

THE ENFORCEABILITY OF INTERNATIONAL SURROGACY IN SOUTH AFRICA: HOW WOULD A SOUTH AFRICAN COURT PROCEED IN DETERMINING AN INTERNATIONAL SURROGACY CASE?

By

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A research paper submitted in partial fulfilment of the requirements for the degree of Master of Laws (LLM) in the Faculty of Law of the University of the Western Cape

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KEYWORDS/ PHRASES

International surrogacy arrangement

Surrogate motherhood agreement

Commissioning (intending) parent(s)

Legal parentage

Birth Registration

Domicile

Enforceability

Good cause shown

Limping legal relationship

Best Interests of the child



DECLARATION

I declare that 'The Enforceability Of International Surrogacy In South Africa: How Would A South African Court Proceed In Determining An International Surrogacy Case?' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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ABSTRACT

Thesis submitted in partial fulfilment of the degree Magister Legume, University of the Western Cape.

In this research, I sought to investigate the extent to which South Africa recognises international surrogacy agreements. I examined Chapter 19 of the Children's Act as the first legislation to afford surrogate motherhood agreements legal recognition in South Africa. Section 292(1)(b)-(e) of the Children's Act sets out the requirements for the validity of a surrogate agreement. The validity of the agreement is governed by South African law if it was concluded in South Africa, and at least one of the commissioning parents and the surrogate mother and her husband or partner must be domiciled in South Africa at the time of entering into the agreement.

I explored South African legislation that may be applicable to the children born of commissioning parents (whether the commissioning parents are South Africans or foreign nationals) who entered into international surrogacy agreements. I concluded that the main issue that relates to international surrogacy are the implications that rise from registering a surrogate born child's birth in South Africa and in other countries. I further concluded that the current position of South African law will result in a surrogate born child being left stateless and parentless.

I considered the criminal aspect of international surrogacy agreements as a consequence of a null and void international surrogacy agreement. Furthermore, I referred to the legal difficulties of international surrogacy and potential rights infringed on or denied to the child born of an international surrogacy by examining international case law. I concluded that South African courts do not have precedents, guidelines or legislation governing international surrogacy agreements and thus it is important to examine international case law. I further concluded that, it is important for South African authorities and courts to consider the possibility of international surrogacy occurring in South Africa. I hope that the South African courts take a child-centered approach, building on the views established in the international case law, and that courts do not adopt a strict interpretation of our current laws.

Lastly, I suggested recommendations for the appropriate manner in which to legislate international surrogacy agreements in South Africa. I submitted that judicial and administrative authorities could inspect the international surrogacy agreement and ensure that the terms do not harm the child and that the child is recognised as the legal child of the commissioning parents. The courts should first look at the suitability of the commissioning parents and finally consider the best interest of the child as being of paramount importance, before ordering the international surrogacy agreement null and void.

I further suggested that a statutory regulation that contemplates international surrogacy should be formulated, as a source of reference, which will assist a court when faced with determining the issue of the parentage of a surrogate born child, and consequently, his or her nationality. I concluded that the South African Parliament should either re-draft or provide clearer guidelines regarding surrogacy and the possibility of international surrogacy agreements.

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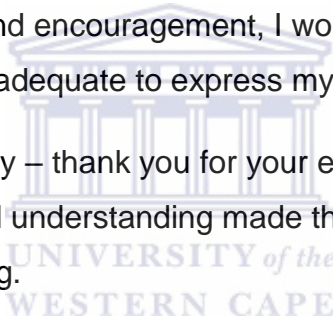
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CONTENT PAGE

	PAGE
Title page	i
Keywords	ii
Plagiarism Declaration	iii
Abstract	iv
Acknowledgements	vi
Table of Contents	vii
List of Abbreviations	xi
CHAPTER 1: INTRODUCTION	
1.1 Introduction: Background to this study	1
1.2 The Status and Rights of the Surrogate born Child	3
1.3 Increase of International Surrogacy Agreements	4
1.4 Hague Conference on Private International Law and International Surrogacy	6
1.5 Objective of this study	8
1.6 Research Question:	9
1.7 Significance of the research	10
1.8 Literature Review	11
1.9 Methodology	16
1.10 Chapter Outline	17
1.10.1 Chapter 1: Introduction	17

1.10.2 Chapter 2: The South African Perspective Regarding Surrogacy	17
1.10.3 Chapter 3: South African legislation and its influence on the Court's discretion	17
1.10.4 Chapter 4: Consequences of International Surrogacy Agreements	18
1.10.5 Chapter 5: Conclusion	18

CHAPTER 2: THE SOUTH AFRICAN PERSPECTIVE REGARDING SURROGACY

2.1. Introduction	19
2.2. Surrogacy in South Africa	19
2.2.1. Terminology	19
2.2.2. The History of Surrogacy in South Africa	20
2.3. Discussion on Chapter 19 of the Children's Act 38 of 2005	24
2.4. Reported South African cases concerning Surrogacy	29
2.4.1. Ex Parte Applications for the Confirmation of three Surrogate Motherhood Agreements 2011 6 SA 22 (GSJ)	29
2.4.2. Ex Parte WH 2011 6 SA 514 (GNP)	30
2.4.3. Ex Parte MS and Others 2014 (3) SA 415 (GP)	32
2.4.4 AB and Another v Minister of Social Development; as Amicus Curiae: Centre for Child Law 2016 (2) 27 (GP)	33
2.5. What is referred to as 'good cause shown' in section 292(2) of the Children's Act 38 of 2005? How would it be challenged or enforced in South Africa?	36
2.6. Conclusion	37

CHAPTER 3: SOUTH AFRICAN LEGISLATION AND ITS INFLUENCE ON THE COURT'S DISCRETION

3.1 Introduction	39
3.2 Legal framework on birth registration, nationality and statelessness in South Africa	39
3.2.1 South African Constitution	40
3.2.2 South African Citizenship Act 88 of 1995	42
3.2.3. Births and Deaths Registration Act 51 of 1992	45
3.2.3.1 Who may register a child's birth?	46
3.3 Applying for a Passport	49
3.4 Domicile in South Africa	49
3.4.1 General principles governing domicile	50
3.4.2 Domicile of origin	50
3.4.3 Domicile of choice	51
3.4.4 Domicile by operation of law	51
3.5 The Criminal Aspect of International Surrogacy Agreements	51
3.6 Conclusion	54



CHAPTER 4: CONSEQUENCES OF INTERNATIONAL SURROGACY AGREEMENTS

4.1 Introduction	56
4.2 Potential Situations that a South African Court might be seized with	56
4.2.1 Scenario 1	56
4.2.2 Scenario 2	58

4.2.3 Scenario 3	64
4.3 The Possible Way Forward	67
4.3.1. Inclusion of adequate provisions and inspection by authorities	67
4.3.2. Suitability of commissioning parents	68
4.3.3 Best interests of the child	69
4.4 Conclusion	70
CHAPTER 5: CONCLUSIONS	72
BIBLIOGRAPHY	78



LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
BDRA	Birth and Deaths Registration Act 51 of 1992
CSA	Children's Status Act 82 of 1987
DHA	Department of Home Affairs
HCCH	Hague Conference of International Private Law
HFEA	Human Fertilization and Embryology Act, 2008
HTA	Human Tissue Act 65 of 1983
IVF	In-vitro Fertilization
SALRC	South African Law Reform Commission
UK	United Kingdom
UNCRC	United Nations Convention on the Rights of a Child



CHAPTER 1: INTRODUCTION

1.1 Introduction: Background to this study

Surrogacy is one of the methods of assisted reproduction. A surrogate motherhood agreement is defined as “an agreement between a surrogate mother and a commissioning parent whereby it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent.”¹ The agreement is concluded before the surrogate mother² is fertilised and it is made with the sole intention of the resulting child being handed over to the commissioning parent(s).³ The surrogate mother thus relinquishes all responsibilities and rights regarding that child. There are two types of surrogate motherhood agreements: partial and full surrogacy.⁴ In partial surrogacy, the surrogate mother becomes pregnant with the sperm of the intended father⁵ or she is inseminated with donor sperm. The surrogate mother is genetically linked to the child. In full surrogacy, an embryo is created by in vitro fertilisation, using the egg of the commissioning mother (or a donor egg) and the sperm of the commissioning father (or a donor sperm). As a result, the surrogate mother has no genetic relationship with the child.⁶

The increased interest in surrogacy as an alternative means of reproduction could be attributed to a wide range of reasons. These reasons include improved medical technology, a wider public acceptance of surrogacy, a decrease in new born babies becoming available for adoption, increased access to information, increased access to global travel and financially motivated reasons.⁷ Furthermore, entering into a surrogacy motherhood agreement is either prohibited, strictly regulated or financially inaccessible

¹ “and in which the surrogate mother undertakes to hand over such 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.” This definition is provided for in section 1(1) of the Children’s Act 38 of 2005.

² A surrogate mother may be defined as a woman who carries a child pursuant to an agreement made between herself and the commissioning parent(s).

³ Trimmings K and Beaumont P (2013) ‘General Report on Surrogacy’ in Trimmings K and Beaumont P (ed) *International Surrogacy Arrangements: Legal Regulation at the International Level* 440.

⁴ Also known as traditional (partial) and gestational (full) surrogacy.

⁵ Usually by insemination.

⁶ Trimmings and Beaumont (2013: 440).

⁷ Talip T (2013) ‘Lost in Transit: Cross border surrogacy arrangements and the right of children not to be discriminated against on the basis of their birth or status’ (LLM dissertation University of the Western Cape) 7; Mohapatra S (2012) ‘Stateless babies and adoption scams: A bioethical analysis of international commercial surrogacy’ *Berkeley Journal of International Law* Vol 30 2 413.

in certain States. Thus, commissioning parents residing in these States go abroad to countries where surrogacy is legal or the law is more flexible.⁸ This is referred to as international surrogacy. International surrogacy occurs when commissioning parent(s) resident in one country enters into an agreement with a surrogate resident in a different country.⁹ The agreement is referred to as an international surrogacy agreement. Such an agreement may well involve gamete donor(s) in the country where the surrogate resides, or even in a third country.¹⁰

Problems often arise when the commissioning parent(s) attempt to return to their home country with the child.¹¹ Problems arise when the legal relationship between the commissioning parents and the child exists under one law, but is not recognised by another legal system. Thus, the legal rights and obligations of commissioning parents regarding the child may be recognised in one State but not recognised in another and are therefore not enforceable. This is referred to as a limping legal relationship. Problems may also arise when the commissioning parent(s) wish to register the child's foreign birth certificate in their home country or when they attempt to register a judicial or administrative order relating to the child's parentage in their home country.¹² Additionally, difficulties could arise later when the child's parentage is brought into question in matters relating to parental rights and responsibilities such as care and maintenance.¹³ The most common problems which have been identified are the risk of the surrogate born child being left stateless and with uncertain parentage.¹⁴

⁸ Lin T (2013) 'Born Lost: Stateless children in international surrogacy arrangements' *Cardozo Journal of International & Comparative Law* Vol. 21 Issue 2 553.

⁹ The Hague Conference on Private International Law Permanent Bureau *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* Preliminary Document No 10 of March 2012 i

¹⁰ The Hague Conference on Private International Law Permanent Bureau *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* Preliminary Document No 10 of March 2012 i

¹¹ *Baby Manji Yamada v Union of India and Anr; G (Surrogacy: Foreign Domicile)* (2008) 1 FLR 1047.

¹² The Hague Conference on Private International Permanent Bureau "A Preliminary Report on Private International Law Issues Surrounding the Status of Children, including issues arising from International Surrogacy Arrangements" *Preliminary Document No 11 of March 2011* available at <http://www.hcch.net/upload/wop/genaff2011pd11e.pdf> (Accessed on 23 February 2015) para 13; *Baby Manji Yamada v Union of India and Anr; G (Surrogacy: Foreign Domicile)* (2008) 1 FLR 1047.

¹³ HCCH Preliminary Document 11 (March 2011) para 14.

¹⁴ Heaton J "The Pitfalls of International Surrogacy: A South African Family Law Perspective" 2015 (78) *Journal of Contemporary Roman-Dutch Law*, 26-27 European Parliament: Directorate General for Internal Policies (Policy Department C: Citizen's rights and constitutional affairs) 'A comparative study on the regime of surrogacy in EU member states' (May 2013); HCCH Preliminary Document 11 (March 2011) para 13; *Baby Manji Yamada v Union of India and Anr (Japan/India).; G (Surrogacy: Foreign Domicile)*.

Section 292 (1) (a) -(e) of the Children's Act 38 of 2005 ("Children's Act") regulates surrogacy in South Africa. It is important to note the requirements of section 292(1) (b), (c) and (d) of the Children's Act, namely that, the surrogate motherhood agreement must be concluded in South Africa; at least one of the commissioning parents must be domiciled in South Africa when the agreement was entered into and the surrogate mother and her husband or partner must be domiciled in South Africa at the time of the conclusion of the agreement.¹⁵ Thus, should the requirements not be fulfilled, the High Court will refuse to confirm the agreement and the agreement would be invalid and unenforceable.¹⁶

The objective of this dissertation is to explore how a South African court might approach an international surrogacy agreement concluded by a South African with a foreign surrogate mother or an agreement between a South African surrogate mother and foreign commissioning parent(s) which has not been confirmed by the High Court of South Africa. The importance of exploring this topic is shown through the problems arising from international surrogacy mentioned above. It has already been submitted, that because of the increase of surrogacy and rigid domestic laws of a country, couples seek surrogates elsewhere. Thus, it may be submitted that it is possible that South Africans might do the same. Therefore, the author finds it necessary to explore the possibility of international surrogacy occurring in South Africa or affecting South African nationals who seek surrogacy services abroad. Additionally, what approach the South African court might take is to be discussed. Furthermore, the author will explore the possibility of evasion of the domicile requirement by foreigners.

1.2 The Status and Rights of the Surrogate born Child

In the past, references to the status of a child in many legal systems had been references to a child's status as a child born out of wedlock or born within a marriage.¹⁷ However, in recent decades, in many legal systems, the distinction between legitimate and illegitimate children has been abolished.¹⁸ The United Nation Convention on the

¹⁵ Section 292(1)(b),(c) and (d) of the Children's Act 38 of 2005; Louw A *Acquisition of Parental Responsibilities and Rights* (2009) 336 - 337; Louw A 'Surrogate Motherhood' in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007) 19-8.

