogate faces substantial harm from continuing the pregnancy.[1614] Importantly, although the agreements often contain abortion and selective reduction provisions, practitioners routinely describe these provisions as unenforceable.[1615] The choice of termination of the pregnancy legally remains the choice of the surrogate, as it is her body that is involved in the procedure.

The advancement in technology and assisted reproduction make it more difficult to determine parentage.[1616] Pyrce regards the most serious issue regarding countries that use diverse methods to determine the status of a surrogacy-born child in citizenship and parentage law as that of statelessness.[1617] Statelessness occurs when the commissioning parents' domestic parentage and citizenship requirements are in conflict with the laws of the surrogate's country.[1618] It may also occur where the child

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1610 Forman, D.L. "Abortion clauses in surrogacy contracts: Insights from a case study" 2015 *Family Law Quarterly* 49(1) 31.

1611 Forman, D.L. "Abortion clauses in surrogacy contracts: Insights from a case study" 2015 *Family Law Quarterly* 49(1) 31.

1612 Forman, D.L. "Abortion clauses in surrogacy contracts: Insights from a case study" 2015 *Family Law Quarterly* 49(1) 31 and 33.

1613 Forman, D.L. "Abortion clauses in surrogacy contracts: Insights from a case study" 2015 *Family Law Quarterly* 49(1) 34. It is often the case that the contract provides for the intended parents to have the right to make all termination decisions. Provisions in respect of the reduction of a foetus can be more specific, for example, to not allow the intended parents selective reduction for gender selection purposes.

1614 Forman, D.L. "Abortion clauses in surrogacy contracts: Insights from a case study" 2015 *Family Law Quarterly* 49(1) 34.

1615 Forman, D.L. "Abortion clauses in surrogacy contracts: Insights from a case study" 2015 *Family Law Quarterly* 49(1) 34. At 35 the author explained that the scholars by and large echo that provisions relating to abortion are either unenforceable altogether or at best subject to a suit for damages.

1616 Pyrce, C "Surrogacy and citizenship: A conjunctive solution to a global problem" 2016 *Indiana Journal of Global Legal Studies* 23(2) 930.

1617 Pyrce, C "Surrogacy and citizenship: A conjunctive solution to a global problem" 2016 *Indiana Journal of Global Legal Studies* 23(2) 933.

1618 Pyrce, C "Surrogacy and citizenship: A conjunctive solution to a global problem" 2016 *Indiana Journal of Global Legal Studies* 23(2) 934.

is not a citizen of the commissioning parents' home country (because its laws prohibit surrogacy) and where the child is also not a citizen in the surrogate's country (because parentage is genetically determined and the surrogate is not genetically related to the child).[1619] If a child is stateless, he or she cannot gain citizenship; nor can he or she obtain a passport from either the countries which means that the child is stranded, parentless and rightless.[1620] A child's right to be with his or family under international and regional human rights instruments is clearly threatened when the commissioning parents' home state refuses to recognise a surrogate child's birth certificate where the commissioning parents are listed as the parent(s) instead of the surrogate.[1621] Pyrce advocates for reforms to domestic legislation so that a middle ground may be found regarding the risk of statelessness, to avoid a situation where the impact of new technology may lead to absurd results that may force the assisted reproduction market out of the country or into the black market.[1622]

5. THE ROLE OF EPIGENETICS

Epigenetics literally means "above" or "on top of" genetics.[1623] Epigenetics refers to external alterations to DNA that turn genes "on" or "off."[1624] Rettner explains that these alterations do not change the DNA sequence, but instead, they affect how cells "read" genes.[1625]

1619 Pyrce, C "Surrogacy and citizenship: A conjunctive solution to a global problem" 2016 *Indiana Journal of Global Legal Studies* 23(2) 934.

1620 Pyrce, C "Surrogacy and citizenship: A conjunctive solution to a global problem" 2016 *Indiana Journal of Global Legal Studies* 23(2) 934.

1621 Pyrce, C "Surrogacy and citizenship: A conjunctive solution to a global problem" 2016 *Indiana Journal of Global Legal Studies* 23(2) 935. It can also happen that the lack of any genetic relation to the commissioning parents can prevent the child from gaining citizenship by descent if the commissioning parents use traditional surrogacy to have a child in another country.

1622 Pyrce, C "Surrogacy and citizenship: A conjunctive solution to a global problem" 2016 *Indiana Journal of Global Legal Studies* 23(2) 952. Citizenship laws must be amended as it is necessary to specifically contemplate the surrogacy context so that children that are born abroad will be able to gain citizenship and travel home with the commissioning parents.

1623 Rettner, Rachael: Epigenetics: Definition & Examples (June 24, 2013) accessed from https://www.livescience.com/37703-epigenetics.html (accessed on 16 January 2021)

1624 Rettner, Rachael: Epigenetics: Definition & Examples (June 24, 2013) accessed from https://www.livescience.com/37703-epigenetics.html (accessed on 16 January 2021). Christiansen, K "Who is the mother? Negotiating identity in an Irish surrogacy case" 2015 *Medicine, Health Care and Philosophy* 18(3) 319.

1625 Rettner, Rachael: Epigenetics: Definition & Examples (June 24, 2013) accessed from https://www.livescience.com/37703-epigenetics.html (accessed on 16 January 2021). The author gives an example of epigenetics as follows: "Epigenetic changes alter the physical structure of DNA. One example of an epigenetic change is DNA methylation — the

The Centre for Disease Control and Prevention (CDC) describes epigenetics as the study of how behaviour and environment can cause changes that affect the way genes work and, unlike genetic changes, epigenetic changes are reversible and do not change a person's DNA sequence, but they can change how a person's body reads a DNA sequence.[1626] The basic underlying mechanism of epigenetics involves methylation and acetylation of specific DNA base pairs or DNA-associated proteins to regulate gene activation.[1627] As discussed in an earlier chapter, the genetic makeup of a surrogate has a substantial impact upon the genetics of the child that she carries in her womb, irrespective of whether or not she is an ovum donor.[1628] Although the two biological parents of the child contribute their genetic material to the child, the genetic *expression* of the child's genes, in other words, how its genes are switched on, is significantly influenced by the surrogate's transcription factors.[1629] It is for this reason that Nicholson argues that, contrary to the view that the sperm and ovum donors are the only two biological parents of the child, where the womb for the gestation of the child is the womb of a third person, this third person becomes an additional biological parent whose input is experienced both *in utero* and after birth by the said child.[1630] The reality is that at least three people have a biological and psychological effect on the foetus.[1631] Fischbach and Loike maintain that there are scientific evidence that shows, with reference to gestational surrogacy, how maternal-foetal cellular exchange (microchimerism) and epigenetic factors create intimate biological bonds between the surrogate and the foetus that she is carrying.[1632]

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addition of a methyl group, or a "chemical cap," to part of the DNA molecule, which prevents certain genes from being expressed."

1626 "What is epigenetics?" accessed from https://www.cdc.gov/genomics/disease/epigenetics.htm (accessed on 16 January 2021). Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 426. Nicholson states that epigenetic changes simply change the expression of the genes by adding small marks to the DNA.

1627 Fischbach, R.L. and Loike, J.D "Maternal-fetal cell transfer in surrogacy: Ties that bind" 2014 *American Journal of Bioethics* 14(5) 35.

1628 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 425.

1629 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 425.

1630 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 425. Rasheed, A "Confronting problematic legal fictions in gestational surrogacy" 2021 *Journal of Health Care Law and Policy* 24(2) 195.

1631 Rasheed, A "Confronting problematic legal fictions in gestational surrogacy" 2021 *Journal of Health Care Law and Policy* 24(2) 198.

1632 Fischbach, R.L. and Loike, J.D "Maternal-fetal cell transfer in surrogacy: Ties that bind" 2014 *American Journal of Bioethics* 14(5) 35. Rasheed, A "Confronting problematic legal fictions in

Bidirectional cellular exchange between the gestational mother and the foetus, together with the epigenetic processes, reveal that the mother and the foetus are connected beyond the defined time that the foetus stays in the womb.[1633] Surrogates are not only financially compensated for the use of their uterus, but they are undeniably establishing a biological bond with the foetus which appears to last for decades.[1634] Both the surrogate and the commissioning mother should understand this biological bond and they should give voluntary and valid consent especially because microchimerism is known to increase the incidence of autoimmune diseases in a child.[1635] The parties to a surrogacy agreement must understand that epigenetic processes resulting from the surrogate's lifestyle could have both physiological and behavioural consequences for the child.[1636] Possible health risks must therefore be recognised by the parties.[1637] Rasheed points out that the physical effects of pregnancy begin immediately, lasts indefinitely and they are by every measure profound.[1638] The indirect genetic influences are significant to the growing embryo because epigenetic changes may influence everything from the child's sensitivity to allergens to increased infant death and immune dysfunction.[1639] Prenatal programming takes place in the womb and this programming predisposes the child to certain adult diseases.[1640]

Christiansen points out that what happens in the womb can activate or deactivate certain genetic traits in the child.[1641] As a result of all the methylation being erased after fertilisation, the heritable epigenetics and environmental programming of the

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gestational surrogacy" 2021 *Journal of Health Care Law and Policy* 24(2) 196. The author opines that even if only genetic in small amounts, the biological connection between the surrogate and the child is undeniable.

1633 Fischbach, R.L. and Loike, J.D "Maternal-fetal cell transfer in surrogacy: Ties that bind" 2014 *American Journal of Bioethics* 14(5) 35.

1634 Fischbach, R.L. and Loike, J.D "Maternal-fetal cell transfer in surrogacy: Ties that bind" 2014 *American Journal of Bioethics* 14(5) 35.

1635 Fischbach, R.L. and Loike, J.D "Maternal-fetal cell transfer in surrogacy: Ties that bind" 2014 *American Journal of Bioethics* 14(5) 35.

1636 Fischbach, R.L. and Loike, J.D "Maternal-fetal cell transfer in surrogacy: Ties that bind" 2014 *American Journal of Bioethics* 14(5) 35.

1637 Fischbach, R.L. and Loike, J.D "Maternal-fetal cell transfer in surrogacy: Ties that bind" 2014 *American Journal of Bioethics* 14(5) 35.

1638 Rasheed, A "Confronting problematic legal fictions in gestational surrogacy" 2021 *Journal of Health Care Law and Policy* 24(2) 191.

1639 Rasheed, A "Confronting problematic legal fictions in gestational surrogacy" 2021 *Journal of Health Care Law and Policy* 24(2) 195.

1640 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 435.

1641 Christiansen, K "Who is the mother? Negotiating identity in an Irish surrogacy case" 2015 *Medicine, Health Care and Philosophy* 18(3) 319.

epigenome is dependent on the womb environment.[1642] The foetus thus has the genetic information of two genetic parents together with the imprinted gene silencing and the integration of environmental signals.[1643]

Because of the significant role of epigenetics, one may rightly ask who should be regarded as the biological mother of a commissioned child where the ovum comes from the commissioning woman and the womb from the surrogate mother?[1644] Both women may be said to have contributed genetically to the child's development, as epigenetics allows an organism (in this scenario the foetus) to respond to its environment (in this scenario the womb) by changes in gene expression.[1645] Nicholson and Nicholson remark as follows on the role of the womb in foetal development:

> Offspring often have similar methylation patterns in their DNA to those of their parents. There is mounting evidence that epigenetic programming is sensitive to nutrition, endocrine signaling, maternal stress and maternal care. The developing foetus is the point of human development most sensitive to epigenetic changes. The foetus is undergoing rapid cell proliferation, differentiation and programming of specific cells to specific tissues, increasing the need for flexibility in the epigenome.[1646] The embryo has very limited epigenetic programming to allow for the rapid gene adaptation of the foetus to the new environmental conditions and tissue specific gene expression requirements. This makes the environment in which a foetus develops vital to its proper epigenetic programming.[1647]

1642 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 432.

1643 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 431.

1644 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 425. The authors states that it is not a simple matter of nature or nurture as the womb is significantly more than an incubator.

1645 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 425. Rasheed, A "Confronting problematic legal fictions in gestational surrogacy" 2021 *Journal of Health Care Law and Policy* 24(2) 195. The surrogate is not biologically separate from her foetus.

1646 The National Human Genome Research Institute (NHI) defines the term epigenome as follows: "The term epigenome is derived from the Greek word epi which literally means "above" the genome. The epigenome consists of chemical compounds that modify, or mark, the genome in a way that tells it what to do, where to do it, and when to do it. Different cells have different epigenetic marks. These epigenetic marks, which are not part of the DNA itself, can be passed on from cell to cell as cells divide, and from one generation to the next." Talking glossary of genetic terms accessed from https://www.genome.gov/genetics-glossary/Epigenome (accessed on 29 January 2023).

1647 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 427.

Rasheed argues that the correct understanding of biology indicates that surrogates and other tissue donors play a genetic role that courts, and policy makers have not yet recognised.[1648]

Even though the effect of epigenetics on the developing commissioned child is still not well-known, one may conclude that this development may lead to intense confusion and uncertainty in the surrogacy context. Chapter 19 of the Children's Act does not provide for circumstances where the gestational mother may claim rights over the child because she has an epigenetic connection or bond with the child. The role of epigenetic processes will play an important role in the selection of a healthy and suitable surrogate mother. The impact of epigenetics also means that maternal stress and nutrition, as well as the surrogate's epigenetic profile, must be considered when surrogates or egg donors are selected. Fischbach and Loike believe that a complete genetic analysis of both the proposed surrogate and the gamete donors should be obtained.[1649]

Epigenetics also has a reach beyond the surrogate agreement. Nicholson argues that the legal and ethical implications of epigenetics cannot be underestimated because of numerous legal and ethical challenges and because a person can be influenced generations later by the circumstances and experiences of a forbearer.[1650]

> If the frightening reality is that the memories that are transferred by parents to their children's genes, where they are entrenched and might potentially negatively affect that child or future generations, how much more frightening does this scenario become when the child is exposed to a third set of influences through the womb of a surrogate?[1651]

The idea of including a third parent to the equation of surrogacy brings forth the important question of how far the commissioning couple can go with having control over the surrogate (as third parent) and her life during the gestational period in trying to protect the foetus from any harm? The surrogate, as third parent, might argue that she knows the best. How far can the commissioning couple go in doing an in-depth

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1648 Rasheed, A "Confronting problematic legal fictions in gestational surrogacy" 2021 *Journal of Health Care Law and Policy* 24(2) 191.

1649 Fischbach, R.L. and Loike, J.D "Maternal-fetal cell transfer in surrogacy: Ties that bind" 2014 *American Journal of Bioethics* 14(5) 35.

1650 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 432.

1651 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 432.

investigation into the life and background of the surrogate? It is evident from the above that the surrogate's way of life, her psychological state together with her health and any underlying genetic disorder all influence the foetus and thus the resultant child. Ethically, the commissioning parent(s) cannot go further than what the surrogate allows them to know. It is thus an unknown risk that the commissioning parent(s) will have to accept when using the surrogate as gestational mother of the commissioned child.

The issue of responsibility for birth defects in the child is also complicated by epigenetics which makes the environment, nutrition and medical history of the surrogate, even one whose gamete is not used, relevant.[1652] The biological realities of gestational surrogacy, including the biological bond between the surrogate and the child, is overlooked by the law of surrogacy when policing the balance of power between private parties in surrogacy agreements.[1653] The difficulty lies in giving the 'third parent' any rights in respect of the commissioned child in light of the biological bond that exists between the resultant child and the surrogate, especially in circumstances where it was a gestational surrogacy. Where can one draw the line as the commissioning parent(s) still holds the genetic link to the child and it is the commissioning parent(s) that will be acknowledged as the parent(s) of the commissioned child? As is clear from the above, the surrogate is the bearer of the most responsibility in respect of the commissioned child during the gestation period but it is a choice that she made.

Further, if one takes the view that surrogacy is a simple matter of contract, would commissioning parents be able to rely on product liability if the child proves to have some predisposition to psychological or physical conditions inherited from the surrogate?[1654]

In conclusion, although requesting a complete genetic analysis from the surrogate mother and/or gamete donors may be advisable, succeeding with this is unlikely in the

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1652 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 434.

1653 Rasheed, A "Confronting problematic legal fictions in gestational surrogacy" 2021 *Journal of Health Care Law and Policy* 24(2) 196.

1654 Nicholson, S and Nicholson, C "I used to have two parents and now I have three? When science (fiction) and the law meet: Unexpected complications" 2016 *Medicine and Law* 35 434.

South African context. Commissioning parent(s) are already required to spend a lot of money on the drafting of the agreement and the application for confirmation by the court, not to mention the costs that they will incur for the pregnancy and birth of the child. Should the commissioning couple select not to request a complete genetic analysis and it appears after the birth of the child that the surrogate did have existing health issues (which she was unaware of) which may have caused harm to the child, the commissioning couple will arguably not be able to hold the surrogate responsible for the harm to child because they elected to accept the risk of not knowing when they concluded the surrogate agreement.