¹⁶ Louw (2007:19-8).

¹⁷ Hcch (2011:4).

¹⁸ *Ibid.*

Rights of the Child¹⁹ and the European Convention on Human Rights²⁰ confirm a child's right to parentage, a right to know their parentage and a right to non-discrimination through their status acquired at birth by virtue of their parentage.²¹ The determination of who has legal parentage for a child has far reaching consequences, which will affect the child not only in childhood but also into adulthood. Parentage determines nationality, rights of citizenship, rights of abode, who is responsible for a child's care and who is responsible to provide for a child.²²

In South Africa, a child has a right 'to a name and a nationality from birth'.²³ Furthermore, a child's best interests are of paramount importance in every matter concerning the child.²⁴ With this in mind, the author will explore how the consequences of an invalid international surrogacy agreement could affect the surrogate born child.

1.3 Increase of International Surrogacy Agreements

Despite its expanding occurrence, the global surrogacy market remains completely unregulated. This leaves parties to international surrogacy agreements at a serious risk of exploitation and results in complex legal problems in individual cases of international surrogacy agreements.²⁵

Countries have taken different legislative approaches to surrogacy agreements. Combined with a lack of international regulation, this divergence creates a number of legal problems and conflict of law issues. Several countries, including France, Italy, Germany, China and Japan²⁶ ban surrogacy arrangements altogether, even if no commercial element is present in the agreement. Others such as South Africa, the

¹⁹The United Nations Convention on the Rights of the Child (1990) available at http://www.unicef.org.uk/Documents/Publicationpdfs/UNCRC_PRESS200910web.pdf (Accessed on 23 February 2015).

²⁰ The European Convention on Human Rights (ECHR) (1950) available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (Accessed on 23 February 2015).

²¹ Hutchinson AM (2012) 'The Hague Convention on surrogacy: Should we agree to disagree' American Bar Association Section of Family Law 2012 Fall CLE Conference (unpublished) 5.

²²Hutchinson (2012:5).

²³ Constitution of the Republic of South Africa 1996, s 28(1)(a).

²⁴ Constitution of the Republic of South Africa 1996, s 20(2).

²⁵ Trimmings and Beaumont (2013:442).

²⁶ As well as Germany, Mexico, Sweden and Switzerland. The Hague Conference on Private International Law Permanent Bureau *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* Preliminary Document No 10 of March 2012 para 10.

United Kingdom, New Zealand, Israel, and Holland allow altruistic surrogacy only.²⁷ In only a few countries is commercial surrogacy allowed and are such surrogacy agreements legally enforceable. These countries, including India, Israel, Ukraine, Russia and some American states (California and Florida), have consequently become destinations for couples seeking a child via surrogacy.²⁸

The author will provide a few examples of the dangers of unregulated international surrogacy agreements:

1. A couple (who intend to be commissioning parents) contacts a surrogacy agency on the internet; they enter into an agreement with the agency and the surrogate mother. The couple will provide their own gametes, thus it will be a gestational surrogacy agreement. The agreement is also a commercial agreement.²⁹ After the child is born, the laws of the country in which the child was born may view the commissioning parents' as having full parental responsibility and rights regarding the child and the surrogate mother as having no responsibilities and rights regarding the child. The commissioning parents would possibly take the child home to their state of origin, where the law might not recognise commercial surrogacy. This means that the child will not be recognised as their child, thus the child is stateless and parentless.
2. The laws of the State in which the commissioning parents were born might not recognise the birth certificate granted in the State in which the surrogate born child was born.
3. There is a possibility that the commissioning parents would be unable to obtain a passport or travel document for the child.
4. The child born from a surrogate agreement may not only be stateless and parentless but his or her fundamental rights and will be affected, including the right not to suffer adverse discrimination on the basis of birth or parental status, the right of the child to have his or her best interests regarded as a primary consideration in all actions concerning him or her, as well as the child's rights to acquire a nationality and to preserve his or her identity.³⁰

²⁷ Trimmings and Beaumont (2013:454).

²⁸ Trimmings and Beaumont (2013: 443).

²⁹ The surrogate mother will be compensated beyond her reasonable expenses.

³⁰ The United Nations Convention on the Rights of the Child, 20 November 1989, Arts 2, 3, 7, 8 and 9.

There are currently no international laws regulating international surrogacy agreements. Additionally, there are no provisions applicable for rights of parentage either from perspective of the commissioning parent(s), surrogate mothers or most importantly the child. Furthermore there are no means by which internationally mobile parents can ensure that parental responsibilities and rights acquired in one state can be recognised in their new state of habitual residence (if they decided to relocate). The lack of international standards or regulations also raises serious child protection concerns.³¹

1.4 Hague Conference on Private International Law and International Surrogacy

In April 2010, the Council on General Affairs, “invited the Permanent Bureau to provide a brief preliminary note to the Council of 2011 on the private international law issues surrounding the status of children (excluding adoption) and, in particular, on the issue of recognition of parent-child relationships”.³² The growing issues of international surrogacy agreements were also discussed in the Council’s conclusions, which “acknowledged the complex issues of private international law and child protection arising from the growth in cross-border surrogacy arrangements”.³³ The Council, in April 2011, requested that the Permanent Bureau intensify the investigation, with emphasis on the broad range of issues arising from international surrogacy agreements, and produce a Preliminary Report on progress in 2012.³⁴

In 2012 the Permanent Bureau published a Preliminary Report (“Preliminary Report”) that reflects issues surrounding the status of children, including issues arising from international surrogacy arrangements.³⁵ The Preliminary Report identified the serious problems arising from international surrogacy arrangements which are often that a child

³¹ Hutchinson AM (2012:4).

³² Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (2010), p. 3.

³³ Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (2010), p 3.

³⁴ Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (2011) para 17-20.

³⁵ The Hague Conference on Private International Law Permanent Bureau *Private International Law Issues Surrounding the Status of Children, including Issues Arising from International Surrogacy Arrangements* Preliminary Document No 11 of March 2011 3-4.

ends up being stateless and parentless. The Preliminary Report provides that the disparities of States fall into four broad categories:³⁶

1. States which prohibit surrogacy arrangements
2. States in which surrogacy is largely unregulated
3. States which expressly permit and regulate surrogacy
4. States with a permissive approach to surrogacy, including commercial surrogacy.

The Preliminary Report conveys that international surrogacy arrangements implicate the fundamental rights and interests of children, rights and interests which have already been widely recognised by the international community.³⁷ Thus the crucial need is for a multilateral instrument which would put in place structures and procedures to enable States to ensure that these obligations are being met in the context of this transnational occurrence.³⁸ This would include ensuring that these children have parentage, nationality, ensuring their rights to know their identity is secured; and putting in place procedures to ensure that they are protected from harm.³⁹ Additionally, the multilateral instrument should also ensure that the surrogate mother, particular those mothers from economically disadvantages backgrounds, and the intending parents are protected from any harm that may arise from the international surrogacy arrangement.⁴⁰

During the April 2013 annual meeting, the Council received an oral update provided by the Permanent Bureau, and decided to circulate a number of questionnaires to various recipients – one was directed to members of the Hague conference and other interested states and three online questionnaires were sent to legal practitioners, health professionals and surrogacy agencies.⁴¹ Recently, in March 2014, the Permanent

³⁶ The Hague Conference on Private International Law Permanent Bureau *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* Preliminary Document No 10 of March 2012 9-16.