6. CONCLUSION

This chapter explored the salient issues relating to assisted reproduction and related ethical, social and religious issues with reference to the NHA and regulations. The difference between adoption and surrogacy has also been canvassed. A pertinent issue that may significantly impact on the health of the commissioned child, is the role of epigenetics, which directly relates to the surrogate mother's genetic profile. It is imperative that all parties to a surrogate agreement take note of the impact of epigenetics, as this may require a revision of existing agreements with regard to the type and scope of medical tests that may be required. Epigenetics also changes the dynamic between the parties, as her biological link to the commissioned child is stronger than previously thought.

The next chapter will turn to a comparative discussion of the regulation of surrogacy in the United Kingdom, Canada and India with the objective of tracing best practices in these jurisdictions that may assist in addressing some of the identified *lacunae* arising from the surrogate motherhood legal framework in South Africa.

CHAPTER 6

COMPARATIVE ANALYSIS OF SURROGACY REGULATION IN THE UNITED KINGDOM, CANADA AND INDIA

1. INTRODUCTION

Many jurisdictions have introduced legislation to regulate surrogate motherhood. It is well-established that law reform often relies on comparative law elsewhere to address shortcomings in domestic legislation.

In this chapter, the legal systems regulating surrogate motherhood in the United Kingdom, Canada and India will be compared with the purpose of identifying best practices in these systems that may clarify or address some of the unresolved or ambiguous issues relating to assisted reproduction and surrogate motherhood in South Africa. The selection of the UK, Canada and India is motivated by the fact that the UK and Canada, like South Africa, ban any form of commercial surrogacy but allow altruistic surrogacy. India is one of the countries that initially opened its doors to commercial surrogacy, subject to guidelines that regulate assisted reproduction. Like South Africa, the UK, Canada and India are all committed to the protection of rights and freedoms.

2. THE UNITED KINGDOM

2.1 Regulation of surrogate motherhood

Surrogacy has been allowed as a form of reproduction in the UK since 1985. The UK is one of the first jurisdictions in the world to introduce surrogacy legislation.[1655] The first statute that provided for the use of surrogacy was the Surrogacy Arrangements Act of 1985.[1656] The Human Fertilisation and Embryology Act 1990 ("HFEA 1990")

1655 Fenton-Glynn, C "The regulation and recognition of surrogacy under English Law: an overview of the case-law" 2015 *Child and Family Law Quarterly* 27(1) 83.

1656 Fenton-Glynn, C "The regulation and recognition of surrogacy under English Law: an overview of the case-law" 2015 *Child and Family Law Quarterly* 27(1) 84.

amended certain provisions of the Surrogacy Arrangements Act. The aim of the HFEA 1990 was to make provision for fertilisation and human embryos and any subsequent development of such embryos; to prohibit certain practices regarding embryos and gametes; to establish a Human Fertilisation and Embryology Authority; to provide for persons who under certain circumstances are to be treated in law as the parents of a child; and to amend the Surrogacy Arrangements Act 1985.[1657] Section 5 of the HFEA created the Human Fertilisation and Embryology Authority to regulate and license activities involving human embryos.[1658] Other pertinent issues covered by the Act are, for example, consent, legal status and the welfare of the resulting child and the necessity of potential parents having proper understanding of the course upon which they were embarking.[1659] The Act further introduced a statutory requirement that the welfare of the child (born as a result of the fertility treatment) was to be taken into account.[1660]

The Human Fertilisation and Embryology Act 2008 ("HFEA 2008") amended certain provisions of the HFEA 1990 and specifically made amendments to the sections relating to surrogacy.[1661] The aim of the 2008 amendments was to provide for the persons who in certain circumstances are to be treated in law as the parents of a child and for connected purposes.[1662] It is important to note that the requirement for the consideration of the child's welfare remained part of the revised Act.[1663] The reading

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1657 Introduction of HFEA 1990 accessed from https://www.legislation.gov.uk/ukpga/1990/37/introduction (accessed on 21 January 2023). *JP v LP and others* [2014] EWHC 595 (Fam) at par 17. Kennedy and Grubb *Medical Law* 768. This regulatory framework took effect on 1 August 1991. This framework was only applicable in so far as a surrogate birth was achieved through the use, in part or whole, of donated genetic material or using IVF techniques. Otherwise, the practice of surrogacy was regulated, in part, by the Surrogacy Arrangements Act 1985.

1658 Sec 5 of Human Fertilisation and Embryology Act 1990 (HFEA 1990). *JP v LP and others* at par 17. Mason, McCall Smith and Laurie *Law and Medical Ethics* 69.

1659 *JP v LP and others* at par 17.

1660 Sec 13(5) determined that a woman shall not be provided with treatment services, other than basic partner treatment services, unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth. Code of practice 8th ed accessed from https://portal.hfea.gov.uk/media/1593/hfea-code-of-practice-8th-edition-r8.pdf (accessed on 11 January 2023).

1661 *JP v LP and others* at par 19. Fenton-Glynn, C "The regulation and recognition of surrogacy under English Law: an overview of the case-law" 2015 *Child and Family Law Quarterly* 27(1) 84.

1662 Introduction of HFE Act 2008 accessed from https://www.legislation.gov.uk/ukpga/2008/22/introduction (accessed on 21 January 2023).

1663 Sec 13(5) of the HFEA 1990 and as amended by sec 14(2) of HFE Act 2008. *JP v LP and others* at par 19.

of the HFEA 2008 is complicated by the fact that it did not repeal the HFEA 1990 in its entirety. The Act made amendments which should be read into the HFEA 1990 and the Surrogacy Arrangement Act. The most relevant provisions regarding surrogacy will be discussed, also considering the Surrogacy Arrangement Act, the HFEA 1990 and the HFEA 2008.

It is a condition of the granting of a treatment license to a fertility clinic that a woman shall not be treated unless she, and any partner who are being treated together, have been given a suitable opportunity to receive proper counselling about the implications of proceeding with the proposed treatment steps, and have been provided with such relevant information as is appropriate.[1664] Similar to South Africa, at least one of the two commissioning parents must contribute a gamete for the purposes of conception.[1665]

The UK Surrogacy Arrangements Act of 1985 discourages the use of surrogacy by making surrogacy agreements unenforceable and by criminalising certain acts relating to surrogacy agreements.[1666] Although surrogate agreements are defined in the 1985 Act, it does not include agreements concluded after the child is conceived and which are intended to result in the child being handed over by the surrogate mother.[1667] The intention of the parties to the surrogate agreement that the commissioned child be handed over to the commissioning parents (after the said child's birth) is part and parcel of the purpose of any surrogacy agreement. Lyon sets out the provisions which are likely to be included in a surrogacy agreement: arrangements relating to

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1664 Sec 13(6) of HFEA 1990 as amended by Sec 14(3) of HFEA 2008. The 8th Code of Practice, Part 3 specifically refers to counselling being provided at every stage of the treatment process by a qualified counsellor.

1665 Sec 54(1)(b) of HFEA 2008 in cases where there are two applicants and sec 54A(1)(b) in cases where there is only one applicant.

1666 Chapter 49 of the Surrogacy Arrangements Act 1985, was enacted on 16 July 1985 to regulate certain activities in connection with arrangements made with a view to women carrying children as surrogate mothers. Sec 1A. "No surrogacy arrangement is enforceable by or against any of the persons making it." Louw 2013 *THRHR* 572. Strauss *Doctor, Patient and the Law* 188. Mason, McCall Smith and Laurie *Law and Medical Ethics* 99. Fenton-Glynn, C "The regulation and recognition of surrogacy under English Law: an overview of the case-law" 2015 *Child and Family Law Quarterly* 27(1) 84. Elder, AH "Wombs to rent: Examining the jurisdiction of international surrogacy" 2014 16(2) *Oregon Review of International Law* 365. Brown, A "Trans parenthood and the meaning of 'mother', 'father' and 'parent' – R (McConnell and YY) v Registrar General for England and Wales [2020] EWCA Civ 559" 2021 *Medical Law Review* 29(1) 160.

1667 Kennedy and Grubb *Medical Law* 846. The writers point out that such an arrangement would remain governed by the common law.

conception, pregnancy, birth and post-birth; expenses and a will by the intending parents.[1668]

In terms of the common law, the woman who gestates and gives birth to a child is the legal mother of child.[1669] Parenthood was defined by genetic make-up which meant that where sperm was donated, the donor was considered the legal father of the child. If the child was born within a marriage, the husband would be deemed the father by virtue of a rebuttable presumption.[1670] Further, regarding the egg or embryo donation, the common law's unfamiliarity with these practices (which separate the gestational from the genetic) would probably have meant that it would have preferred the claims of the gestational mother.[1671] The common law rule in respect of sperm donation was reversed by section 27 of the Family Law Reform Act 1987.[1672] In terms of this section, the husband of a woman who was artificially fertilised was regarded as the father of any child born unless it was proved that he did not consent to the said procedure.[1673]

The current position in respect of the commissioned child's status is set out in the HFEA 2008. Section 33 of HFEA 2008 defines "mother" as:

> The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.[1674]

"Father" is described with reference to the scenario below:

> If at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination, W was a party to a marriage [with a man][or a civil partnership with a man], and the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage [or civil partnership], then, subject to section 38(2) to (4), the other party to the marriage [or civil partnership] is to be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm or to her artificial insemination (as the case may be).[1675]

1668 Lyon, F "The surrogacy journey" 2020 *New Law Journal* 170(7900) 12.

1669 Brown, A "Trans parenthood and the meaning of 'mother', 'father' and 'parent' – R (McConnell and YY) v Registrar General for England and Wales [2020] EWCA Civ 559" 2021 *Medical Law Review* 29(1) 160.

1670 Kennedy and Grubb *Medical Law* 815.

1671 Kennedy and Grubb *Medical Law* 815. The writers point out that the inconsistency between the two positions could have persuaded a court to opt for the genetic determination of parenthood regarding both the mother and the father.

1672 Family Law Reform Act 1987 Chapter 42. This Act was enacted on 15 May 1987 to reform the law relating to the consequences of birth outside marriage; to make further provision with respect to the rights and duties of parents and the determination of parentage; and for connected purposes. Kennedy and Grubb *Medical Law* 816.

1673 Sec 27 of the Family Law Reform Act 1987. Kennedy and Grubb *Medical Law* 816.

1674 Sec 33(1) of HFEA 2008.

1675 Sec 35(1) of HFEA 2008.

Because the surrogate (and if married, her husband or partner) is/are seen as the parent(s) of the child that is born of surrogacy, it is necessary for the commissioning parents to apply to court for a parental order so that they can be regarded as the legal parents of the commissioned child. A woman will not be considered as the parent of a child in circumstances where she only donated an ovum, without carrying the child.[1676]

Provisions in terms of the HFEA 2008 that are relevant to surrogacy are sections 54 and 59. Section 54 provides for the application for parental orders and section 59 amends certain provisions in the Surrogacy Arrangements Act. Parties to a surrogacy agreement must ensure that they meet the requirements of a parental order before going the surrogacy route, as there might otherwise be complications at the end (discussed elsewhere in this chapter with reference to case law).[1677]

Where two applicants apply to court for a parental order, the court may make an order if the following conditions are met: the child was carried by a woman other than one of the applicants and as a result of her artificial fertilisation or the placing in her of an embryo or sperm and eggs;[1678] at least one of the applicants' gametes was used for the conception of the embryo;[1679] the applicants must be married (husband and wife)[1680] or they may be civil partners of each other[1681] or they may live as partners in an enduring family relationship.[1682] Further, the application must be brought within six months from the date of the child's birth.[1683] The child must be living with the applicants at the time that the application is brought and the order is made.[1684] One or both of the applicants must be domiciled in the UK, the Channel Islands or the Isle of Man at the

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1676 Sec 47 of HFEA 2008. Except where she is married (or in a civil partnership) to the woman being artificially fertilised with her ovum or where she agrees to parenthood of the child as in terms of sec 43 and 44 of the Act.

1677 Lyon, F "The surrogacy journey" 2020 *New Law Journal* 170(7900) 13.

1678 Sec 54(1)(a) of HFEA 2008. Sec 54(10) determines that this provision applies even if the woman was not in the UK at the time of placing in her of the embryo or the sperm and the eggs or her artificial fertilisation.

1679 Sec 54(1)(b) of HFEA 2008.

1680 Sec 54(2)(a) of HFEA 2008.

1681 Sec 54(2)(b) of HFEA 2008.

1682 Sec 54(2)(c) of HFEA 2008. The applicants must not be within a prohibited degree of relationship with each other.

1683 Sec 54(3) of HFEA 2008.

1684 Sec 54(4)(a) of HFEA 2008.

time of the application.[1685] At the time that the order is granted, both the applicants must be older than eighteen years.[1686]

Section 54(6) determines that the court must be satisfied that the surrogate and any other person being a parent of the child (not one of the applicants) have freely and with full understanding of what is involved, agreed unconditionally to the granting of the order.[1687] In circumstances where the surrogate cannot be found or she is incapable of giving her agreement, her agreement is not required.[1688] Importantly, the surrogate's agreement will be ineffective if given by her less than six weeks after the child's birth.[1689] Before a parental order can be made, the court must be satisfied there was no money paid (except for reasonable expenses) or any other benefit has been given or received by either of the applicants for or in consideration of making of the order;[1690] any agreement required from the surrogate (and the other parent)[1691] for the handing over of the child;[1692] or the making of arrangements with a view to making of the order,[1693] except where the court approves such payment.[1694] Moreover, section 54(8A) determines that no order in respect of the child must previously have been made under sections 54 or 54A, except where the order has been quashed or an appeal against the order has been allowed.[1695]

A parental order allows the child to be considered in law as the child of the commissioning parents (the applicants) as it extinguishes the parental status of the surrogate (and the other parent).[1696]

1685 Sec 54(4)(b) of HFEA 2008.
1686 Sec 54(5) of HFEA 2008.
1687 Sec 54(6) of HFEA 2008.
1688 Sec 54(7) of HFEA 2008.
1689 Sec 54(7) of HFEA 2008. Louw 2013 *THRHR* 572. Fenton-Glynn, C "The regulation and recognition of surrogacy under English Law: an overview of the case-law" 2015 *Child and Family Law Quarterly* 27(1) 89. The author argues that the six-week rule is there to protect women from making life-changing decisions immediately after birth. This would exploit the woman's weakness at a time when she is most vulnerable and it would be unfair to put any weight on her consent at such time.
1690 Sec 54(8)(a) of HFEA 2008.
1691 Sec 54(8)(b) of HFEA 2008.
1692 Sec 54(8)(c) of HFEA 2008.
1693 Sec 54(8)(d) of HFEA 2008.
1694 Sec 54(8) of HFEA 2008.
1695 Sec 54(8A) of HFEA 2008.
1696 Louw 2013 *THRHR 572.* Elder, AH "Wombs to rent: Examining the jurisdiction of international surrogacy" 2014 16(2) *Oregon Review of International Law* 366.