³⁷ The Hague Conference on Private International Law Permanent Bureau *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* Preliminary Document No 10 of March 2012 26.

³⁸ The Hague Conference on Private International Law Permanent Bureau *a Preliminary Report on the Issues Arising from International Surrogacy Arrangements* Preliminary Document No 10 of March 2012 26.

³⁹ The Hague Conference on Private International Law Permanent Bureau *a Preliminary Report on the Issues Arising from International Surrogacy Arrangements* Preliminary Document No 10 of March 2012 26.

⁴⁰ The Hague Conference on Private International Law Permanent Bureau *a Preliminary Report on the Issues Arising from International Surrogacy Arrangements* Preliminary Document No 10 of March 2012 26-27.

⁴¹ All questionnaires are available at http://www.hcch.net/index_en.php?act=text.display&tid=183.

Bureau published two additional studies concerning parentage and surrogacy and, more specifically, about the issues arising from international surrogacy arrangements.⁴² In April 2014, the Hague Conference agreed to continue to explore the feasibility of an international convention on surrogacy. In February 2016, the Experts' Group on Parentage / Surrogacy ("the Group") met in The Hague. The Group determined that, owing to the complexity of the subject and the diversity of approaches by States to these matters, definitive conclusions could not be reached at the meeting as to the feasibility of a possible work product in this area and its type or scope. The Group was of the view that work should continue and at this stage, the consideration of the feasibility should focus primarily on recognition of children's status when they are born of surrogacy agreements.⁴³

1.5 Objective of this study

The research aims to examine South Africa's approach to recognising surrogacy agreements with an international dimension entered into South Africa and/or abroad. The author will examine reported South African cases in order to establish how the South African courts interpret and implement the Children's Act. This research will also provide hypothetical scenarios that may occur in South Africa. These hypothetical scenarios will reflect problems that may arise from international surrogacy agreements. This will assist in providing reasons why South African courts should implement safeguards in the context of international surrogacy agreements.

Thereafter, the research aims to examine South Africa's approach to surrogacy with international dimensions. The author submits that South African law appears to recognise the possibility of international surrogacy agreements.⁴⁴ Thus, the author will explore to what extent South African law recognises international surrogacy. The author submits that it may be necessary to implement safeguards to protect commissioning parent(s), surrogate mothers and the child should the South African court be seized with

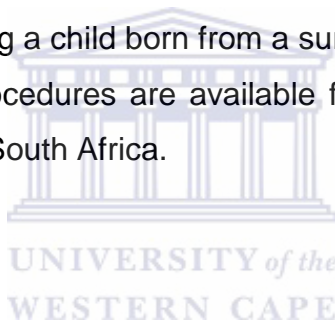
⁴² The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project and a Study of Legal Parentage and the Issues Arising From International Surrogacy Arrangements.

⁴³ Report of the February 2016 Meeting of the Experts' Group on Parentage / Surrogacy *A Preliminary Document No 3 of February 2016* 3

⁴⁴ Section 292(2) of the Children's Act - a court may, on good cause shown, dispense with the requirement that the surrogate mother and her husband/partner must be domiciled in South Africa.

a scenario where a foreign couple enters South Africa to find a surrogate mother or where South Africans go abroad to find surrogate mothers.

The research also aims to examine the requirements and procedures available in South African law concerning the birth registration of children, surrogacy agreements and citizenship. The author will be examining the Birth and Deaths Registration Act 51 of 1992, the South Africa Citizenship Act 88 of 1995, Domicile Act 3 of 1992 and the Children's Act 38 of 2005. By doing this, the author will examine how the birth registration of a child is conducted in South Africa with a view to examine what might occur in relation to the birth registration of a child born of international surrogacy. Additionally, the author will examine what procedures foreigners must undertake in order to attain citizenship in South Africa for themselves as commissioning parents and for the child born from a surrogacy agreement. Furthermore, the research will explore what might happen to a foreigners' parental status in South Africa, if he or she decides to leave South Africa after receiving a child born from a surrogate mother. Furthermore, the research will examine what procedures are available for courts to discover whether a foreigner is in fact domiciled in South Africa.



1.6 Research Question:

The research paper will address the question to what extent the South African legal system prohibits international surrogacy? And if a South African Court is faced with an opportunity to determine a matter regarding international surrogacy, would the courts recognise legal parentage and enforce birth registration of children born from international surrogacy agreements?

In addressing this question, the author will examine section 292(2) of the Children's Act which provides for the domicile requirement of the surrogate mother and/or her partner to be dispensed with on grounds of good cause shown. The author will also consider the increase of international surrogacy agreements and the dangers thereof. Cases from South Africa as well as international cases which illustrate problems encountered will be used to demonstrate the legal difficulties and potential rights infringed on or denied to the child born of an international surrogacy agreement. The author will consider South

African legislation that may have an influence on the recognition of international surrogacy agreements.

1.7 Significance of the research

International surrogacy agreements form part of a growing medical tourism industry.⁴⁵ A significant number of international cases have highlighted the need to address and regulate international surrogacy agreements. These cases have exposed the real risk of children born of an international surrogacy agreement being denied their basic rights. The rise of mobility, commercialisation of surrogacy and the decrease of fertility make it highly likely that international surrogacy problems might arise.

Although some research⁴⁶ has addressed the issue of international surrogacy in South Africa, there is general consensus that an international surrogacy agreement will be invalid in South Africa and thus the child will be the child of the surrogate mother. However, some authors have examined how the South African courts interpret the requirements of a valid surrogacy agreement and claim that there is a need for a change of laws regulating surrogacy in South Africa.⁴⁷ The study will add to existing literature regarding the need for a change. The study will also contribute to the existing literature regarding the South African court's interpretation of Chapter 19 of the Children's Act.⁴⁸ It will contribute to existing literature on the rights and protection of the child born from a surrogacy agreement. The research paper will examine and explore South African legislation regulating citizenship, nationality and birth registration. It will outline the potential risks that a surrogate born child may be exposed to. The research will address the need to consider the possibility of a South African court being seized with an international surrogacy case. Therefore, this dissertation will be the first to examine to what extent South African law prohibits international surrogacy as well as what approach South African courts should take regarding international surrogacy agreements.

⁴⁵ Talip (2013:14).

⁴⁶ Professor Anna Louw in (2007) 'Surrogate Motherhood' in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* and in 2009) *Acquisition of Parental Responsibilities and Rights* (LLD Thesis); Bonthuys E and Broeders N (2013) "Guidelines for the Approval of Surrogate Motherhood Agreements: *Ex Parte WH* (2013) 130 *The South African Law Journal* 493; Slabbert M and Roodt C (2013) 'South Africa' in Trimmings K and Beaumont P (ed) *International Surrogacy Arrangements: Legal Regulation at the International Level* 325; Heaton J (2015) 'The pitfalls of international surrogacy: A South African family law perspective'.