In circumstances where there is a single applicant who applies for a parental order, section 54A governs the process. The court may make a parental order on application of one person if the following requirements are met:[1697] the child was carried by a woman other than the applicant and because of her artificial fertilisation or the placing in her of an embryo or sperm and eggs,[1698] and the applicant's gametes were used for the conception of the embryo[1699]. The application must be brought within six months from the date of the child's birth.[1700] The child must be living with the applicant at the time that the application is brought and the order is made.[1701] The applicant must be domiciled in the UK, the Channel Islands or the Isle of Man at the time of the application.[1702] The applicant must be eighteen years old at the time that the order is granted.[1703]

The court must further be satisfied that the surrogate and any other person being a parent of the child (but is not the applicant) have freely and with full understanding of what is involved, agreed unconditionally to the making of the order.[1704] Where the surrogate cannot be found or she is incapable of giving her agreement, it is not required to get her agreement before the order can be made.[1705] Here too, the surrogate's agreement will be ineffective if given by her less than six weeks after the child's birth.[1706] Before the court can grant a parental order, it must be satisfied there was no money paid (except for reasonable expenses) or any other benefit has been given or received by the applicant for or in consideration of making of the order,[1707] for any agreement required from the surrogate (and the other parent)[1708] for the handing

1697 Sec 54A(1) of HFEA 2008.
1698 Sec 54A(1)(a) of HFEA 2008. Sec 54A(10) determines that this provision applies even if the woman was not in the UK at the time of placing in her of the embryo or the sperm and the eggs or her artificial fertilisation.
1699 Sec 54A(1)(b) of HFEA 2008.
1700 Sec 54A(2) of HFEA 2008.
1701 Sec 54A(3)(a) of HFEA 2008.
1702 Sec 54A(3)(b) of HFEA 2008.
1703 Sec 54A(4) of HFEA 2008.
1704 Sec 54A(5) of HFEA 2008.
1705 Sec 54A(6) of HFEA 2008.
1706 Sec 54A(6) of HFEA 2008.
1707 Sec 54A(7)(a) of HFEA 2008.
1708 Sec 54A(7)(b) of HFEA 2008.

over of the child[1709] or for making of arrangements with a view to making of the order,[1710] except where the court approves such payment.[1711]

Commercial surrogacy is expressly prohibited in the UK. Section 2(1) of the Surrogacy Arrangements Act contains the relevant provisions which were amended by the HFEA 2008. Where a person contravenes the provisions set out in section 2(1), he or she will be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a period up to three months, or both.[1712]

Regarding the right to know one's origins, the position is as follows: persons born through gamete donation are allowed to apply for non-identifying information at the age of sixteen and identifying information at the age of eighteen years.[1713] Such an application must be made to the Human Fertilisation and Embryology Authority for the said information.[1714] Advertising surrogacy services are prohibited in terms of section 3 of the Surrogacy Arrangements Act. It is not allowed to advertise an indication that a person is or may be willing to enter into a surrogacy agreement or to negotiate or facilitate the making of a surrogacy agreement.[1715] It is further not allowed to advertise an indication that a person is looking for a woman willing to act as surrogate or for persons wanting a woman to act as surrogate for them.[1716]

1709 Sec 54A(7)(c) of HFEA 2008.

1710 Sec 54A(7)(d) of HFEA 2008.

1711 Sec 54A(7) of HFEA 2008.

1712 Sec 4 of Surrogacy Arrangements Act 1985.

1713 Sec 24 of the HFEA 2008 https://www.legislation.gov.uk/ukpga/2008/22/section/24 (accessed 13 January 2023) and sec 31ZA(1) and sec 31ZA(4) of HFEA 1990 https://www.legislation.gov.uk/ukpga/1990/37/section/31ZA (accessed on 13 January 2023). Sec 24 of HFEA 2008 amended sec 31 of the HFEA 1990. Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (come into force on 1st of July 2004) https://www.legislation.gov.uk/uksi/2004/1511/regulation/2/made (accessed 13 January 2023). Reg 2(2) of Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 determines what kind of information may be made available. Wade, K "Reconceptualising the interest in knowing one's origins: a case for mandatory disclosure" 2020 *Medical Law Review* 28(4) 738.

1714 Sec 24 of the HFEA 2008 and sec 31ZA of HFEA 1990. Wade, K "Reconceptualising the interest in knowing one's origins: a case for mandatory disclosure" 2020 *Medical Law Review* 28(4) 738.

1715 Sec 3(1)(a) of the Surrogacy Arrangements Act 1985 as amended by the HFEA 1990 and the HFEA 2008.

1716 Sec 3(1)(b) of the Surrogacy Arrangements Act 1985 as amended by the HFEA 1990 and the HFEA 2008.

The biggest differences between the provisions of the South African Children's Act and the provisions of the different Acts described above, are that in South Africa, the commissioning parent(s) must first obtain a court order, confirming the surrogacy agreement, before the surrogate may be artificially fertilised. Also, only where the surrogate is genetically linked to the commissioned child will she be entitled to a cooling off period of sixty days after the child's birth.

It is submitted that chapter 19 of the Children's Act provides more legal security for the different parties to a surrogacy agreement. The important advantage is that a surrogacy agreement is contractually enforceable, and it is scrutinised by a court before artificial fertilisation of the proposed surrogate may take place.

The following judgment explains the importance of a parental order and complying with sections 54 and 54A of HFEA 2008.

2.2 *AB v DE*[1717]

This case concerns an application for a parental order in respect of a child born as a result of IVF treatment (performed in Moscow) on a married Russian surrogate.[1718] The first applicant's sperm was used together with the eggs from an anonymous Russian donor.[1719] The applicants had 10 failed cycles of IVF treatment in the UK using donor eggs and a further failed IVF treatment in Russia.[1720] They also experienced two failed attempts at conception by an unmarried surrogate in Russia.[1721] The applicants were thereafter put in touch with a married surrogate and she became pregnant after IVF treatment that was followed by her giving birth to the child ("C") in Moscow in 2012.[1722] C was registered as a British citizen upon application and the family returned to the UK after receipt of his passport.[1723]

1717 [2013] EWHC 2413 (Fam).
1718 *AB v DE* at par 1.
1719 *AB v DE* at par 2.
1720 *AB v DE* at par 3.
1721 *AB v DE* at par 4.
1722 *AB v DE* at par 4.
1723 *AB v DE* at par 5.

The court observes that because surrogacy agreements are legal in Russia, the applicants were thus treated as the legal parents of C under Russian law as they were legitimately registered as such on C's Russian birth certificate with the consent of the first respondent.[1724] Considering a parental order application, the court had to be satisfied that the criteria under section 54 of HFEA 2008 were fulfilled and that such an order would meet the lifelong welfare needs of C.[1725] The first applicant's gametes were used in the conception of C and he was carried by the first respondent.[1726] The applicants are married.[1727] This application was made within six (6) months of C's birth.[1728] The child C has been in the continuous care of the applicants and he had his home with them at the time of the application and of the granting of the order.[1729] The applicants are domiciled in the UK and they are older than eighteen (18) years.[1730] Because the surrogate was married at the time of conception, the court had to be satisfied that both the respondents had consented to the parental order.[1731] Section 35 of the HFEA 2008 determines that because the respondents were married at the time of C's conception, the second respondent is C's legal father and he is therefore 'the other person who is a parent of the child', meaning that his consent was also required for the parental order.[1732]

The court next turned to the aspect of payment for the surrogacy arrangement. Section 54(8) of the Act, the final requirement of section 54, deals with the issue of payments.[1733] An amount of €50,000.00 was paid by the applicants to the agency in terms of the surrogacy agreement.[1734] The surrogate received 196,269.00 RR for her actual expenses which included costs relating to travel, medication, clothes, child care,

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1724 *AB v DE* at par 6. It is important to note that neither of the respondents are treated as a legal parent of C in Russia.
1725 *AB v DE* at par 7.
1726 *AB v DE* at par 8. In terms of sec 54(1).
1727 *AB v DE* at par 9. In terms of sec 54(2).
1728 *AB v DE* at par 10. In terms of sec 54(3).
1729 *AB v DE* at par 11. In terms of sec 54(4)(a).
1730 *AB v DE* at par 11 and 12. In terms of sec 54(4)(b) and sec 54(5).
1731 *AB v DE* at par 13. In terms of sec 54(6)(a) and 7.
1732 *AB v DE* at par 13. In terms of sec 54(6)(b).
1733 *AB v DE* at par 14. Sec 54(8) determines that the court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of (a) the making of the order; (b) any agreement required by subsection (6) above; (c) the handing over of the child to the applicants, or (d) the making of any arrangements with a view to the making of the order, unless authorised by the court.
1734 *AB v DE* at par 15.

including a further 400,000.00 RR as compensation.[1735] The court had to consider the following factors when exercising its discretion to authorise the said payments: (a) was the said sum disproportionate to reasonable expenses; (b) were the applicants acting in good faith and without 'moral taint' while dealing with the surrogate; and finally, (c) were the applicants part of any attempt to defraud the authorities.[1736] It was clear to the court that about half of the global fee paid went to the agency.[1737] The court was satisfied that the amount paid to the first respondent was not unusually high in the context of what other surrogates received elsewhere in Russia.[1738] The court further stated that the payments made were not so disproportionate as to amount to an affront to public policy or to have overborne the will of the first respondent.[1739] The court had to exercise its discretion regarding authorising the payments made by the applicants to the agency, which included payments other than for expenses reasonably incurred.[1740] The court was satisfied that the evidence pointed to a warm and caring relationship between the applicants and the first respondent and that there was no suggestion of bad faith or moral taint on the side of the applicants.[1741] The applicants requested a parental order to fully regularise C's status and their legal parenthood status, as at the time of application for the parental order, they had no strong legal connection with C as the child's parents, except for a residence order made by the court which gave the applicants parental responsibility.[1742]

With regard to the child C, the court stated that its paramount consideration in relation to this application was C's lifelong welfare as set out in section 1(4) of the Adoption and Children Act 2002.[1743] The court confirmed that C's legal parents remain the respondents (as per section 33(1), (3) and section 35 of HFEA 2008) and that they

1735 *AB v DE* at par 15.
1736 *AB v DE* at par 16.
1737 *AB v DE* at par 17. On the papers before the court it was explained that payments in surrogacy are not regulated by Russian law and there is no prohibition of commercial surrogacy in Russian law.
1738 *AB v DE* at par 18.
1739 *AB v DE* at par 21. The information regarding the first respondent's actions did support the conclusion that she entered into the surrogacy agreement of her own free will.
1740 *AB v DE* at par 29.
1741 *AB v DE* at par 23.
1742 *AB v DE* at par 25 and par 32 and 34. In light of the fact that the applicants are not C's legal parents, C lacks a lifelong connection with the applicants for matters such as inheritance, financial support and his wider identity. Without a parental order, he would be left in something of a legal vacuum without full legal membership of any family anywhere in the world.
1743 *AB v DE* at par 30.

also shared parental responsibility for him (as per section 2(1) of the Children Act 1989).[1744] In terms of section 33(1), the woman who carries the child is seen as the child's mother and the second applicant is thereby excluded from being regarded as the parent of C.[1745] The first applicant is excluded from being considered C's father (even though he is C's biological father) by virtue of section 38(1).[1746] The court further observed that the respondents are not C's legal parents under Russian law and neither did they have a biological connection with C.[1747] The court concluded by stating that the welfare needs of C would clearly not be met by the respondents remaining his legal parents in the UK when they were not recognised as such in Russia. In addition, they had no intention of having any future parental role in C's life.[1748]

C's future is in the long-term care of the applicants, they are his de facto legal parents and his welfare demands their relationship is given lifelong security which can only be achieved by making a parental order.[1749]

2.3 *CC v DD*[1750]

This matter relates to an application for a parental order in respect of Q, a one-year old boy born through an international surrogacy agreement.[1751] The applicants were British and French, respectively, and Q was born in the US while the applicants lived in France.[1752] The application was made in the UK.[1753] The first applicant was raised in the UK and lived there until 2006 when she met the second applicant and moved to France.[1754] The applicants were married in 2011 and the first applicant continued to return to the UK on a regular basis and maintained significant connections in the

1744 *AB v DE* at par 31.
1745 *AB v DE* at par 31.
1746 *AB v DE* at par 31. "Section 38(1) provides '*Where a person is to be treated as the father of the child by virtue of section 35 of 36, no other person is to be treated as the father of the child*'.
1747 *AB v DE* at par 31. The court referred to the Russian export report which states that the applicants are considered as C's legal parents and the respondents have no parental rights in respect of him.
1748 *AB v DE* at par 36.
1749 *AB v DE* at par 36.
1750 [2014] EWHC 1307 (Fam).
1751 *CC v DD* at par 1 and 3.
1752 *CC v DD* at par 6.
1753 *CC v DD* at par 3. The surrogate agreement involved legal procedures between two US States.
1754 *CC v DD* at par 4.

UK.[1755] The surrogacy agreement was entered into under the law of Iowa (where the respondents lived at the time of application) and Minnesota (where the surrogacy agency is based).[1756] The second respondent (as surrogate) donated her egg to the applicants which resulted in the conception and birth of Q.[1757] The necessary legal steps were taken in Minnesota to secure the applicants' status as Q's legal parents.[1758] This include an order made in line with the normal post-birth procedure in Minnesota, confirming the first applicant as Q's legal father with the consent of the surrogate mother, extinguishing her legal motherhood.[1759] A stepparent adoption order was made under the law of Minnesota whereby the second applicant's position as Q's mother was secured.[1760] The applicants were recorded as Q's legal parents on his birth certificate which was issued in Iowa.[1761] By virtue of the Full Faith and Credit Clause of the US Constitution, the orders made by the court in Minnesota are recognised in other US States, including Iowa.[1762]

The court stated that it had to be satisfied about two matters in considering this application, namely, (a) whether the requirements of section 54 of HFEA 2008 are satisfied, and (b) whether Q's lifelong welfare needs will be secured by this court making a parental order (section 1 of the Adoption and Children Act 2002).[1763] The court had to consider the relevance, or not, of the adoption order that was granted in Minnesota.[1764]

Although a parental order has the effect of conferring parental responsibility on the child's new legal parents, the primary function of the application is to transfer legal parenthood from the surrogate and her husband to the applicants.[1765] Thus, the relevant legal provision governing this application is primarily concerned with parentage and status and not parental responsibility. The court was satisfied that the

1755 *CC v DD* at par 5.
1756 *CC v DD* at par 6. Q resided in Minnesota temporarily after his birth.
1757 *CC v DD* at par 7.
1758 *CC v DD* at par 8.
1759 *CC v DD* at par 8.
1760 *CC v DD* at par 8.
1761 *CC v DD* at par 8.
1762 *CC v DD* at par 8.
1763 *CC v DD* at par 9.
1764 *CC v DD* at par 11.
1765 *CC v DD* at par 21.

surrogate and her husband had consented freely, unconditionally and with full understanding to the making of a parental order.[1766] Regarding the question of payments, a total of approximately $35, 780.00 was paid in respect of the surrogacy agreement.[1767] The amount of $19,200.00 was paid towards compensation rather than expenses and this would be the focus of the court requiring authorisation under section 54(8).[1768] The court was satisfied that the sums paid were not so disproportionate to the expenses that were incurred and that the applicants acted in good faith and the payments were therefore authorised.[1769] Documents submitted to the court confirmed that surrogacy was not illegal in either Minnesota or Iowa.[1770]

Two novel points raised by the existence of the adoption order in this case are: (a) whether the applicants had committed any breach of UK domestic adoption law pursuant to section 83 of the Adoption and Children Act 2002, despite the fact that in the US the adoption was not considered as an international adoption (subject to the Hague Convention), and (b) whether the applicants were already recognised as Q's legal parents under the UK law by virtue of the adoption order and, if so, what impact that would have on the making of a parental order.[1771] The court found that there had been no breach of section 83 of the Adoption and Children Act 2002 because neither of the applicants was or has been habitually resident in the British Isles, with the result that this section did not apply.[1772] Because the US is a designated country for the purpose of an overseas adoption, the adoption order should be recognised in the UK.[1773]

Because the second applicant was not the subject of the adoption order, his status as Q's legal father was not recognised in the UK by virtue of section 35 of HFEA 2008,

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1766 *CC v DD* at par 29. Sec 54(6) and (7).
1767 *CC v DD* at par 30.
1768 *CC v DD* at par 30. Commercial organisations (the agency) are lawfully allowed to operate in the US.
1769 *CC v DD* at par 31.
1770 *CC v DD* at par 34.
1771 *CC v DD* at par 35. The court pointed out in par 36 that sec 83 of the Adoption and Children Act 2002 creates an offence for persons who are habitually resident in the British Islands to adopt a child abroad unless they have complied with the provisions of that section and all the relevant regulations made there under.
1772 *CC v DD* at par 36.
1773 *CC v DD* at par 38.

as the surrogate was married.[1774] A parental order would, however, confer legal parenthood on both the applicants.[1775] In granting the parental order, the court concluded by stating that it is clear that Q's lifelong welfare could only be met by securing his relationship with both the applicants in a lifelong way that would give them equal status and would endure for the rest of their lives.[1776]

2.4 *JP v LP and others*[1777]

The applicant was the mother of a little boy, CP, born because of an informal surrogacy agreement.[1778] The surrogate (SP) was a friend of the applicant. The surrogate was artificially fertilised at home with the sperm of the commissioning father, whereafter she became pregnant.[1779] The court mentioned that under section 1(A) of the Surrogacy Arrangements Act 1985, surrogacy agreements are not enforceable by law.[1780] At the time the surrogate was about to give birth to CP after the hospital became aware that the birth would follow as a result of a surrogacy agreement, the hospital asked the parties to conclude a surrogacy agreement.[1781] The agreement had to be provided to the hospital.[1782]

After the birth, CP was handed over to the applicant and the father.[1783] The surrogate registered CP's birth (the birth certificate showed her as the registered mother and the commissioning father as CP's father).[1784] Although the applicant and the father had planned to issue an application for a parental order in terms of section 54 of HFEA 2008, the applicant failed to lodge the application within the prescribed six months

1774 *CC v DD* at par 40(1).
1775 *CC v DD* at par 40(1).
1776 *CC v DD* at par 43.
1777 [2014] EWHC 595 (Fam).
1778 *JP v LP and others* at par 1 – 3. The applicant is however not the birth nor the genetic mother of CP. The applicant had a hysterectomy and the applicant and the respondent father (LP) wanted to conceive through partial surrogacy.
1779 *JP v LP and others* at par 4.
1780 *JP v LP and others* at par 5.
1781 *JP v LP and others* at par 6. At par 7. The agreement was prepared by a firm of Birmingham solicitors. The solicitors were actually committing a criminal offence as, whilst such agreements can lawfully be drawn up free of charge, the solicitors in preparing and charging for the preparation of the said agreement were negotiating surrogacy arrangements on a commercial basis which is in contravention of sec 2 of the Surrogacy Arrangements Act 1985.
1782 *JP v LP and others* at par 6.
1783 *JP v LP and others* at par 8.
1784 *JP v LP and others* at par 8. At par 9-10. After the relationship between the applicant and the father broke down, a shared residence order was made in favour of the applicant and the father.

after CP's birth.[1785] The applicant made an application for sole residence of CP, despite that no parental order was yet made.[1786]

The court had to address the issues which arose in circumstances where there was no parental order regularising the legal status of each of the parties involved.[1787] The court also had to consider how this impacted on the exercise of parental responsibility by each of the parties (the applicant (child's mother), the father and the surrogate).[1788]

The court referred to full surrogacy involving *in vitro* fertilisation and stated that this must take place in a licenced fertility clinic, as it must fall within the remit of the HFEA regulations.[1789] Partial surrogacy, on the other hand, may be carried out in an informal manner between the parties themselves and without involving a licenced fertility clinic.[1790] Thus, such partial surrogacy cases are not controlled or regulated.[1791] The HFEA 2008 spells out the legal effect of such an informal arrangement, despite that the arrangement might have taken place outside the structure of the Act.[1792]

In terms of section 33(1) of the HFEA, the surrogate mother is regarded as the child's (CP) legal mother, unless the child is adopted after birth or parenthood is transferred through a parental order.[1793] The father is seen as the genetic and social father of CP.[1794] The commissioning mother does not have parental responsibility without any

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1785 *JP v LP and others* at par 10 and 11.

1786 *JP v LP and others* at par 15.

1787 *JP v LP and others* at par 16.

1788 *JP v LP and others* at par 16.

1789 *JP v LP and others* at par 21. The commissioning couple's sperm and egg are fertilised in vitro and implanted into the surrogate mother. Further see ch 1, par 1.2.5 above.

1790 *JP v LP and others* at par 22. The parties in this matter opted for partial surrogacy in that the surrogate mother's egg was inseminated with the commissioning father's sperm and it was done at home.

1791 *JP v LP and others* at par 22. In these circumstances, there is no third party consideration of the welfare of the child to be born and none of the three people (commissioning parents and the surrogate mother) involved received the necessary information about critical issues for instance, who will be the legal parents of the child or information or counselling to ensure they understand the challenges presented to parents about issues, such as identity, consequent upon a surrogate birth.

1792 *JP v LP and others* at par 23.

1793 *JP v LP and others* at par 23 (i). The surrogate mother has and retains parental responsibility without a subsequent adoption or a parental order.

1794 *JP v LP and others* at par 23 (ii). Because the surrogate mother was not married and because she was not treated in a UK licenced clinic, she was not in the category of relationship which would satisfy the 'fathership' conditions in terms of sec 37 of the Act. The relationship could otherwise have the effect of making her husband or partner the legal father in place of the genetic father.

legal intervention and she has no status other than the emotional and social status of being CP's psychological mother.[1795] The court pointed out that prior to November 1994, the only means by which the commissioning parents of a commissioned child could obtain parental status of the child, was through a full adoption procedure.[1796] Because section 54 of HFEA 2008 now regulates the application process for parental orders, an application for a parental order in this case was made on 16 July 2010.[1797] The only requirements in terms of section 54 that were satisfied by the applicants were sections 54(1)(a),[1798] 54(2)(a),[1799] 54(5),[1800] 54(6),[1801] and 54(8).[1802] The requirements that were not satisfied related to sections 54(3)[1803] and 54(4)(a).[1804] The parties did recognise that the policy and the purpose of parental orders were to provide for the speedy consensual regularisation of the legal parental status of a child's carers following a birth through a surrogacy agreement.[1805] The court stated that the policy did not fit comfortably with extensions of time in this case, which inevitably resulted in the continued involvement over a protracted period of the surrogate in the lives of the commissioning couple and their child.[1806] The court concluded that a parental order was not an option for the applicants.[1807] The court further explained that an adoption

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1795 *JP v LP and others* at par 23 (iii). The effect is that she does not have parental responsibility which means that she cannot give consent to medical treatment, register CP for school or take a myriad of decisions in relation to CP which parents usually do without a thought as to whether or not they have the authority to do so.

1796 *JP v LP and others* at par 24. The court explained in par 25 that The Parental Orders (Human Fertilisation and Embryology) Regulations 1994 was brought in effect by sec 30 of the HFEA 1990. The regulations created parental orders which provided for a consensual 'fast-track' way for the transfer of legal parenthood to a couple in the case where the child was conceived using the gametes of at least one of the couple. Sec 30 was repealed and the new provisions for parental orders can be found in sec 54 of HFEA 2008. The Act expanded the categories of individuals in respect of whom parental orders could be made so as to include married couples, civil partners, unmarried opposite- sex couples and same sex couples not in a civil partnership.

1797 *JP v LP and others* at par 25 and 27.

1798 CP was carried by a woman (artificially fertilised with the sperm of the father) and she was not one of the applicants.

1799 The applicants are husband and wife.

1800 The applicants are older than 18 years.

1801 The surrogate mother consented unconditionally to the making of the parental order.

1802 *JP v LP and others* at par 27. No money or benefit had been given or received.

1803 The application was not made within the six-month period. The court pointed out that sec 54(3) states the parties must apply for the order during the prescribed time and there is no provision within the Act to provide for a discretionary extension to the statutory six-month time limit and no one sought to argue that the court could seek to circumnavigate the mandatory provisions of the statute.

1804 *JP v LP and others* at par 28. The question regarding if CP's home was with the applicants at the time of the application was not argued although there is a shared residence order.

1805 *JP v LP and others* at par 30.

1806 *JP v LP and others* at par 30.

1807 *JP v LP and others* at par 31.

order did not provide a solution to the mother's status of irrevocable parental responsibility.[1808] A special guardianship order was also not an option because the applicant would then have been able to exercise her newly granted parental responsibility to the exclusion of the surrogate and the first respondent (as the father).[1809] Although a shared residence order was granted and parental responsibility was conferred upon the applicant, the residence order did confer legal motherhood upon her.[1810] The shared residence order merely regulated where CP would live and it gave the applicant parental responsibility, yet the surrogate retained legal motherhood and parental responsibility of CP in terms of section 33 of HFEA 2008.[1811]

The parties subsequently reached a shared care arrangement in respect of CP on the following terms: that CP would be made and remain a ward of court until further order; a shared residence order be made between the mother and father (applicant and first respondent); that all issues of parental responsibility be delegated to the mother and the father jointly; and the surrogate be prohibited from exercising any parental responsibility for CP without the leave of the court.[1812]

This case is very interesting in that it shows how the issue of legal parenthood is handled completely different in the UK compared to South Africa. The UK framework resembles the legal position in South Africa prior to the promulgation of chapter 19 of the Children's Act. Without a successful parental order, the commissioning parents will not be considered the legal parents of their commissioned child.

2.5 *Re A*[1813]

1808 *JP v LP and others* at par 32. The court explained that if the mother were to adopt CP alone, the father's parental responsibility would be extinguished pursuant to sections 46 and 67 of the Adoption and Children Act 2002. The applicant and first respondent cannot adopt together because they got divorced and they are not living together as partners in an enduring family relationship.

1809 *JP v LP and others* at par 33.

1810 *JP v LP and others* at par 34. In the event that she ceases to have a residence order, she would lose her parental responsibility over CP as well.

1811 *JP v LP and others* at par 34.

1812 *JP v LP and others* at par 36. The court explained in par 37 that given the wholly exceptional circumstances of this case, wardship is the most appropriate way in which to manage the overall use of parental responsibility as between the father, the legal mother and the psychological mother of CP.

1813 [2015] EWHC 1756 (Fam).

This is an application for a parental order in relation to A, a little girl, born as a result of a surrogacy agreement concluded in South Africa.[1814] There were three particular features to this application: (a) it was the court's first experience of dealing with a surrogate agreement from South Africa; (b) the court agreed to proceed with the application despite that A was not present in UK by allowing her to join via video link; and (c) the Parental Order Reporter was assisted by a social worker in South Africa to assist with the welfare enquiries that had to be made.[1815]

Two matters that the court had to be satisfied of, were compliance with the requirements under section 54 of HFEA 2008; and whether A's lifelong welfare needs as per section 1 of the Adoption and Children Act 2002 would be met by the court granting the parental order.[1816] The court stated that the surrogate had cooperated entirely with the South African process overseen by the High Court in advance of A's conception, which extinguished the surrogate's status as A's legal mother.[1817] The court was satisfied that all the criteria in respect of section 54 were met.[1818]

The court remarked that the lifelong needs of A included ensuring that her legal relationship with those who care for her was put on the securest footing possible.[1819] As stated above, unless an order is made under UK law, the respondent surrogate would remain A's legal mother, although this would not be the legal position in South Africa.[1820] In granting the parental order, the court expressed the view that it was therefore clearly in A's lifelong interests that there was consistency regarding her legal status in relation to those who care for her across the relevant jurisdictions where she was likely to live.[1821]

1814 *Re A* at par 1 and 2. The surrogate mother is a widowed lady residing in South Africa. A was born in South Africa after she was conceived through IVF treatment with an embryo created from the sperm of the father and an egg from a donor.

1815 *Re A* at par 2. The court pointed out in par 3 that this was the second application made by the applicants in that they also made application for a parental order in 2011 in respect of a little boy who was born as a result of a surrogacy agreement concluded in South Africa.

1816 *Re A* at par 4.

1817 *Re A* at par 16.

1818 *Re A* at par 19. The court did describe the procedure that has to be followed in South Africa in par 12 to 15.

1819 *Re A* at par 21.

1820 *Re A* at par 21.

1821 *Re A* at par 21.

Although the only permissible payments in terms of a surrogacy agreement are for reasonable expenses, the judgments above seem more flexible than courts applying chapter 19 of the Children's Act in South Africa.

The regulation of surrogacy in Canada will be examined next, pointing out differences and similarities where relevant.

3. CANADA

3.1 Regulation of surrogate motherhood

As is the case in South Africa and the UK, altruistic surrogacy is the only form of assisted reproduction allowed in Canada. The relevant legislation and guidelines that govern surrogacy and artificial fertilisation are the Assisted Human Reproduction Act;[1822] Consent for the Use of Human Reproductive Material and In Vitro Embryos Regulations;[1823] Administration and Enforcement (Assisted Human Reproduction Act) Regulations;[1824] Reimbursement Related to Assisted Human Reproduction Regulations;[1825] and the Safety of Sperm and Ova Regulations.[1826] The following sections of Assisted Human Reproduction Act are relevant to surrogacy: section 6 (the payment for surrogacy services and related matters); section 12 (the reimbursement of expenditures)[1827] and section 60 (offences in terms of the Act and punishment). The most relevant regulations to surrogacy are Reimbursement Related to Assisted Human Reproduction Regulations which will be discussed below.

1822 S.C. 2004, c. 2. This Act was assented to on 29 March 2004. Accessed from https://laws-lois.justice.gc.ca/PDF/A-13.4.pdf (accessed 20 January 2023).

1823 SOR/2007-137. Accessed from https://laws-lois.justice.gc.ca/PDF/SOR-2007-137.pdf (accessed on 20 January 2023).

1824 SOR/2019-194. Accessed from https://laws-lois.justice.gc.ca/PDF/SOR-2019-194.pdf (accessed on 20 January 2023). These Regulations came into force on date of registration, 10 June 2019.

1825 SOR/2019-193. Accessed from https://laws-lois.justice.gc.ca/PDF/SOR-2019-193.pdf (accessed on 20 January 2023). These Regulations came in force with sec 12 of the Assisted Human Reproduction Act. See reg 13 of Reimbursement Related to Assisted Human Reproduction Regulations. Carsley, S "Regulating reimbursements for surrogate mothers" 2021 *Alberta Law Review* 58(4) 812. Carsley pointed out that these regulations came into force sixteen years after Assisted Human Reproduction Act received royal assent on 29 March 2004.

1826 SOR/2019-192.

1827 Sec 12 came into force on 9 June 2020. Sec 78 of Assisted Human Reproduction Act.

The surrogate is assumed to be the legal parent of the child born from a surrogacy agreement.[1828] Interesting to note, and similar to the position in the UK, is that the surrogate is only allowed to consent to the transfer of her parental rights in respect of the child to the commissioning (intended) parents *after* the birth of the child.[1829] Provincial legislation in Canada determines the parentage or filiation of a child born through surrogacy.[1830] For example, in Quebec, parental rights are relinquished through 'special consent' adoption, whereas in Ontario and British Columbia, the commissioning parents may be registered as the parents of the child if the surrogate consented thereto after the child's birth and if the parties concluded a written agreement prior to conception, setting out the intentions regarding the child's parentage.[1831] Ontario further determines that the surrogate must receive independent legal advice and she is only allowed to consent seven days after the birth of the child.[1832] To make matters more difficult, some provincial statutes determine that surrogacy agreements are not legally binding and that a surrogate cannot be forced to relinquish her parental status solely based on a surrogacy agreement.[1833]

In contrast to chapter 19 of the Children's Act in South Africa, the Canadian Assisted Human Reproduction Act does not deal with the aspect of surrogacy with the same amount of detail. The Canadian Act determines that a woman is not allowed to be paid to act as a surrogate and no person shall offer to pay a surrogate or advertise that she will be paid.[1834] No person is allowed to act as go-between in accepting payment for arranging for the services of a surrogate or to offer to make such an arrangement or to advertise that such services can be arranged.[1835] It is further not allowed for a person to pay a go-between for arranging surrogacy services nor to offer to pay or

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1828 Carsley, S "Surrogacy in Canada: Lawyers' experiences and practices" 2022 *Canadian Journal of Women and the Law* 34(1) 45.

1829 Carsley, S "Surrogacy in Canada: Lawyers' experiences and practices" 2022 *Canadian Journal of Women and the Law* 34(1) 45.

1830 Carsley, S "Surrogacy in Canada: Lawyers' experiences and practices" 2022 *Canadian Journal of Women and the Law* 34(1) 45.

1831 Carsley, S "Surrogacy in Canada: Lawyers' experiences and practices" 2022 *Canadian Journal of Women and the Law* 34(1) 45 (fn 13).

1832 Carsley, S "Surrogacy in Canada: Lawyers' experiences and practices" 2022 *Canadian Journal of Women and the Law* 34(1) 45 (fn 13).

1833 Carsley, S "Surrogacy in Canada: Lawyers' experiences and practices" 2022 *Canadian Journal of Women and the Law* 34(1) 45.