⁴⁷ Slabbert M and Roodt C (2013) 'South Africa' in Trimmings K and Beaumont P (ed) *International Surrogacy Arrangements: Legal Regulation at the International Level* 325.

⁴⁸ Children's Act 38 of 2005.

1.8 Literature Review

The following will be overviews of a few South Africa academics and their analysis of international surrogacy in South Africa.

Louw⁴⁹ has through her own analysis of section 292(2) argued that the underlying aim of the provisions included in the Children's Act⁵⁰ was to prevent couples from concluding surrogacy agreements in other jurisdictions where the procedures are less cumbersome, while at the same time excluding the possibility of foreigners abusing legalised surrogate motherhood in South Africa.⁵¹ Louw argues that with regards to section 292(2) of the Children's Act⁵², commissioning parent(s) may use a relative (who is a non-South African) as a surrogate mother. Thus, a pre-authorisation of an international surrogate agreement by a South African court is not completely ruled out.⁵³ She provides however, that the domicile requirements do not prevent the pregnant surrogate mother from leaving the country to evade the legal consequences of the valid surrogate motherhood agreement.⁵⁴

Bonthuys and Broeders⁵⁵ have also given an analysis of section 292(2) of the Children's Act⁵⁶ and conclude that the Children's Act attempts to guard against international surrogacy; however they point out that the commissioning parents in the South African case of *Ex parte WH*⁵⁷ were of Danish and Dutch origin. The couple had been living in South Africa for one year and 17 days when the judgment was handed down. They are of the opinion that although the commissioning parents indicated that they were domiciled in the country and intended to stay here permanently,⁵⁸ the commissioning parents admitted that they had during this year of residence in South Africa already entered into another surrogacy agreement, which had been confirmed by a court, but

⁴⁹ Louw A (2007) 'Surrogate Motherhood' in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* 19-1.

⁵⁰ Children's Act 38 of 2005.

⁵¹ Louw A (2009) *Acquisition of Parental Responsibilities and Rights* (LLD Thesis) 337.

⁵² Section 292(2) of the Children's Act - a court may, on good cause shown, dispense with the requirement that the surrogate mother and her husband/partner must be domiciled in South Africa.

⁵³ Louw (2009:337).

⁵⁴ Louw A (2007:19-8).

⁵⁵ Bonthuys E and Broeders N (2013) "Guidelines for the Approval of Surrogate Motherhood Agreements: *Ex Parte WH* (2013) 130 *The South African Law Journal* 493.

⁵⁶ Children's Act 38 of 2005.

⁵⁷ *Ex Parte WH* 2011 6 SA 514 (GNP).

⁵⁸ *Ex Parte WH* 2011 6 SA 514 (GNP) para 15.

which was unsuccessful because the surrogate mother became ill.⁵⁹ Bonthuys and Broeders argue that for the commissioning parents to enter into two surrogacy agreements and have them both confirmed by the extremely busy courts within a year of arriving in the country appears remarkable and should have sounded alarm bells to the court.⁶⁰ They assert that it raises questions about how the commissioning parents established domicile so rapidly and whether, given the existence of two surrogacy agreements in this time, the purpose of their residence was not reproductive tourism.⁶¹ They argue that the judgment provides no evidence that the court considered this and they claim that their thinking is not an unrealistic possibility.⁶² Bonthuys and Broeders warn that given the vulnerability of surrogate mothers and the desperate desires of many childless couples, courts should be alive to the real potential for financial exploitation in surrogacy agreements and it is the court's duty to guard against it.⁶³

Slabbert and Roodt⁶⁴ through their own analysis of Chapter 19 of the Children's Act argue that South Africa has a unilateral conflict rule due to the domicile requirement. They argue that the unilateral conflicts rule contained in section 292⁶⁵ of the Children's Act is the first specific private international law rule that exists for surrogacy in South Africa. The unilateral conflicts rule safeguards the opportunity for the South African judiciary to exercise discretion and control over surrogacy agreements. It also precludes the insertion of any choice of law or choice of court clauses into the agreement. Thus, the parties are not at liberty to select the law applicable to their agreement and the rule itself finds application by virtue of designating the court that is competent to confirm the agreement.⁶⁶

This lends predictability and certainty to the situation. However, Slabbert and Roodt argue that the unilateral conflicts rule displays a number of potential weaknesses. Firstly, it does not avoid the risk of limping situations that might arise when a surrogate motherhood agreement is valid in the country in which it was concluded but is invalid

⁵⁹ *Ex Parte WH* 2011 6 SA 514 (GNP) para 17.

⁶⁰ Bonthuys and Broeders (2013:493-494).

⁶¹ Bonthuys and Broeders (2013: 493- 494).

⁶² Bonthuys and Broeders (2013:493-494).

⁶³ Bonthuys and Broeders (2013:494).

⁶⁴ Slabbert M and Roodt C (2013) 'South Africa' in Trimmings K and Beaumont P (ed) *International Surrogacy Arrangements: Legal Regulation at the International Level* 325.

⁶⁵ *Baby Manji Yamada v Union of India and Anr; G (Surrogacy: Foreign Domicile)* (2008) 1 FLR 1047.

⁶⁶ Slabbert and Roodt (2013: 333).

elsewhere.⁶⁷ Secondly, if each jurisdiction regulates the issue on its own, in a uniquely different way, surrogate born children may continue to be exposed to a number of legal and practical risks.⁶⁸ They argue that in the absence of a Convention that regulates the legal consequences of surrogacy agreements, ordinary rules of private international law will apply in a situation where commissioning parent(s) who had a child by a valid surrogacy agreement in South Africa, settled in a foreign country.⁶⁹ Thus the commissioning parent(s) will be the legal parents of the child when South African law is the applicable law unless that foreign country considers surrogacy to be contrary to its public policy.⁷⁰ They further argue that adoption in terms of the 1993 Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption may be an option for foreigners who do not meet the domicile requirements but who are habitually resident in a state party.⁷¹

The author agrees with Slabbert and Roodt that the South African law regulating surrogacy displays a number of potential weaknesses and will contribute to their findings. The author will also contribute to the existing literature regarding the South African cases. However, this dissertation will differ to the extent that the author will focus on the possibility of South Africans being involved in an international surrogacy agreement, whether entered in South Africa or abroad. The authors mentioned above are of the view that the possibility of a South African court being seized with an international surrogacy agreement case is slim and if it does occur, the courts should refuse to confirm it. The surrogate mother will then be seen as the legal mother unless the commissioning parents go through the adoption process. The author will, however, explore how the consequences of an invalid international surrogacy agreement will affect the surrogate born child.

In her recent article, Heaton⁷² considers the consequences of the legal position of two instances of international surrogacy. She firstly sets out the position where persons who

⁶⁷ Slabbert and Roodt (2013: 344).

⁶⁸ Slabbert and Roodt (2013: 344).

⁶⁹ Slabbert and Roodt (2013: 344).

⁷⁰ Slabbert and Roodt (2013:344).

⁷¹ Slabbert and Roodt (2013: 344).