1834 Sec 6(1) of Assisted Human Reproduction Act.

1835 Sec 6(2) of Assisted Human Reproduction Act.

advertise to pay for the said arrangement.[1836] Importantly, a proposed surrogate may not be younger than 21 years.[1837]

Section 12 sets out the provisions relating to the repayment for expenditures relating to the donation of ova or sperm,[1838] the maintenance or transport of an *in vitro* embryo,[1839] and costs relating to a woman acting as surrogate.[1840] Reimbursement may only be paid in accordance with the Reimbursement Related to Assisted Human Reproduction Regulations.[1841] No reimbursement may be made by any person for the expenses unless he or she received a receipt for the said expenses.[1842] No person is allowed to reimburse a surrogate for a loss of income that she suffered during her pregnancy, except where a qualified medical practitioner provides a written confirmation that the continuation of work may pose a risk to the surrogate's health or to that of the embryo or the foetus.[1843]

Any person breaching the provisions set out in section 6 will be guilty of an offence which is punishable. The person who is convicted on indictment is liable to a fine not exceeding $500,000 or imprisonment for a period not exceeding ten years or both.[1844] On summary conviction, the person is liable to a fine not exceeding $250,000 or to imprisonment for a period not exceeding ten years, or to both.[1845]

Regulations 4 to 11 of Reimbursement Related to Assisted Human Reproduction Regulations[1846] provide for surrogacy expenses and the reimbursement thereof. The expenses incurred by a surrogate relating to her surrogacy that may be lawfully reimbursed are set out in regulation 4. The following expenses are provided for:

1836 Sec 6(3) of Assisted Human Reproduction Act.
1837 Sec 6(4) of Assisted Human Reproduction Act.
1838 Sec 12(1)(a) of Assisted Human Reproduction Act.
1839 Sec 12(1)(b) of Assisted Human Reproduction Act.
1840 Sec 12(1)(c) of Assisted Human Reproduction Act.
1841 SOR/2019-193.
1842 Sec 12(2) of Assisted Human Reproduction Act.
1843 Sec 12(3)(a) of Assisted Human Reproduction Act. The repayment may only be made in accordance with the said Regulations.
1844 Sec 60(a) of Assisted Human Reproduction Act.
1845 Sec 60(b) of Assisted Human Reproduction Act.
1846 SOR/2019-193.

travelling;[1847] care of dependants or pets;[1848] counselling;[1849] legal services and disbursements;[1850] obtaining any drug or device (as defined in section 2 of the Food and Drugs Act);[1851] obtaining products or services that a person (authorised under the laws of a province to assess, monitor and provide health care to a pregnant woman) provided or recommended in writing,[1852] and for getting the recommendation.[1853] Also covered are: services of a midwife or doula;[1854] groceries (except any non-food items);[1855] maternity clothes;[1856] telecommunications;[1857] prenatal exercise classes[1858] linked with the delivery;[1859] health, disability, travel or life insurance cover;[1860] and to obtain or confirm medical or other records.[1861]

Before a person is allowed to reimburse any of the expenses as set out in regulation 4, he or she must have obtained the following documents:[1862] a declaration by the person requesting repayment (dated and signed by the person)[1863] setting out his or her name and address,[1864] the nature of each expense,[1865] the amount incurred for each expense and the amount requested for reimbursement if the amount is less than the incurred amount;[1866] the date of each expense;[1867] where transportation was

1847 Reg 4(a) Reimbursement Related to Assisted Human Reproduction Regulations.
1848 Reg 4(b) Reimbursement Related to Assisted Human Reproduction Regulations.
1849 Reg 4(c) Reimbursement Related to Assisted Human Reproduction Regulations.
1850 Reg 4(d) Reimbursement Related to Assisted Human Reproduction Regulations.
1851 Reg 4(e) Reimbursement Related to Assisted Human Reproduction Regulations.
1852 Reg 4(f) Reimbursement Related to Assisted Human Reproduction Regulations.
1853 Reg 4(g) Reimbursement Related to Assisted Human Reproduction Regulations.
1854 Reg 4(h) Reimbursement Related to Assisted Human Reproduction Regulations. A doula can be described as a person who is a trained professional who supports a woman before, during and after she had a baby. Doulas however do not deliver health care services, but they do offer physical and emotional support to a pregnant woman who is preparing to welcome a new baby into her and her family's life. A doula assists and advocates for the mother or birthing parent. See https://my.clevelandclinic.org/health/articles/23075-doula (accessed on 7 June 2023).
1855 Reg 4(i) Reimbursement Related to Assisted Human Reproduction Regulations.
1856 Reg 4(j) Reimbursement Related to Assisted Human Reproduction Regulations.
1857 Reg 4(k) Reimbursement Related to Assisted Human Reproduction Regulations.
1858 Reg 4(l) Reimbursement Related to Assisted Human Reproduction Regulations.
1859 Reg 4(m) Reimbursement Related to Assisted Human Reproduction Regulations.
1860 Reg 4(n) Reimbursement Related to Assisted Human Reproduction Regulations.
1861 Reg 4(o) Reimbursement Related to Assisted Human Reproduction Regulations.
1862 Reg 6 Reimbursement Related to Assisted Human Reproduction Regulations.
1863 Reg 6(a) Reimbursement Related to Assisted Human Reproduction Regulations.
1864 Reg 6(a)(i) Reimbursement Related to Assisted Human Reproduction Regulations.
1865 Reg 6(a)(ii) Reimbursement Related to Assisted Human Reproduction Regulations.
1866 Reg 6(a)(iii) Reimbursement Related to Assisted Human Reproduction Regulations.
1867 Reg 6(a)(iv) Reimbursement Related to Assisted Human Reproduction Regulations.

used;[1868] the addresses of the points of departure and the destination,[1869] together with the total distance in kilometres between the two points;[1870] a statement that states each of the expenses was incurred in relation to surrogacy;[1871] a statement indicating that the amount of each expense has not been paid to him or her by any other source, in full or in part;[1872] and a statement that confirms all of the information set out in the declaration is correct and complete to the best of his or her knowledge.[1873] Further, a receipt for each expense for which reimbursement is requested that identifies the date of each expense is also required.[1874]

Regulation 7 determines that a person who reimburses an expense as set out in the declaration must indicate on the document the amount of each expense that was repaid, and he or she must sign it to confirm the information. The preliminary requirements for the reimbursement of a surrogate for her loss of income is set out in regulation 8. The following documents are necessary before a person may reimburse a surrogate for a loss of income suffered by her during the pregnancy:[1875] the surrogate must provide the person with a declaration dated and signed by her and setting out her name and address;[1876] the start and end dates of the period that she could not work during her pregnancy (for a reason certified by a qualified medical practitioner in terms of section 12(3) of the Act);[1877] the amount that she is requesting for repayment;[1878] a statement wherein the surrogate indicate that she has not received compensation from any other source, in full or in part, for her loss of income;[1879] and a statement confirming that all the information set out in the declaration is correct and complete to the best of her knowledge.[1880] Further, supporting evidence must be

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1868 Reg 6(a)(v) Reimbursement Related to Assisted Human Reproduction Regulations. If no receipt was provided by the transport service.

1869 Reg 6(a)(v)(A) Reimbursement Related to Assisted Human Reproduction Regulations.

1870 Reg 6(a)(v)(B) Reimbursement Related to Assisted Human Reproduction Regulations.

1871 Reg 6(a)(vi) Reimbursement Related to Assisted Human Reproduction Regulations. This regulation is also regarding expenses incurred in the course of donating ova or sperm and in the maintenance or transport of an *in vitro* embryo.

1872 Reg 6(a)(vii) Reimbursement Related to Assisted Human Reproduction Regulations.

1873 Reg 6(a)(viii) Reimbursement Related to Assisted Human Reproduction Regulations.

1874 Reg 6(d) Reimbursement Related to Assisted Human Reproduction Regulations. A receipt is not necessary in the case of transport expenses.

1875 Reg 8 Reimbursement Related to Assisted Human Reproduction Regulations. This repayment can be made for loss of income under sec 12(3) of Assisted Human Reproduction Act.

1876 Reg 8(a)(i) Reimbursement Related to Assisted Human Reproduction Regulations.

1877 Reg 8(a)(ii) Reimbursement Related to Assisted Human Reproduction Regulations.

1878 Reg 8(a)(iii) Reimbursement Related to Assisted Human Reproduction Regulations.

1879 Reg 8(a)(iv) Reimbursement Related to Assisted Human Reproduction Regulations.

1880 Reg 8(a)(v) Reimbursement Related to Assisted Human Reproduction Regulations.

provided of the income that the surrogate would have earned had she not been absent from her work (for the period set out in regulation 8(a)(ii))[1881] and a copy of the certification that was provided by a qualified medical practitioner in terms of section 12(3)(a) of Assisted Human Reproduction Act.[1882]

The person who reimburses the surrogate for her loss of income as set out on the declaration must indicate on the document the amount of the loss of income that was repaid, the date that it was paid and he or she must sign it to confirm the information.[1883]

South Africa will most definitely benefit from detailed regulations guiding the courts on the exact type of expenses that fall under the different categories of section 301 of the Children's Act. Requiring the surrogate to provide the commissioning parent(s) with proof of actual expenses protects the commissioning parent(s) from the surrogate trying to claim expenses unrelated to the surrogacy agreement. Furthermore, it is also submitted regulations be proposed, like the Canadian example above, where it becomes a requirement that the surrogate provides the commissioning parent(s) with an affidavit setting out the exact expenses together with the receipt for every expense. Further, the surrogate in South Africa should also be required to provide an affidavit with a medical certificate and proof of loss of income should she claim loss of income from the commissioning parent(s). Surrogacy is already an expensive exercise for the commissioning parents and these proposed regulations will protect them from unnecessary expenses should the surrogate inflate expenses or a loss of income.

Carsley argues that there are certain kinds of expenses for which surrogates have been reimbursed and they are likely to continue receiving these kinds of payments in spite of the Regulations, because Health Canada does not require proof of what the

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1881 Reg 8(b) Reimbursement Related to Assisted Human Reproduction Regulations.

1882 Reg 8(c) Reimbursement Related to Assisted Human Reproduction Regulations.

1883 Reg 9 Reimbursement Related to Assisted Human Reproduction Regulations. Reg 11(1) determines that the person who repaid expenses as referred to in the regulations must keep a record of all the documents obtained in respect of the repayments for a period of six years after the date of the repayment of each expense. Reg 11(2) determines that the person who repaid the surrogate for her loss of income must, for each repayment made, maintain a record of all the documents obtained for the purposes of repayment for a period of six years after the date of repayment.

surrogate's monthly expenses are prior to her pregnancy.[1884] Examples of expenses that were claimed are: lawn mowing, fitness classes, babysitting and snow clearing.[1885] These expenses are for services incurred independent of a surrogacy agreement.[1886] The author further argues that surrogates are also likely to continue receiving bonuses for being an experienced surrogate, giving birth to twins and undergoing a caesarean section, because Health Canada has done little to enforce the Assisted Human Reproductive Act.[1887] A Guidance Document was released alongside the Regulations to explain that the provision regarding expenses is intentionally broad so that it can cover different circumstances.[1888] It would, however, appear that this Guidance Document is causing confusion, for example, the Regulations provide for loss of income during the surrogate's pregnancy, yet the Guidance Document indicates that surrogates may be reimbursed for loss of income during the pre-pregnancy and the post-partum period.[1889] The Guidance Document does not have the force of law and judges are hence not bound by it (although it may be persuasive).[1890] In instances where a discrepancy or conflict arises between a statute and/or regulations and the Guidance Document, the first-mentioned will prevail.[1891]

A recent legal development worth mention is the introduction of "Bill 2" in Quebec in October 2022 that aims to create a framework regulating surrogacy by requiring the conclusion of a notarised surrogacy agreement before the onset of pregnancy. It would also require obtaining (after the birth of the child) the consent of the person who gave

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1884 Carsley, S "Regulating reimbursements for surrogate mothers" 2021 *Alberta Law Review* 58(4) 834.

1885 Carsley, S "Regulating reimbursements for surrogate mothers" 2021 *Alberta Law Review* 58(4) 834.

1886 Carsley, S "Regulating reimbursements for surrogate mothers" 2021 *Alberta Law Review* 58(4) 834.

1887 Carsley, S "Regulating reimbursements for surrogate mothers" 2021 *Alberta Law Review* 58(4) 834.

1888 Carsley, S "Regulating reimbursements for surrogate mothers" 2021 *Alberta Law Review* 58(4) 833.

1889 Carsley, S "Regulating reimbursements for surrogate mothers" 2021 *Alberta Law Review* 58(4) 835.

1890 Carsley, S "Regulating reimbursements for surrogate mothers" 2021 *Alberta Law Review* 58(4) 835.

1891 Carsley, S "Regulating reimbursements for surrogate mothers" 2021 *Alberta Law Review* 58(4) 835.

birth that she relinquishes any legal rights to the child.[1892] A surrogate mother will also need to be at least 21 years old and would be compensated for loss of work income and for several expenses (yet not paid for her services).[1893] She would be able to change her mind and terminate the contract at any time without risking a lawsuit.[1894]

Comparing the legal position in South Africa with that of Canada reveals interesting, yet not surprising similarities and differences. Firstly, for surrogacy to be lawful in both jurisdictions, it may only be altruistic surrogacy. Both South Africa and Canada criminalises commercial surrogacy. The legal status of the parties in a surrogacy arrangement resembles those in the UK, where federal law in Canada gives parental rights to the surrogate mother upon the birth of the commissioned child and not the commissioning parents. This is different from the South African position in terms of which legal parenthood is bestowed on the commissioning parents via legislation (chapter 19 of the Children's Act). Canada does not restrict surrogacy services to married, heterosexual couples because discrimination on grounds of sexual orientation or marital status is prohibited. Intended parents usually find the process of acquiring legal parental rights over children born of surrogacy, accommodating. It is curious that a lot of attention is placed on certain logistical matters, such as which payments may be made to surrogates, as well as the supporting documentation that is required. This approach is not observed in South Africa or the United Kingdom.

3.2 *B.A.N. v. J.H.*[1895]

The petitioners in this case were husband and wife and they were seeking a declaratory order of parentage of children born as a result of a surrogacy

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1892 West, R "Proposed changes to Quebec Surrogacy laws under Bill 2" https://canadafertility.law/blog/proposed-changes-to-quebec-surrogacy-laws-under-bill-2/ (accessed 28 January 2023).

1893 West, R "Proposed changes to Quebec Surrogacy laws under Bill 2" https://canadafertility.law/blog/proposed-changes-to-quebec-surrogacy-laws-under-bill-2/ (accessed 28 January 2023).

1894 National Assembly of Quebec, Second Session, 42nd Legislature. Bill 2 (2022, chapter 22). An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status. Assented to on 8 June 2022. http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2022C22A.PDF (accessed 25 January 2023).

1895 2008 BCSC 808 accessed on https://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc808/2008bcsc808.html (accessed on 30 January 2023).

agreement.[1896] The surrogate was only the gestational carrier as the husband's sperm was used together with donor ova.[1897] The donor and the surrogate both stated that consent was given freely and voluntarily for the intended parents to be the sole parents and guardians of the children and further that they lay no claim and wish that the intended parents be declared as the sole parents and guardians of the children.[1898] The surrogacy agreement that was concluded between the parties confirms the intention of the parties and that the birth registration would record the intended parents as the birth parents of the children.[1899] Further, the surrogate and her husband would have no parental relationship with the children.[1900] The court pointed out that:

> The definition of "birth" in s. 1 of the *Vital Statistics Act*, R.S.B.C. 1996, c. 479, presumes the birth mother to be the mother of a child. The surrogate mother could of course register the birth, showing herself as the birth mother and the intended and genetic father as the birth father. Then, given that all five persons involved are consenting, for the intended mother to go through a second-parent adoption under s. 29(2) of the *Adoption Act*, R.S.B.C. 1996, c. 5. This would serve to sever any legal relationships that could then exist between the children and the egg donor or the surrogate mother by operation of s. 37(2)(b) of the *Adoption Act*.[1901]

The petitioners however did not want to follow the adoption route. The Vital Statistics Agency indicated in a letter that it approves the registration of the intended parents as the birth parents had indicated that at least one of them was a genetic parent of the children.[1902] The court found that the province did not have legislation that dealt specifically with surrogacy and that, in light of the fact that the Vital Statistics Agency had approved the approach that was taken by the petitioners, and the other parties had agreed to the relief sought, the court declared that the intended parents are the parents of the children and also the parents to the exclusion of the egg donor and the surrogate.[1903]

3.3 *MAM v TAM*[1904]

1896 *B.A.N. v. J.H.* at par 1. All the parties agreed to the relief sought by the petitioners.
1897 *B.A.N. v. J.H.* at par 3.
1898 *B.A.N. v. J.H.* at par 3.
1899 *B.A.N. v. J.H.* at par 4.
1900 *B.A.N. v. J.H.* at par 4.
1901 *B.A.N. v. J.H.* at par 8.
1902 *B.A.N. v. J.H.* at par 19.
1903 *B.A.N. v. J.H.* at par 22-24.
1904 2015 NBQB 145 accessed on https://www.canlii.org/en/nb/nbqb/doc/2015/2015nbqb145/2015nbqb145.html?searchUrlHash=AAAAAQAfYXNzaXN0ZWQgaHVtYW4gcmVwcm9kdWN0aW9uIGFjdAAAAAAB&resultIndex=12 (accessed 30 January 2023).

This was an application wherein the applicants were seeking relief in the form of declaratory orders.[1905] The second applicant was to be recognised as the father of the children and that he is their natural father; the first applicant was to be recognised as the mother of the children and that she is their natural mother; the second respondent is not the natural father of the children and the first respondent is not the natural mother of the said children.[1906] The application was brought in terms of the Family Services Act, S.N.B., 2003, Chap.F-22, the Assisted Human Reproduction Act, S.C. 2004, C.2 and the Assisted Human Reproduction (section 8 consent) Regulations, SOR/2007-137.[1907] The applicants were married but they were unable to conceive naturally and the first applicant's uterus was unable to carry a pregnancy.[1908] The first respondent agreed to act as gestational surrogate for the applicants (donor ova and the sperm of the second applicant was used for conception) whereafter twin boys were born.[1909] The applicants took the children with them to Ontario, where they were residing.[1910] The children's birth certificates however indicated the first respondent, the surrogate, and second applicant as the father.[1911] The parties concluded a surrogacy agreement wherein it was stated that the respondents agreed to relinquish any parental rights or obligations after the children were born.[1912] Further, the applicants agreed to pay the first respondent for expenses incurred as a result of the surrogacy and the first respondent would act altruistically.[1913] The applicants concluded a reimbursement of expenses agreement with the donor.[1914] The respondents were in agreement with the relief that the applicants were seeking.[1915]

The court pointed out that the Family Service Act, which was assented to on 16 July 1980, did not contemplate that children would be created with the sperm of the father and the ova of an anonymous donor.[1916] The court found that the applicants have been the children's caregivers and it is evident, from the agreements concluded between

1905 *MAM v TAM* at par 1.
1906 *MAM v TAM* at par 1.
1907 *MAM v TAM* at par 2.
1908 *MAM v TAM* at par 4 and 6.
1909 *MAM v TAM* at par 6-7.
1910 *MAM v TAM* at par 8.
1911 *MAM v TAM* at par 9.
1912 *MAM v TAM* at par 13.
1913 *MAM v TAM* at par 13.
1914 *MAM v TAM* at par 11.
1915 *MAM v TAM* at par 15.
1916 *MAM v TAM* at par 27.

the parties, that there was a clear intention that the applicants be the parents of the children.[1917] Further, the court found that the applicants were both the social and the intended parents of the children and that there is a parent and child relationship between them and the children.[1918] The court concluded that, taking into account also the best interests of the children, the applicants are declared to be the children's mother and father.[1919] The court did not want to declare the first applicant the natural mother of the children but it held that the respondents are not to the parents of the children.[1920]

The regulation of surrogacy in India will be discussed next.

4. INDIA

4.1 Regulation of surrogate motherhood

The reproductive right of persons is regarded as a basic right in India.[1921] With commercial surrogacy not prohibited in India, Indian fertility clinics have often been accused of becoming "baby factories."[1922] Some scholars regard the Indian model of commercial surrogacy as great success that is founded upon the notion of a liberal market model.[1923] However, in 2015 the Indian government prohibited commercial surrogacy for foreign nationals but still allowed domestic commercial surrogacy.[1924]

1917 *MAM v TAM* at par 30-31.
1918 *MAM v TAM* at par 32.
1919 *MAM v TAM* at par 33.
1920 *MAM v TAM* at par 34 and 38.
1921 Law Commission of India (2009) *Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy* (Report no.228) 12 accessed from https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081094-1.pdf (accessed 13 January 2023).
1922 Elder, AH "Wombs to rent: Examining the jurisdiction of international surrogacy" 2014 16(2) *Oregon Review of International Law* 368. *Ex parte application WH and others* 2011 (4) All SA 630 (GP) at par 45. Nicholson 2013 *SAJHR* 508. Biko, J & Nene, Z 'Ethics aspects of third-party reproduction' *Obstetrics & Gynaecology Forum* 2017, Issue 3, p 14. The commercial surrogacy is leading to a boom in the fertility tourism trade. Law Commission of India (2009) *Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy* (Report no.228) 11 accessed from https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081094-1.pdf (accessed 13 January 2023).
1923 Nicholson 2013 *SAJHR* 508.
1924 Gola, S "One Step forward or one step back? Autonomy, agency and surrogates in the Indian Surrogacy (Regulation) Bill 2019" 2021 *International Journal of Law in Context* 17(1) 59.

Previously, India did not have laws regulating surrogacy apart from guidelines that governed assisted reproductive technology procedures.[1925] The Assisted Reproductive Technology (Regulation) Bill, 2020, was drafted with the objective of regulating assisted reproduction and surrogacy.[1926] With the enactment of the Surrogacy (Regulation) Act[1927] and the Assisted Reproductive Technology (Regulation) Act,[1928] surrogacy agreements and assisted reproduction were finally regulated more comprehensively.[1929]

Chapter 2 of the Surrogacy (Regulation) Act regulates the registration of surrogacy clinics. Only a registered surrogacy clinic is allowed to conduct activities in respect of surrogacy and surrogacy procedures may only be performed in a place registered in terms of the Act.[1930] Commercial surrogacy is now completely prohibited, both domestically and internationally.[1931] It is prohibited to promote, publish, canvass, propagate or advertise or cause to be promoted, published, canvassed, propagated or advertised, with the intention to induce or is likely to induce a woman to act as surrogate;[1932] to seek or intend to seek a woman to act as a surrogate[1933]; or to say or

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1925 Elder, AH "Wombs to rent: Examining the jurisdiction of international surrogacy" 2014 16(2) *Oregon Review of International Law* 369.

1926 The Assisted Reproductive Technology (Regulation) Bill, 2020 to be accessed from https://www.prsindia.org/billtrack/assisted-reproductive-technology-regulation-bill-2020 (date accessed 9 February 2021). The Bill was introduced in Lok Sabha on 14 September 2020 and its aim was to provide for the regulation of assisted reproductive technology services in the country.

1927 47 of 2021. Accessed from https://www.indiacode.nic.in/handle/123456789/17046?sam_handle=123456789/1362 (accessed on 20 January 2023).

1928 42 of 2021. The Act was published on 20 December 2021. Accessed from https://www.indiacode.nic.in/handle/123456789/17031?sam_handle=123456789/1362 (accessed on 20 January 2023).

1929 Elder, AH "Wombs to rent: Examining the jurisdiction of international surrogacy" 2014 16(2) *Oregon Review of International Law* 368.

1930 Sec 3(i), 3(iv) and sec 11 of The Surrogacy (Regulation) Act.

1931 Sec 3(ii) of The Surrogacy (Regulation) Act. "[n]o surrogacy clinic, paediatrician, gynaecologist, embryologist, registered medical practitioner or any person shall conduct, offer, undertake, promote or associate with or avail of commercial surrogacy in any form." Sec 3(v) "[n]o surrogacy clinic, registered medical practitioner, gynaecologist, paediatrician, embryologist or any other person shall promote, publish, canvass, propagate or advertise or cause to be promoted, published, canvassed, propagated or advertised which"- Sec 3(v)(b) "[i]s aimed at promoting a surrogacy clinic for commercial surrogacy or promoting commercial surrogacy in general". Sec 3(v)(e) advertise commercial surrogacy in any form. New laws in India regulates assisted reproduction and surrogacy https://reproductiverights.org/assisted-reproduction-and-surrogacy-in-india/ (accessed 26 January 2023).

1932 Sec 3(v)(a) of The Surrogacy (Regulation) Act.

1933 Sec 3(v)(c) of The Surrogacy (Regulation) Act.

suggest that a woman is willing to act as surrogate.[1934] It is important to note that no surrogacy clinic, registered medical practitioner, gynaecologist, paediatrician, embryologist, intending couple or any other person shall perform or cause an abortion to be performed during the gestation period of the surrogacy period unless written consent of the surrogate and approval by the appropriate authority concerned was obtained.[1935]

Chapter 3 of the Act regulates surrogacy and surrogacy procedures. Surrogacy is only allowed for purposes as set out in section 4(ii) of the Act, and after satisfying all the conditions as set out in section 4(iii).[1936] No surrogacy or surrogacy procedure is permitted except when gestational surrogacy is required as a result of a medical indication of the intending couple.[1937] A couple of Indian origin or an intending woman who plans to use surrogacy must first apply to the National Assisted Reproductive Technology and Surrogacy Board for a certificate of recommendation.[1938] Only altruistic surrogacy is permitted.[1939] Surrogacy or surrogacy procedures will not be allowed for commercial purposes or for the commercialisation of surrogacy or surrogacy procedures.[1940] Surrogacy or surrogacy procedures are furthermore not permitted for producing children for sale, prostitution or for any other form of exploitation.[1941] However, surrogacy or surrogacy procedures may be permitted for any other condition or disease specified by the regulations.[1942]

Furthermore, surrogacy and surrogacy procedures are only allowed in circumstances where the Director or person in-charge of the surrogacy clinic and the person that is qualified to do so are satisfied that the required conditions have been fulfilled.[1943] The intending couple must have a "certificate of essentiality" issued by the authority upon confirmation that the following conditions are met, which are:[1944] that a certificate of a

1934 Sec 3(v)(d) of The Surrogacy (Regulation) Act.
1935 Sec 3(iv) of The Surrogacy (Regulation) Act.
1936 Sec 4(i) of The Surrogacy (Regulation) Act.
1937 Sec 4(ii)(a) of The Surrogacy (Regulation) Act.
1938 Sec 4(ii)(a) of The Surrogacy (Regulation) Act.
1939 Sec 4(ii)(b) of The Surrogacy (Regulation) Act.
1940 Sec 4(ii)(c) of The Surrogacy (Regulation) Act.
1941 Sec 4(ii)(d) of The Surrogacy (Regulation) Act.
1942 Sec 4(ii)(e) of The Surrogacy (Regulation) Act.
1943 Sec 4(iii) of The Surrogacy (Regulation) Act.
1944 Sec 4(iii)(a) of The Surrogacy (Regulation) Act.

medical indication in favour of one or both of them or the intending woman necessitating gestational surrogacy as provided by a District Medical Board is issued;[1945] an order of a court regarding the parentage and custody of the commissioned child is made;[1946] and that insurance cover in favour of the proposed surrogate for a period of thirty-six months covering postpartum delivery complications is provided.[1947]

The surrogate must have an eligibility certificate issued by the appropriate authority, which will be issued if the following conditions are met:[1948] the surrogate must be between the age of 25 to 35 years; she must be an "ever-married woman" having a child of her own on the day of implantation;[1949] she shall act as surrogate and will be permitted to undergo surrogacy procedures in terms of the provisions of the Act, provided that the necessary application is submitted to the authority;[1950] she is not allowed to use her own gametes;[1951] she may only act as surrogate once in her lifetime;[1952] and she must produce a certificate issued by a registered medical practitioner testifying to her medical and psychological fitness for surrogacy and the surrogacy procedures.[1953]

Further to the above, the intending couple's eligibility certificate is supplied separately by the appropriate authority upon fulfilment of the following conditions:[1954] they must be married; the woman must be between the ages of 23 to 50 years and the male between the ages 26 to 55 years on the day of certification;[1955] and they may not have any surviving child (biologically or through adoption or through earlier surrogacy). The latter provision shall not affect a couple who have a child who is mentally or physically

1945 Sec 4(iii)(a)(I) of The Surrogacy (Regulation) Act.
1946 Sec 4(iii)(a)(II) of The Surrogacy (Regulation) Act. The intending couple or intending woman and the proposed surrogate shall bring an application in this regard. The order shall be the birth affidavit after the commissioned child is born.
1947 Sec 4(iii)(a)(III) of The Surrogacy (Regulation) Act. The insurance must be from an insurance company or an agent that is recognised by the Insurance Regulatory and Development Authority.
1948 Sec 4(iii)(b) of The Surrogacy (Regulation) Act.
1949 Sec 4(iii)(b)(I) of The Surrogacy (Regulation) Act. The woman can then help in surrogacy be being a donor.
1950 Sec 4(iii)(b)(II) of The Surrogacy (Regulation) Act.
1951 Sec 4(iii)(b)(III) of The Surrogacy (Regulation) Act.
1952 Sec 4(iii)(b)(IV) of The Surrogacy (Regulation) Act.
1953 Sec 4(iii)(b)(V) of The Surrogacy (Regulation) Act.
1954 Sec 4(iii)(c) of The Surrogacy (Regulation) Act.
1955 Sec 4(iii)(c)(I) of The Surrogacy (Regulation) Act.

challenged or suffers from a life-threatening disorder or fatal illness with no permanent cure, the latter to be confirmed and approved by the appropriate authority, supported and confirmed by a medical certificate from a District Medical Board.[1956]

The provisions in the South African Children's Act are different in that there is no limit on the amount of times that the surrogate can act as surrogate mother. Moreover, the surrogate in South Africa is allowed to donate her gametes for the surrogacy process and commissioning parents are allowed to have other children when they use the surrogacy process for reproduction. There is merit in the argument that a surrogate should not be allowed to donate her gametes for use by the commissioning parents, as the commissioned child will not be genetically linked to her. This may obviate the need for the cooling-off period which the surrogate has in terms of section 298 of the Children's Act. It will also provide more security to the commissioning parents as the potential risk that the surrogate may refuse to hand the commissioned child over after birth will be minimised.

It is prohibited for any person to seek or encourage to conduct any surrogacy or surrogacy procedures on her except for the purposes as set out in section 4(ii) of the Act.[1957] The latter provision applies to the surrogate mother. Furthermore, no person is permitted to seek or conduct surrogacy procedures unless[1958] he or she has explained all the known side effects, as well as the after effects of the procedures, to the surrogate.[1959] He or she must have obtained written informed consent of the surrogate before she is to undergo the procedures.[1960] The surrogate, however, shall have the option to withdraw her consent for the surrogacy before the implantation of the embryo in her womb.[1961] The intending couple or intending woman is prohibited from abandoning the commissioned child for any reason whatsoever, within or outside India.[1962] The commissioned child shall be deemed to be the biological child of the

1956 Sec 4(iii)(c)(II) of The Surrogacy (Regulation) Act.
1957 Sec 5 of The Surrogacy (Regulation) Act.
1958 Sec 6(1) of The Surrogacy (Regulation) Act.
1959 Sec 6(1)(i) of The Surrogacy (Regulation) Act.
1960 Sec 6(1)(ii) of The Surrogacy (Regulation) Act. The consent must be in the prescribed form and in the language that the surrogate understands.
1961 Sec 6(2) of The Surrogacy (Regulation) Act.
1962 Sec 7 of The Surrogacy (Regulation) Act. The reason includes, but is not limited to, any genetic defect, birth defect, any other medical condition, the defects developing subsequently, sex of the child or conception of more than one baby and the like.

intending couple or intending woman.[1963] The child shall thus be entitled to all the rights and privileges available to a natural child under any law from time being in force.[1964] It is also prohibited for any person, organisation, surrogacy clinic, laboratory or clinical establishment of any kind, to force the surrogate to undergo an abortion at any stage of surrogacy except in prescribed conditions.[1965]

Like the position in South Africa (and after an order of confirmation of the surrogacy agreement is granted), the commissioned child in India will be deemed to be the child of the commissioning parent(s), or the "intending parents". It is submitted that this explicit recognition of the child's legal status provides more security for the different parties vis-à-vis the position in the UK where a parental order application must first be brought after the birth of the child to transfer parental rights to the commissioning parents. The Indian "eligibility certificate requirement" that applies to each of the parties to the surrogacy agreement may be helpful for a court in South Africa when an application for the confirmation of a surrogacy agreement serves before a High Court.

Chapter 7 of the Surrogacy (Regulation) Act sets out the offences and penalties in terms of the Act. Section 38 prohibits commercial surrogacy: No person, organisation, surrogacy clinic, laboratory or clinical establishment of any kind shall – (a) undertake commercial surrogacy, provide commercial surrogacy or its related component procedures or services in any form or run a racket or an organised group to empanel or select surrogate mothers or use individual brokers or intermediaries to arrange for surrogate mothers and for surrogacy procedures, at such clinics, laboratories or at any other place.[1966]

Commercial surrogacy may not be advertised in any manner by any means whatsoever, scientific or otherwise.[1967] It is further prohibited to abandon, disown or exploit or cause to be abandoned, disowned or exploited in any form, the child(ren) that are born through surrogacy.[1968] The surrogate and the commissioned child may

1963 Sec 8 of The Surrogacy (Regulation) Act.
1964 Sec 8 of The Surrogacy (Regulation) Act.
1965 Sec 10 of The Surrogacy (Regulation) Act.
1966 Sec 38(1)(a) of The Surrogacy (Regulation) Act.
1967 Sec 38(1)(b) of The Surrogacy (Regulation) Act.
1968 Sec 38(1)(c) of The Surrogacy (Regulation) Act.

not be exploited in any manner.[1969] The person contravening any provision of the Act, other than section 38, shall be punishable with imprisonment for a period up to five years and with a fine up to ten lakh rupees.[1970] In instances where a person wants to follow the surrogacy route, but does not want to adhere to altruistic surrogacy or where the person is conducting surrogacy procedures for commercial purposes, that person shall be punishable with imprisonment for a period of up to five years and with a fine up to five lakh rupees.[1971] The Act also provides for the maintenance and preservation of records by the surrogacy clinic for a period of twenty-five years.[1972]

The purpose of the Assisted Reproductive Technology (Regulation) Act is, among others, the regulation and supervision of ART clinics and the ART banks. The clinics have the duty to make the commissioning couple aware of the rights of a child that is born through the use of ART.[1973] Information about the commissioning couple, woman and donor shall be kept confidential and the information regarding the treatment shall not be disclosed to any person, except to the database of the National Registry; if there is a medical emergency and at the request of the commissioning couple or by an order of court.[1974] No treatment or procedure shall be performed by a clinic without the written informed consent of all the parties seeking ART.[1975] Any one of the commissioning couple may withdraw his or her consent any time before the embryos or gametes are transferred to the woman's uterus.[1976] The commissioning or intending couple shall be deemed the biological parent(s) of a child born through ART, which means that the child shall be entitled to all the rights and privileges that is available to a natural child.[1977] A gamete donor shall, however, relinquish all parental rights over the child(ren) which may be born from his or her gametes.[1978]

1969 Sec 38(1)(d) of The Surrogacy (Regulation) Act.

1970 Sec 39(1) of The Surrogacy (Regulation) Act. Ten lakh rupees (1 000 000 Indian rupees) are equivalent to 230,363.00 South African Rand (ZAR) and 12,115.26 United State Dollars (USD).