⁷² Heaton J (2015) 'The pitfalls of international surrogacy: A South African family law perspective' available at http://uir.unisa.ac.za/bitstream/handle/10500/19675/THRHR_February%202015international%20surrogacy.pdf?sequence=1.

are not domiciled in South Africa obtain a child via surrogacy and secondly, the position of South Africans who obtain a child via surrogacy in a foreign country.⁷³

With regards to the first position, she provides that a surrogate motherhood agreement will be invalid and unenforceable if persons to the agreement do not comply with the domicile requirement in the Children's Act.⁷⁴ The surrogate mother is deemed to be the child's mother for all purposes. Thus, the commissioning parents lose any rights to the child. However, the commissioning parents may become the child's legal parents by adopting the child.⁷⁵

She is of the opinion that if the child's birth is registered in South Africa and the commissioning father or both commissioning parents are not entered as the child's parents, the commissioning parents might decide to obtain an order from the High Court granting them sole guardianship and sole care on the ground of the best interests of the child, before they seek to take the child to their country of origin. However, the Constitutional Court has held that orders granting sole guardianship and sole care of South African children⁷⁶ to foreigners who intend to obtain an inter-country adoption abroad will be made only in exceptional circumstances.⁷⁷ Furthermore, the Children's Act provides that if a non-South African citizen applies to the High Court for an order granting him or her guardianship, the application must be regarded as an inter-country adoption for the purposes of the Convention on Inter-country Adoption.⁷⁸

⁷³ Heaton (2015:34)

⁷⁴ Heaton (2015:35).

⁷⁵ If foreign commissioning parents want to adopt a child in South Africa, the provisions of the Children's Act on inter-country adoption come into play. The Act draws a distinction between cases where the adoption applicants are habitually resident in a country in which The Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption has entered into force and those in which it has not. If applicants who are habitually resident in a Convention country want to adopt a child who is habitually resident in South Africa, they must comply with the requirements of the Children's Act and the Convention on Inter-country Adoption. First, the subsidiarity principle must be satisfied. The subsidiarity principle does not exclude adoption of South African child by foreigners, but requires that the possibilities for placing the child in South Africa must first be considered. Secondly, the Convention stipulates that there should be no contact between the prospective adoptive parents and the child's parents until it has been determined that the prospective adoptive parents are eligible and suitable adoptive parents; that the child is adoptable; that the subsidiarity principle has been applied; that an inter-country adoption is in the child's best interest; and that the necessary consent has been given freely and without having been induced by payment or compensation of any kind. Thirdly, the central authorities of both countries must agree to the adoption; (Heaton 2015: 35-37).

⁷⁶ If the surrogate mother is a South African citizen, the child has South African citizenship by birth: s 2(1)(b) of the South African Citizenship Act 88 of 2005. Therefore the child qualifies as a South African child.

⁷⁷ *AD v DW (Centre of Child Law as Amicus Curiae; Department of Social Development as Intervening Party)* 2008 3 SA 183 (CC); Heaton (2015:40).

⁷⁸ Children's Act 38 of 2005, s 25.

With regards to the latter position, Heaton suggests that South African law does not prohibit South African citizens or persons who are domiciled or resident in this country from participating in surrogacy in a foreign country.⁷⁹ However, she claims that because altruistic surrogacy is legal in South Africa, there is little need for such persons to resort to international surrogacy.⁸⁰ She claims that South African prospective commissioning parents are only likely to engage in international surrogacy if they do not want their gametes to be used for the artificial fertilisation of the surrogate mother; the commissioning mother can give birth but chooses not to do so; medical facilities are better or surrogacy is cheaper in the foreign country; the commissioning parents want to access a bigger pool of potential surrogate mothers; or they are set on ordering a child who has specific physical or racial characteristics.⁸¹

She suggests that if commissioning parents participated in altruistic surrogacy which was valid in terms of the law of the foreign country and the law of the foreign country automatically conferred legal parentage on them, their parental status is likely to be recognised in South Africa since altruistic surrogacy is permitted in this country too.⁸²

Heaton suggests the Courts might argue that if the commissioning parents were excluded as the child's legal parents and the child's unwilling surrogate mother was compelled to be the child's parent, the child would probably end up in alternative care.⁸³ She asserts that such a state of affairs would not be in the best interests of the child as it would amount to punishing the child for the commissioning parents and the surrogate mother's actions.⁸⁴ The court might hold that denying recognition to the legal parentage of the commissioning parents would unjustifiably violate the paramountcy of the child's best interest.⁸⁵ She further suggests the court might also hold that denying the child

⁷⁹ Heaton (2015:40).

⁸⁰ Heaton (2015:40).

⁸¹ Heaton (2015:41).

⁸² If the foreign surrogacy was commercial, the matter would become more complicated. As there is widespread international distaste for commercial surrogacy and commercial surrogacy is illegal and against public policy in South Africa, a South African court might withhold recognition of the commissioning parents' legal parentage even if the commercial surrogacy was valid in terms of the law of the foreign country; Heaton (2015:41).

⁸³ Heaton (2015:41).

⁸⁴ Heaton (2015:42).

⁸⁵ The Constitution of the Republic of South Africa, S 28(2) read with s 36; Heaton (2015:42)

parental care by commissioning parents who want to provide parental care to the child, unjustifiably violates the child's constitutional right to parental care.⁸⁶

The author agrees with the above suggestion. However, the author argues that the court should also have the same reaction in the instance where persons who are not domiciled in South Africa obtained a child through a surrogacy agreement entered into in South Africa with a South African surrogate mother.

Both instances affect the child in a similar way. In a situation where the surrogate mother cannot afford to take care of the child, the commissioning parents (whether South Africans or foreign nationals) are willing to provide the child with the parental care that the child needs. In both instances denying the recognition of legal parentage of the commissioning parents in respect of the child, unjustifiably violates his or her constitutional rights. The author will explore this argument in further detail in Chapter 3 below by looking at international case law.

Regarding section 292(2) of the Children's Act,⁸⁷ the author will make her own recommendations by examining the English legal system and case decisions in order to determine the meaning of 'good cause shown'. The author will be examining the English legal system because the regulatory framework regarding surrogacy is similar in South Africa and in England. Both jurisdictions strictly regulate surrogacy.⁸⁸ Additionally, English courts have been seized with international surrogacy agreements cases.

1.9 Methodology

The method employed in this study will be predominantly done by way of desktop literature reviews of articles on international surrogacy agreements as well as on non-international surrogacy. Furthermore, the research consists of an extensive review of the reported judgments in South African involving national surrogacy agreements as well as on the European Court of Human Rights decision regarding international surrogacy agreements and the Hague Conference on Private International Law reports regarding international surrogacy. Chapter 19 of the Children's Act will also be referred to. Other textbooks, South African and international journals, international conventions, South African and foreign legislation and case law will form a large part of this research.

⁸⁶ The Constitution of the Republic of South Africa, s28 (1) (b) read with s36; Heaton (2015:42).

⁸⁷ Children's Act 38 of 2005.

⁸⁸ Carnelley M (2012) "Ex parte WH 2011 6 SA 514 (GNP)" De Jure 180.

1.10 Chapter Outline

1.10.1 Chapter 1: Introduction

Chapter 1 will be an introduction to the history of surrogacy (international surrogacy agreements) and the background to the research. It also sets out important concepts, the aims and significance of the research. It further identifies the research question and provides an outline of the chapters which follow.