1971 Sec 40 of The Surrogacy (Regulation) Act. A subsequent offence will be punishable with imprisonment of up to ten years and a fine with up to ten lakh rupees.

1972 Sec 46 determines that the clinic shall maintain all records, charts, forms, reports, consent letters, agreements and all other documents under the Act.

1973 Sec 21 of The Assisted Reproductive Technology (Regulation) Act.

1974 Sec 21(e) of The Assisted Reproductive Technology (Regulation) Act.

1975 Sec 22(a) of The Assisted Reproductive Technology (Regulation) Act.

1976 Sec 22(4) of The Assisted Reproductive Technology (Regulation) Act.

1977 Sec 31 of The Assisted Reproductive Technology (Regulation) Act. This provision is similar to sec 8 of The Surrogacy (Regulation) Act.

1978 Sec 31(2) of The Assisted Reproductive Technology (Regulation) Act.

Important legal questions of parentage and citizenship had to be answered by the courts in the below judgments.[1979] It is evident that India's new regulatory framework will answer these legal questions.

4.2 *Baby Manji Yamada v. Union of India*[1980]

In this matter the paternal grandmother filed a petition for custody in respect of a baby that was born through surrogacy.[1981] The petition was filed under article 32 of the Constitution of India, 1950.[1982] A surrogacy agreement was concluded between the biological parents (from Japan) and a surrogate (in India).[1983] The birth certificate indicated the biological father as the parent.[1984] The biological parents separated and the biological father had to return to Japan as a result of his visa expiring.[1985] This matter is important as the lack of a legal framework for surrogacy was pointed out by the third respondent, an NGO.[1986] This was at a time that commercial surrogacy was still allowed in India and was a booming industry. The NGO argued that there was no law in India that governed surrogacy and there were many irregularities being committed as a result of the regulatory gaps.[1987] The NGO further argued that the Union of India should enforce stringent laws that regulate surrogacy in India.[1988] The question that arose during the hearing of the matter was who can be deemed to be the mother of the child—was it the gamete donor or the surrogate?[1989] The identity document that was issued only indicated the father's name as the father and no one was indicated to be the mother on the document.[1990] The court, as a result of the

1979 Gola, S "One Step forward or one step back? Autonomy, agency and surrogates in the Indian Surrogacy (Regulation) Bill 2019" 2021 *International Journal of Law in Context* 17(1) 58.
1980 2008 (13) SCC 518.
1981 *Baby Manji Yamada v. Union of India* at par 2-3.
1982 *Baby Manji Yamada v. Union of India* at par 2.
1983 *Baby Manji Yamada v. Union of India* at par 2.
1984 *Baby Manji Yamada v. Union of India* at par 2.
1985 *Baby Manji Yamada v. Union of India* at par 2.
1986 *Baby Manji Yamada v. Union of India* at par 3. The NGO filed a Division Bench Habeas Corpus Writ Petition before the High Court of Rajasthan, Jaipur Bench. Singh, J "Commercial Surrogacy: The baby Manji Yamada case" https://www.legallore.info/post/commercial-surrogacy-the-baby-manji-yamada-case (accessed 1 June 2023).
1987 *Baby Manji Yamada v. Union of India* at par 3.
1988 *Baby Manji Yamada v. Union of India* at par 3.
1989 *Jan Balaz v. Anand Municipality and others* at par 14.
1990 *Jan Balaz v. Anand Municipality and others* at par 14.

NGO's petition, issued directions on the custody or planning of Baby Manji.[1991] It was as a result of this petition that Baby Manji's paternal grandmother lodged a writ challenge in the Supreme Court wherein she was contesting the High Court's order.[1992] The court observed that the Commission for the Protection of Child Rights Act of 2005 was formed to protect children's rights and further to expedite the prosecution of crimes against children.[1993] The Commission thus had to make a decision in this case should a decision be deemed necessary.[1994] The court further held that there was no complaint made regarding Baby Manji and the order requiring her presence before the court was held to be invalid.[1995] The court furthermore ordered that a passport be granted by the Regional Passport Authority to enable Baby Manji's travel out of India.[1996]

4.3 *Jan Balaz vs. Anand Municipality and others*[1997]

The question in this matter was whether a child, born from a surrogacy arrangement where the surrogate was an Indian national and the biological father a foreign national, would be eligible for Indian citizenship by birth.[1998] The father was registered as the father on the birth certificates of the two children born from the surrogacy agreement and the surrogate was registered as the mother of the children.[1999] In terms of section 3 of the Citizenship Act of 1955, children born from a surrogate agreement could not

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1991 Singh, J "Commercial Surrogacy: The baby Manji Yamada case" https://www.legallore.info/post/commercial-surrogacy-the-baby-manji-yamada-case (accessed on 1 June 2023).

1992 Singh, J "Commercial Surrogacy: The baby Manji Yamada case" https://www.legallore.info/post/commercial-surrogacy-the-baby-manji-yamada-case (accessed on 1 June 2023).

1993 Singh, J "Commercial Surrogacy: The baby Manji Yamada case" https://www.legallore.info/post/commercial-surrogacy-the-baby-manji-yamada-case (accessed 1 June 2023).

1994 Singh, J "Commercial Surrogacy: The baby Manji Yamada case" https://www.legallore.info/post/commercial-surrogacy-the-baby-manji-yamada-case (accessed 1 June 2023).

1995 Ratchaya, S.K "Facts of the case: Baby Manji Yamada v. Union of India" https://liberttem.in/blog/surrogacy-in-india-baby-manji-yamada-case-and-surrogacy-regulation-bill (accessed on 1 June 2023).

1996 Ratchaya, S.K "Facts of the case: Baby Manji Yamada v. Union of India" https://liberttem.in/blog/surrogacy-in-india-baby-manji-yamada-case-and-surrogacy-regulation-bill (accessed on 1 June 2023).

1997 Gujarat H.C. 2009.

1998 *Jan Balaz v. Anand Municipality and others* at par 1.

1999 *Jan Balaz v. Anand Municipality and others* at par 3.

be deemed as Indian citizens.[2000] Here, the biological parents were not Indian citizens which meant that the children were also not Indian citizens.[2001] It was pointed out that the central government of India was yet to legalise surrogacy and therefore, children born from a surrogacy agreement could not be deemed Indian citizens although they were born in India.[2002] The court pointed out that it is primarily concerned with the rights of the biological parents, the surrogate and the gamete donor.[2003] The legitimacy of the children was an issue that the court had to deal with.[2004] The public pressure for comprehensive legislation to define, for instance, the rights of a child born through surrogacy, was gaining momentum.[2005] The court found that in the absence of legislation to the contrary, the court was more inclined to recognise the gestational surrogate, who gave birth to the children, as their natural mother.[2006] Importantly, a gamete donor will not become a natural mother of the resultant child.[2007] Further, the court stated that the only conclusion that was possible is that the gestational mother, who had blood relations with the child, was more deserving to be called as the natural mother of the child as she had carried the embryo for ten months and she had nurtured the babies through the umbilical cord.[2008] The children were entitled to Indian citizenship although they were illegitimate (the biological father was not married to the surrogate).[2009] The important consideration was that they were born from a Indian national.[2010]

5. CONCLUSION

A comparison of the regulation of surrogacy in UK to the position in South Africa reveals that South Africa's regulation of surrogacy through the provisions of the Children's Act constitutes a better structured regulatory vehicle. The UK regulates surrogacy through three different statutes: the Surrogacy Arrangement Act, the HFEA

2000 *Jan Balaz v. Anand Municipality and others* at par 6.
2001 *Jan Balaz v. Anand Municipality and others* at par 6.
2002 *Jan Balaz v. Anand Municipality and others* at par 6.
2003 *Jan Balaz v. Anand Municipality and others* at par 9.
2004 *Jan Balaz v. Anand Municipality and others* at par 9.
2005 *Jan Balaz v. Anand Municipality and others* at par 14.
2006 *Jan Balaz v. Anand Municipality and others* at par 16.
2007 *Jan Balaz v. Anand Municipality and others* at par 16.
2008 *Jan Balaz v. Anand Municipality and others* at par 16.
2009 *Jan Balaz v. Anand Municipality and others* at par 17.
2010 *Jan Balaz v. Anand Municipality and others* at par 17.

1990 and the HFEA 2008. The amendments that the HFEA 2008 brought to the regulation of surrogacy must be read into the two older Acts which complicates the clear understanding of the provisions meant to be relevant to surrogacy. Surrogacy agreements are unenforceable in the UK and the definition of a surrogacy agreement does not include an agreement which intends to result in the surrogate handing the commissioned child over to the commissioning parent(s). This situation, compared to what the reason for using a surrogate is, obscures the regulation of surrogacy. Further, the commissioning parent(s) must first obtain a parental order before he/she/they can be regarded as the legal parents of the commissioned child and this order can only be obtained six weeks after the commissioned child is born. The position in South Africa offers more protection to the commissioning parent(s) in that a court order must first be obtained before the surrogate mother may be artificially fertilised. The commissioning parent(s) will have clarity regarding the legal status of the commissioned child before the child is born.

A legal comparison between the legal frameworks governing surrogacy in South Africa and Canada is complicated by the fact that surrogacy in Canada is regulated under the federal Assisted Human Reproduction Act, yet certain provincial laws also play a role regarding who is legally recognised as the parents of a child. This regulatory picture is further complemented by four different sets of Regulations that apply to all provinces in Canada. Chapter 19 of the Children's Act in South Africa, however, is one comprehensive chapter in an Act that attempts to regulate surrogacy in more detail. It is interesting that the locus of the surrogacy regulation in South Africa falls within the ambit of the Children's Act and not the NHA. Because surrogacy straddles issues relating to both family law and health law, one would expect the legislation to fall into either private-law legislation or health legislation. The clinical aspects regarding artificial fertilisation in the context of surrogacy are governed by the National Health Act and Regulations in South Africa.

Gleaning from the Canadian example, the list of expenses that is set out in regulation 4 of Reimbursement Related to Assisted Human Reproduction Regulations may be helpful to courts in South Africa. This chapter proposes that when regulations to chapter 19 of the Children's Act are promulgated, a list of allowed expenses could be included that resembles the Canadian example.

In contrast to the position in India, South Africa allows partial surrogacy. This chapter proposes that the South African legislator should consider limiting surrogacy in Chapter 19 to allow full surrogacy only. By prohibiting the surrogate from donating her gametes, the commissioning parent(s) may be better protected and the risk that a surrogate may refuse to hand over the commissioned child after birth, may be circumvented. Furthermore, the Indian provisions that aim to secure the position of the commissioned child after birth by prohibiting any effort by the commissioning parents to abandon the commissioned child, should be commended. Finally, India's recent ban on commercial surrogacy should also be welcomed.

This chapter has initially sought to find answers to some of the lacunae in chapter 19 of the Children's Act. Apart from the few instructive comparative examples mentioned above, one's impression of the comparative legal overview is that chapter 19 of the Children's Act constitutes a solid and comprehensive framework compared to its foreign counterparts. It is submitted that the remaining gaps that this thesis has identified, may hopefully be closed in the near future.

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

1. INTRODUCTION

The focus of this thesis was to consider the constitutionality of assisted reproduction and surrogate motherhood and related medico-legal issues. Medico-legal issues in the context of surrogate motherhood are primarily concerned with the artificial fertilisation of the surrogate mother after confirmation of the surrogate agreement by the court.

Chapter 19 of the Children's Act provides some guidance on the conditions required for the legality of the surrogacy agreement, including the legal consequences of both lawful agreements (that comply with the requirements of chapter 19) and unlawful agreements (where the requirements are not met). Legal consequences include the impact of lawful and unlawful surrogacy arrangements on the status of the commissioning couple, the surrogate mother and the commissioned child.

Surrogacy and artificial fertilisation are examples of noncoital reproduction. The right to reproduction includes the right to choose whether or not to have a child and is part and parcel of personal autonomy. The Constitution of South Africa protects the right to bodily and psychological integrity and to make decisions regarding reproduction. Even though the global population has grown steadily over the past few decades, infertility has become increasingly common due to social and environmental changes. Infertility has a severe psychological and physical effect on infertile persons, not to mention the societal pressure they may face to conceive a child of their own. As this thesis has shown, adoption does not provide a satisfactory alternative because of the fundamental differences between the two arrangements.

2. A NEED FOR LEGAL REFORM

It is trite that technology develops faster than the law, leading to legal gaps in regulatory frameworks. The South African regulatory framework regarding surrogate motherhood and artificial fertilisation is a clear example of this, demonstrated in this thesis by an

overview of the legal-historical development of South African law regarding surrogate motherhood and artificial fertilisation and by examining some of the legislative amendments made over decades to close some of these legal ambiguities. Canvassing the legal-historical development is necessary for an understanding of the evolution of some of the key legal principles and rules that found their way into chapter 19 of the Children's Act.

Chapter 19 of the Children's Act provides the current legal framework governing surrogate motherhood. Chapter 2 of the thesis traces the development of laws preceding the promulgation of chapter 19 of the Children's Act, highlighting some of the thorny legal dilemmas that arose from, among others, the now repealed Children's Status Act and Child Care Act concerning the legal status of the commissioned child. The Children's Act has introduced a complete change to the common law position that a child born to a married woman is considered her legal child and the accompanying legal presumption that the husband of such child is the legal father.

3. REGULATORY CLARITY WITH SOME CONSTITUTIONAL CAVEATS

Chapter 3 of the thesis examines the current legal regulatory framework relating to the Children's Act together with relevant provisions in the NHA and Regulations relating to artificial fertilisation. The Children's Act seeks to provide regulatory clarity regarding the rights of all the parties to the surrogacy agreement. Clarity is required because artificial fertilisation can cause a commissioned child to have as many as six parents in some instances. Chapter 19 attempts to provide certainty to all parties involved in a surrogacy agreement regarding their responsibilities and rights towards one another and in respect of the commissioned child. This certainty aims to protect the rights and interests of the commissioned child should there be a dispute after his or her birth.

One of the rights that children generally may lay claim to concerns the right of a child to know his or her biological or genetic origins, which derive from the South African Constitution, the Promotion of Access to Information Act and the Children's Act. For example, children older than sixteen years may request access to hospital files and if younger, a person with parental rights may make such request on the child's behalf.

The type of information that may be accessed by a child determines when it may be requested. Whilst the Children's Act distinguishes between medical information and "any other information concerning the child's genetic parents" (Section 41), a child must be eighteen years old before he or she may be lawfully provided information other than medical information regarding his or her genetic parents. A child is not allowed to receive information regarding the identity of the gamete donors or of the surrogate.

Chapter 3 of the thesis refers extensively to relevant High Court judgments that adjudicated several provisions of the Children's Act relating to surrogate motherhood. In the matter of *Ex Parte MS and another; In Re: Confirmation of surrogate mother agreement*, the importance of first having the surrogacy agreement confirmed before the surrogate is artificially fertilised, came to the fore. The contractual parties have to understand the legal consequences in the event that the court refuses to confirm the surrogacy agreement post-fertilisation. The best interests of the commissioned child, who is the reason for the surrogate agreement in the first instance, must always remain the priority. Legally, confirmation of the surrogate agreement should precede the fertilisation of the surrogate mother, although chapter 3 has discussed instances where the court confirmed an agreement after fertilisation of the agreement, yet before the commissioned child's birth. Where a surrogate is artificially fertilised prior to the surrogacy agreement being confirmed by the court, the risk arises that the court may refuse to confirm the agreement on the ground that the agreement is invalid. The legal consequences of such invalid agreement will be that the commissioned child will be deemed to be the child of the surrogate for all purposes and not the child of the commissioning parent(s). In this instance, the position will revert to the common law position prior to the promulgation of the Children's Act where the commissioning parent(s) would need to adopt the commissioned child. It is therefore imperative that the parties comply with the requirements as set out in chapter 19 of the Act.

The requirements of a valid surrogacy agreement are set out in sections 292 – 296 of the Children's Act. The parties to such an agreement must comply with the said requirements as non-compliance will unfortunately result in the agreement to be invalid and unenforceable between the parties. It is to be noted that the domicile requirement in terms of section 292(1)(d) of the Act does not prevent a pregnant surrogate from leaving South Africa. This is a risk which the commissioning parents must be made

aware of and accept as there will be no form of protection for them should the surrogate leave the country after conclusion of the agreement and the fertilisation already carried out.

One specific (and controversial requirement) in the Act is section 294, which requires that a genetic link exists between the commissioning parent or parents and the commissioned child. The use of only donor gametes in the surrogacy process is not permitted. This study argues that although there may be valid reasons for requiring a genetic link in a surrogacy agreement, it cannot be seen as reasonable and fair to exclude a person, who is both "conception- and pregnancy infertile", from having access to the surrogacy process. The rationale that such parents should rely on adoption to have a child of their own, is untenable, for various reasons relating to the inherent differences to the adoption and surrogacy processes. This thesis submits that this requirement should be removed from chapter 19 of the Children's Act and that a court should exercise its discretion and that each case be decided on a case-by-case approach.

Section 295(d) is an important provision in that it provides for certain requirements regarding the commissioned child's contact, care, upbringing and general welfare, to be included in a surrogacy agreement, including that the best interests of the commissioned child must be considered at all times. It is the court's responsibility to have regard to both the personal, social and financial circumstances and the family situations of the parties to the surrogacy agreement, guided by the best interests of the commissioned child in relation to each of the instances.

With the Constitution at the apex of all laws in South Africa, the thesis also explores the relevant rights of parties to the surrogacy arrangement. Chapter 4 of the thesis identifies a first potentially unconstitutional provision in Section 294 of the Children's Act, which unjustifiably, unfairly and unreasonably draws a distinction between conception and pregnancy infertile persons by denying a person who is biologically unable to offer a genetic link to the commissioned child, access to surrogacy. This prohibition denies such person his or her right guaranteed under section 12(2)(a) of the Constitution. Other fundamental rights relevant to parties to a surrogacy agreement, discussed in chapter 4 are section 10 of the Constitution that protects a

person's right to human dignity, which is potentially violated by section 294 of the Children's Act that treats persons differently in an unjustifiable manner because of inherent personal traits attached to specific infertile persons. Section 14 determines that every person has the right to privacy. The right to equality, protected in section 9 of the Constitution, is potentially infringed by Section 294 of the Children's Act that requires commissioning parent(s) to have a genetic link with the commissioned child and those infertile persons that are unable to provide their own gametes.

The right of access to health care services, which includes the right to reproductive health care, is entrenched in section 27(1) of the Constitution. The right of a person to reproduce non-coitally and their right to reproductive freedom, the latter recognised in section 12 of the Constitution, is linked to section 27(1) of the Constitution in that "health care services" should include services to ameliorate infertility, which is a medical condition. Because fertility treatment (for example, artificial fertilisation) is not a health priority in the health care system, the realisation of reproductive health care and reproductive freedom of persons still has a long way to go.

Chapter 4 of the thesis has placed emphasis on the best interests of the child principle, which is also entrenched in Section 28 of the Constitution (providing an omnibus protecting the rights of children). Courts that have been approached for the confirmation of surrogate agreements have routinely expressed the importance of being provided with sufficient information to enable it to decide in this regard, as it needs to assess the impact of all of the facts on the commissioned child. Based on this assessment, the court must envisage the future of the commissioned child by ensuring that adequate provision is made in the surrogacy agreement for the child's psychological and physical well-being and his or her protection in the long run.

The constitutionality of certain provisions in chapter 19 of the Children's Act came under the spotlight in recent judgments. As alluded to above, section 294 was challenged in the case of *AB and another v Minister of Social Development* on the ground that it unjustifiably infringes upon the constitutional rights to equality, dignity, reproductive autonomy, privacy and the right of access to health care services. The minority found that section 294 is unconstitutional and invalid because of its effect on persons who are both conception- and pregnancy infertile. The majority, on the other

hand, concluded that no limitation on any of the applicant's rights could be demonstrated and that section 294 is thus not unconstitutional.

In the case of *EJ and others v Haupt NO*, which dealt with the situation of children born via artificial insemination to a lesbian couple in a permanent life partnership, the court ruled that a partner who was not the biological parent was to be regarded as a natural parent and guardian and that the children were legitimate in law. Both spouses automatically acquire rights and responsibilities in respect of the child that was born from artificial fertilisation.

The focus of the case, *KB and another v Minister of Social Development*, was again section 294, but this time on the ground that the provision does not provide for a genetic link between siblings, but only requires a genetic link with one or both of the parents. The court held that section 294 has nothing to do with the right of a minor child to have a sibling with the same genetic link and reiterated that the purpose of the section is to provide clarity regarding the origin of a child. The court pointed out that clarity regarding one's origin is important to the self-identity and self-respect of the child.

Section 40 of the Children's Act again came under fire in *VVJ and another v Minister of Social Development and Another*. The court found that the Children's Act remains conservatively lagging in terms of artificial fertilisation and the acknowledgement of partners as parents. Thus, section 40 was found to be unconstitutional in that the provision unfairly discriminates based on marital status in terms of its treatment of children born in or out of wedlock. The court declared section 40 inconsistent with the Constitution to the extent that the said section does not make provision for a "permanent life partner" after the word "spouse" and "husband" wherever such words appear in the section. Not only the Children's Act was in the court's purview regarding constitutionality issues with surrogacy. In the recent case of *Surrogacy Advisory Group v Minister of Health*, certain provisions of the 2012 Regulations Relating to the Artificial Fertilisation of Persons (regulations 7(j)(ii), 13 and 19) and the 2012 Regulations Relating to the Use of Human Biological Material (regulation 6) were declared unconstitutional, on a range of human rights infringements.

The conclusion drawn from the constitutional challenges to the Children's Act is that

despite the Act's laudable intentions, judicial scrutiny has steadily been closing some of the gaps. The Act is still far from perfect but should be considered a "work in progress". One aspect still requiring attention is the Act's failure to accommodate the different and diverse forms of families that exist in present times.

A closer understanding of the nuanced differences between the types of assisted reproductive technologies is necessary, as different legal, ethical and social issues attach to each of these. Chapter 5 of the thesis explores some of these diverse views pertaining to understandings of what a "family" should constitute, including different religious views on ART and surrogate motherhood and the morality of using donor gametes in establishing a family. Surrogacy and artificial fertilisation challenge traditional parent-child relationships because a commissioned child may technically have multiple parents. Gestational surrogacy also results in the commissioned child having a biological bond with two women. The thesis advances the argument that because the WHO regards infertility as a disease, the use of advanced medical technology that aims to treat infertility with the use of donor gametes should be regarded as a form of assistance. Chapter 5 also explores the exciting consequences of epigenetics in the context of surrogacy. Science has convincingly demonstrated the impact of the genetic make-up of the surrogate mother on the health and development of the commissioned child, irrespective of whether she is an ovum donor or not. Contrary to the traditional view that the gamete donors are the only biological parents of the commissioned child where a surrogate is only used for gestation, epigenetic research shows that the surrogate should rightly be considered an additional biological parent of the child that she carries. With this scientific discovery still very novel, this study argues that it should be considered an important factor by parties concluding a surrogate agreement, as the epigenetics of the surrogate will play a determining factor on the developing child during pregnancy and after birth. Not only should the effect of epigenetics be considered in a surrogate agreement, but the Children's Act and proposed regulations to the Children's Act should envisage any claims that may follow from this biological determinant. This study proposed that because of the unforeseen health risks that may arise because of the role of epigenetics, a complete genetic analysis of the proposed surrogate should be undertaken before selection of a suitable surrogate. This would unfortunately be a costly exercise and not a possibility for all commissioning parent(s).

4. LEGAL COMPARATIVE LESSONS

In the final instance, the thesis adopts a comparative legal approach by analysing the legal frameworks regarding surrogate motherhood in three foreign, yet comparable jurisdictions, namely the United Kingdom, Canada and India. The purpose of this comparison was to explore best practices in these legal frameworks that may assist in closing some of the legal gaps that exist in the Children's Act.

This legal comparison reveals interesting findings. Turning to the United Kingdom's framework, the thesis concludes that chapter 19 of the Children's Act, which comprehensively regulates surrogacy in South Africa, provides more legal security to the parties to a surrogacy agreement. Under UK law, a surrogate and her husband or partner (if any) will be deemed the legal parents of the commissioned child that is born because of a surrogacy agreement. The commissioning parent(s) would need to apply for a parental order in terms of the HFEA 2008, after the birth of the child, for the extinguishing of the parental status of the surrogate and her husband or partner.

In Canada, similar to the position in the UK, the surrogate is assumed to be the legal parent of the commissioned child. The surrogate is only allowed to agree to the transfer of her parental rights in respect of the commissioned child after the birth of the child. Any reimbursement for expenses in terms of the surrogate agreement may only be paid in accordance with the specific requirements set out in the Reimbursement Related to Assisted Human Reproduction Regulations.

India only allows a surrogate to act as a surrogate mother once in her life and she is not allowed to donate her own gametes, thus only allowing gestational surrogacy and full surrogacy, but not partial surrogacy. As is the case in South Africa, the commissioned child will be deemed to be the child of the commissioning parent(s) after the surrogacy confirmation order.

The jurisdictions of UK and Canada retain the common law position regarding the legal status of the commissioned child, requiring an additional legal step to change the child's status *after* the child's birth via a parental order (UK) or transfer of parental rights (Canada). In South Africa and India, a confirmation of a surrogate agreement precedes

the artificial fertilisation of the surrogate, as well as the birth of the commissioned child. It is a requirement in India that the confirmation order (regarding the parentage and custody of the commissioned child) forms part of the parties' certificate of essentiality.

5. RECOMMENDATIONS

This study proposes the following recommendations to address the identified gaps and inconsistencies in the current legal framework governing surrogate motherhood and artificial fertilisation:

(1) First, the Children's Act lacks regulations to provide more granularity to the Act. Specific sections of the Children's Act require more detail to improve compliance by parties to a surrogacy agreement. Although the judgments discussed in the thesis provide some guidance on gaps and inconsistencies, these have done so on a case-by-case basis. For example, regulations to the Act could include more detail on the type of costs that may lawfully be provided to a surrogate mother in terms of section 301 of the Children's Act, based on the Canadian model. For example, the proposed regulations could make it a requirement that the surrogate provides the commissioning parent(s) with an affidavit that sets out the exact expenses together with a receipt for each expense. If the surrogate claims a loss of income, she must provide an affidavit with proof of loss of income together with a medical certificate indicating her time off from work.

(2) Second, regulations are necessary regarding any supporting documentation that the parties to a surrogacy agreement must submit to the court for confirmation of such agreement.

(3) Third, regulations are needed to provide some form of protection to the commissioning parent(s) if the surrogate decides to leave South Africa whilst pregnant with the commissioned child. It is recommended that the surrogate at least be required to discuss her intention of leaving South Africa with the commissioning parent(s) prior to her leaving.

(4) Fourth, section 293 of the Children's Act requires the consent of both the commissioning mother and the surrogate's husband, wife or partner. Regulations should also define what a "permanent life partnership" entails, to enable the parties to a surrogacy agreement to provide the consent as required in terms of this section.

(5) Fifth, in respect of the genetic link requirement set out in section 294 of the Act, it is recommended that either the genetic link requirement regarding the commissioning parent(s) be removed in the Children's Act, or, alternatively, that the genetic link requirement be considered for commissioning parent(s) who desire to have more children via surrogacy that are genetically linked to the existing commissioned child(ren). Proposed regulations could provide guidance on how this requirement in the Act be applied in surrogacy confirmation applications on a case-by-case basis. This is of particular importance for commissioning parent(s) who are pregnancy and conception infertile.

(6) Sixth, because section 295(a) requires that the commissioning parent(s) should have a medical condition that makes her unable to give birth to a child, which condition must be permanent and irreversible, regulations should provide detail on this to assist the court on what the possible causes of this inability to give birth could be. The regulations should be clear whether this inability must be because of a physical condition or any other kind of risk that has the same consequences. A closed list of conditions is not advisable, as this may complicate a confirmation application. It is recommended that this section also be dealt with on case-by-case approach as no two applications will be same. It is also important to provide guidance as to the required evidence that the commissioning parent(s) must provide that will suffice as proof of the inability to give birth.

(7) Seventh, this study recommends that the South African legal framework only allow gestational and full surrogacy. Allowing gestational surrogacy will provide more security for the commissioning parent(s) in that the surrogate will not be genetically linked to the commissioned child which means that the cooling-off period will fall away and she will not be able to refuse to hand over the commissioned child after his or her birth.

(8) Eighth, requiring an eligibility certificate from each party to the surrogacy agreement may be helpful to the High Court when dealing with a surrogacy agreement confirmation application. (The eligibility certificate may arguably not be necessary in South Africa currently, considering the required medical reports that have to be included in the confirmation of a surrogate motherhood application. However, such certificate may strengthen the application process in South Africa. The relevant national department and custodian of the Children's Act, the Department of Social Development, may consider appointing a specific body to issue such a certificate.)

The confirmation of surrogate agreements by the courts since the enactment of chapter 19 of the Children's Act has been instructive in clarifying the information that should accompany a confirmation application to the court. This include the following:

(i) detailed information regarding who the commissioning parents are;
(ii) their financial position and support systems;
(iii) their living conditions;
(iv) how they will take care of the commissioned child;
(v) an expert assessment report from a social worker;
(vi) an expert report regarding the suitability of the surrogate;
(vii) a police clearance certificate of the commissioning parent(s);
(viii) regarding the permitted payments, a detailed list of surrogacy expenses must be provided setting out expenses with sufficient specificity; and
(ix) if an agency was involved in the surrogacy process, the parties must explain the relationship between the agency and the commissioning parent(s) and the manner in which the agency operates;
(x) furthermore, detailed information must be presented to show that the commissioning parent(s) will be providing the commissioned child with a stable home environment, as well as how the commissioning parent(s) will function as a family unit and whether they a living together. Should they not live together, they need to explain why this will not impact the commissioning parent(s) and the commissioned child to live as a family unit and why it will be in the best interests of the child; and finally,

(xi) medical reports regarding the proposed surrogate's mental and physical health must be provided.

With reference to international surrogacy, it is worth noting that there is no public or private law instrument that regulates international surrogacy and parties to a surrogacy agreement must be wary of the possibility of the commissioned child ending up being stateless and parentless after his or her birth because of the different legal consequences of each jurisdiction, particularly where the commissioned child is born following a surrogacy agreement in a country where surrogacy agreements are unenforceable or surrogacy is banned.

This thesis has also demonstrated that South Africa is not that far behind in regulating surrogacy and artificial fertilisation compared to other jurisdictions, especially considering that South Africa is a lower- and middle- income country, compared to the UK and Canada as high-income countries. Despite the few regulatory and constitutional gaps that remain, there is no doubt that as soon as these lacunae are closed, South Africa will have an exemplary model for the regulation of surrogate motherhood and artificial fertilisation.

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ATTACHMENT 1:

ETHICAL CLEARANCE

UNISA university of south africa

UNISA 2022 ETHICS REVIEW COMMITTEE

Date: 2022:11:14

Dear Elaine Auret

ERC Reference No.: ST131
Name: E Auret

Decision: Ethics Approval from 2022:11:14 to 2025:11:14

Researcher: Adv Elaine Auret

Supervisor: Prof M Labuschaigne

Co-supervisor: Dr N Mabeka

The constitutionality of, and medico-legal issues regarding assisted reproduction and surrogate motherhood

Qualification: LLD

Thank you for the application for research ethics clearance by the Unisa 2022 Ethics Review Committee for the above mentioned research. Ethics approval is granted for 3 years.

*The **negligible risk application** was **reviewed** by the CLAW Ethics Review Committee on 14 November 2022 in compliance with the Unisa Policy on Research Ethics and the Standard Operating Procedure on Research Ethics Risk Assessment.*

The proposed research may now commence with the provisions that:

1. **The researcher will ensure that the research project adheres to the relevant guidelines set out in the Unisa Covid-19 position statement on research ethics attached.**
2. The researcher(s) will ensure that the research project adheres to the values and principles expressed in the UNISA Policy on Research Ethics.

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3. Any adverse circumstance arising in the undertaking of the research project that is relevant to the ethicality of the study should be communicated in writing to the CLAW Committee.
4. The researcher(s) will conduct the study according to the methods and procedures set out in the approved application.
5. Any changes that can affect the study-related risks for the research participants, particularly in terms of assurances made with regards to the protection of participants' privacy and the confidentiality of the data, should be reported to the Committee in writing, accompanied by a progress report.
6. The researcher will ensure that the research project adheres to any applicable national legislation, professional codes of conduct, institutional guidelines and scientific standards relevant to the specific field of study. Adherence to the following South African legislation is important, if applicable: Protection of Personal Information Act, no 4 of 2013; Children's act no 38 of 2005 and the National Health Act, no 61 of 2003.
7. Only de-identified research data may be used for secondary research purposes in future on condition that the research objectives are similar to those of the original research. Secondary use of identifiable human research data requires additional ethics clearance.
8. No field work activities may continue after the expiry date **2025:11:14.** Submission of a completed research ethics progress report will constitute an application for renewal of Ethics Research Committee approval.

Note:

The reference number ST131-2022 should be clearly indicated on all forms of communication with the intended research participants, as well as with the Committee.

Yours sincerely,

Prof L Fitz
Chair of CLAW ERC
E-mail: fitzlg@unisa.ac.za
Tel: (012) 433-9504

Prof OJ Kole
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ATTACHMENT 2:

TURNITIN REPORT

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