1.10.2 Chapter 2: The South African Perspective Regarding Surrogacy

The chapter will provide the history of surrogacy in South Africa and a discussion on Chapter 19 of the Children's Act.⁸⁹ The chapter will also consist of a discussion of the reported judgments decided by South African courts and the court's interpretation of Chapter 19 of the Children's Act. The focus point of this chapter is to establish the extent to which South African's legal system recognises or might recognise international surrogacy agreements. Furthermore, the author will discuss what is referred to as a 'good cause shown' as an exception to the domicile requirement in the Children's Act⁹⁰, and how it might be challenged or enforced in South African courts.

1.10.3 Chapter 3: South African legislation and its influence on the Court's discretion

This chapter will examine South African legislation that may be applicable to the children born of commissioning parents (whether the commissioning parents are South Africans or foreign nationals) who entered into international surrogacy agreements. The discussion will consider the South African Citizenship Act 88 of 1995, the Birth and Deaths Registration Act 51 of 1992, and the Domicile Act 3 of 1992. These acts may provide a gateway for the commissioning parents to obtain an order granting them responsibilities and rights in respect of a child born from a surrogate mother. The author will examine how the birth registration of a child is conducted in South Africa with a view to examine what might occur in relation to the birth registration of a child born of

⁸⁹ Chapter 19 of the Children's Act 38 of 2005 regulates surrogacy in South Africa.

⁹⁰ Children's Act 38 of 2005.

international surrogacy. Thereafter, the author will examine the criminal aspect of international surrogacy agreements.

1.10.4 Chapter 4: Consequences of International Surrogacy Agreements

This chapter will examine potential situations that the court may be seized with by observing international case law. Subsequently, the author will provide recommendations regarding the approach that the South African courts should consider when seized with an international surrogacy agreement.

1.10.5 Chapter 5: Conclusion

The final chapter will provide a summary of the research. Finally, the author will draw conclusions from the research and respond to the research question.



CHAPTER 2: THE SOUTH AFRICAN PERSPECTIVE REGARDING SURROGACY

2.1. Introduction

The purpose of this chapter is to lay a foundation regarding surrogate motherhood agreements in South Africa. A brief discussion regarding the relevant terminology will be presented, and thereafter the historical background of surrogacy in South Africa will be examined. Subsequently, the author will provide an overview of Chapter 19 of the Children's Act.⁹¹ This overview serves only to contextualise the discussion of the provisions of the Act and does not include a comprehensive discussion of the legal position preceding the legislative intervention. The chapter will also consist of a discussion of the reported judgments decided by South African courts and the court's interpretations of Chapter 19 of the Children's Act.

Furthermore, the author will discuss what is referred to as a 'good cause shown' as an exception to the domicile requirement, and discuss how it might be challenged or enforced in South African courts.

The focal point of this chapter is to explore the framework that will assist in establishing the extent to which South Africa's legal system recognises or might recognise an international surrogacy agreement.

2.2. Surrogacy in South Africa

2.2.1. Terminology

Section 1(1) of the Children's Act defines a surrogate motherhood agreement as 'an agreement between a surrogate mother and a commissioning parent whereby it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent, and according to the agreement, the surrogate mother undertakes to hand over such 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.'⁹²

⁹¹ Chapter 19 of the Children's Act 38 of 2005 regulates surrogacy in South Africa.

⁹² Louw A Chapter 19: Surrogate Motherhood in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007), 7.

The commissioning parent or parents are the individual or the couple who intend(s) to raise the child after birth.⁹³ The term 'surrogate' refers to the substitute or 'stand-in' mother who is implanted with the embryo and who takes on the role of mother until birth.⁹⁴

Two forms of surrogacy practice are recognised in South Africa, namely partial and full. Full surrogacy is where the surrogate has no biological relationship with the commissioning parent whereas, in the instance of partial surrogacy, some form of biological relationship exists.⁹⁵

Artificial insemination is described as the introduction by other than natural means of male gamete or gametes into the reproductive organs of a woman or by placing 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 that woman, an all-encompassing definition capable of the inclusion of many of the procedures used to give effect to surrogacy agreements.⁹⁶

2.2.2. The History of Surrogacy in South Africa

Surrogacy has been available for many years in South Africa, the first recognised case being that of Karen Ferreira-Jorge of Tzaneen in 1987. She was a 48 year old mother who carried her daughter's triplets to term.⁹⁷ 'The daughter was unable to bear children of her own and had been discouraged from enlisting the services of an unknown surrogate in fear that the surrogate may renege on her promise to give up the baby at birth.'⁹⁸ Karen Ferreira-Jorge, after offering her assistance and after the process of ovarian stimulation, gave birth to triplets.⁹⁹

⁹³ Lewis S (2011) 'The Constitutional and Contractual Implications of the application of Chapter 19 of the Children's Act 38 of 2005' (LLM dissertation University of the Western Cape)13.

⁹⁴ A surrogate mother is defined in section 1(1) of the Act as 'an adult woman who enters into a surrogate motherhood agreement with the commissioning parent'. It is submitted that the surrogate mother is 'the woman who agrees to gestate and bear the child rather than the woman who intends to rear the child'. Louw (2009: 335); Parliamentary Monitoring Group Report of the South African Law Commission on Surrogate Motherhood (1997) available at <http://www.pmg.org.za> (accessed on 1 June 2010), 5 - 6.

⁹⁵ Carnelley M and Soni S (2008) "A Tale of Two Mummies" 22 *Speculum Juris*, 37.

⁹⁶ Children's Act 38 of 2005.

⁹⁷ Lewis (2011:13).

⁹⁸ Lewis (2011:13).

⁹⁹ Lewis (2011:13).

Previous Acts, such as the Regulations Regarding the Artificial Insemination of Persons and Related Matters¹⁰⁰ and the Children's Status Act,¹⁰¹ did not explicitly provide for surrogacy agreements; however neither Act expressly prohibited it.¹⁰² The Children's Status Act¹⁰³ ("CSA") became operative less than two weeks after the Ferreira Jorge triplets were born.¹⁰⁴ This legislation provided that the gestational mother and her husband, where he consented to the artificial insemination, were the parents of a child born of artificial insemination using donor sperm or eggs.¹⁰⁵ By implication therefore, the gestational mother and, in the presence of spousal consent to the insemination, her husband, would be the parents of any child born of surrogacy. The CSA was not designed to deal with surrogacy, thus, the unique nature of such arrangements was not considered in drafting the legislation.¹⁰⁶ The consequence was that the effect of the CSA was to attribute parenthood to a mother who never intended to keep the child and to a father whose involvement was minimal at best. This seemed untenable.¹⁰⁷ In instances where donor sperm is used for artificial insemination, the donor's rights were terminated by legislation.¹⁰⁸

The only means by which commissioning parents could acquire parental rights and responsibilities in respect of such a child was to adopt it through the conventional channels.¹⁰⁹ This process was fraught with its own difficulties.¹¹⁰ Commissioning parents may prefer surrogacy arrangements to adoption for a number of reasons, *inter alia*, because: the nine month period of gestation associated with the pregnancy of a surrogate may be far shorter than the waiting period associated with an adoption; surrogacy allows for the possibility that one or both of the commissioning parents may

¹⁰⁰ Regulations Regarding the Artificial Insemination of Persons and Related Matters , Government Gazette (1997-10-17).

¹⁰¹ Children's Status Act 82 of 1987

¹⁰²International Surrogacy Forum (2015) 'South Africa' available at <http://www.internationalsurrogacyforum.com/content/south-africa> [accessed on 23 May 2015] 1.

¹⁰³ The Children's Status Act 82 of 1987.

¹⁰⁴ Pretorius (1991) "Practical Aspects of Surrogate Motherhood" *De Jure* 52 58. Nicholson C and Bauling A (2013) 'Surrogate Motherhood Agreements and their confirmation: A new challenge for practitioners?' *De Jure* 510 512.

¹⁰⁵ Child Status Act 82 of 1987 s 5(1)(a).

¹⁰⁶ Pretorius (1991: 58).

¹⁰⁷ Pretorius (1991: 58).

¹⁰⁸ Human Tissue Act 65 of 1983 s 36.

¹⁰⁹ In terms of the Child Care Act 74 of 1983. Now in terms of Chapter 15 of the Children's Act 38 of 2005.

¹¹⁰ Pretorius (1991:59); Nicholson and Bauling (2013:513).

be biologically related to the child; and commissioning parents are not subject to the age limits associated with adoptive parents.¹¹¹

Thus, until the advent of the Children's Act,¹¹² surrogacy was regulated indirectly by three pieces of legislation that were designed for other purposes: The Human Tissue Act¹¹³ ("HTA") and its regulations, the Child Care Act¹¹⁴ and the CSA.¹¹⁵ These pieces of legislation were not ideal for a number of reasons, not least because the HTA was very restrictive in that it provided, *inter alia*, that only married women could be artificially inseminated or fertilized *in vitro*, effectively excluding unmarried women from acting as surrogates.¹¹⁶

In 1987, the absence of specific legislation governing surrogacy led the South African Law Commission to begin investigating the matter. Following the circulation of a 'Questionnaire on Surrogate Motherhood', the South African Law Commission published a working paper on the topic of surrogacy.¹¹⁷ The investigation by the South African Law Commission culminated in two documents, namely: *Working Paper 38: Surrogate Motherhood*¹¹⁸ and the *Report on Surrogate Motherhood*.¹¹⁹ The abovementioned were followed by, the *Report of the Ad Hoc Committee on the Report of the South African Law Commission on Surrogate Motherhood*¹²⁰ and the *South African Law Reform Commission's Project 110: Review of the Child Care Act*,¹²¹ as well as the *Report: Review of the Child Care Act*.¹²²

¹¹¹ Pretorius (1991: 54); Mills L (2010) "Certainty about surrogacy" *Stell LR* 429; Nicholson and Bauling (2013:513).

¹¹² Children's Act 38 of 2005.

¹¹³ Human Tissue Act 65 of 1983.

¹¹⁴ Child Care Act 74 of 1983.

¹¹⁵ Children's Status Act 82 of 1987. Pretorius (1996) "Surrogate motherhood: A detailed commentary on the Draft Bill" *De Rebus* 114; Nicholson and Bauling (2013:513).

¹¹⁶ Pretorius (1991: 61); Nicholson and Bauling (2013:513).

¹¹⁷ Lewis (2011:2).

¹¹⁸ *South African Law Commission: Working Paper 38: Surrogate Motherhood* Project 65 (April 1991).

¹¹⁹ *South African Law Review Commission: Report on Surrogate Motherhood* (1993) SALR 769.

¹²⁰ *Report of the Ad Hoc Committee on the Report of the South African Law Commission on Surrogate Motherhood* 11 February 1999 available at <https://pmg.org.za/files/docs/990211slrcreport.doc> [accessed on 1 March 2015].

¹²¹ *South African Law Reform Commission's Project 110: Review of the Child Care Act* 18 April 1998 available at <http://ci.org.za/depts/ci/plr/pdf/bills/salrc98issue.pdf> [accessed on 1 March 2015].

¹²² *South African Law Commission's: Report: Review of the Child Care Act* December 2002 available at http://www.justice.gov.za/salrc/reports/r_pr110_01_2002dec.pdf [accessed on 1 March 2015].

The underlying thread running throughout the South African Law Reform Commissions' ("SALRC") and the *Ad Hoc* Committee's underlying thread was that surrogacy should not be banned in South Africa but must be recognised and regulated through legislation.¹²³ Most importantly, in all situations of surrogacy, the best interests of the child must be of paramount consideration. The High Court, which is responsible for the confirmation of the surrogacy agreement before it may be entered into, must refuse to sanction such an agreement if it is not in the best interests of the child as stated in section 28(2) of the Constitution.

In 2003, after a five year period of consultation with organisations representing the children's sector, the SALRC tabled a draft bill aimed at enhancing the rights of vulnerable and poor children, addressing the increase in child abuse and neglect and providing better care for all children. In June 2005, the Children's Bill was approved by the National Assembly¹²⁴ in line with South Africa's obligations as a party to the United Nations Convention on the Rights of a Child ("UNCRC") (ratified in 1995) and the African Charter on the Rights and Welfare of the Child ("ACRWC") (ratified in 2000).

The Children's Bill, in the form of Chapter 20, was the first legislation to openly regulate surrogate motherhood and establish surrogacy as a legally recognised procedure of assisted reproduction. However when the Children's Bill was promulgated into law, surrogate motherhood agreements were governed by Chapter 19 of the Children's Act. In short, Chapter 19 provides that:

- i. surrogacy agreements which are sanctioned by the High Court are valid and enforceable between parties;¹²⁵
- ii. the commissioning parent(s) are recognised as the legal parent(s) from date of birth;¹²⁶

¹²³ *South African Law Commission's: Report: Review of the Child Care Act* December 2002.

¹²⁴ On 1 July 2007, the Children's Act 38 of 2005 had been passed by Parliament and partially promulgated. This statutory compilation represents those chapters of the complete package originally proposed by the SALRC affecting national competencies (courts, adoption, parental rights and responsibilities, international child abduction and so forth). All the provisions affecting the concurrent provincial spheres of competence, and hence implicating provincial budget expenditure, were dealt with and passed in a separate Parliamentary process in the Children's Act Amendment Act 41 of 2007, signed by the State President on 14 March 2008 after being concluded in Parliament in November 2007. Sloth-Nielsen J (2008) "A Developing Dialogue – Children's Rights, Children's Law and Economics: Surveying Experiences from Southern and Eastern African Law Reform Processes" *Electronic Journal of Comparative Law* 12(3) available at <http://www.ejcl.org/123/art123-5.pdf>.

¹²⁵ Section 292(1)(e) provides that no surrogacy agreement is valid unless confirmed by the High Court (subject to the parties meeting the other requirements specified in s295).

- iii. the child born of the agreement is for legal purposes the child of the commissioning parents; and¹²⁷
- iv. surrogacy in exchange for commercial gain is prohibited.¹²⁸

2.3. Discussion on Chapter 19 of the Children's Act 38 of 2005

The provisions contained in Chapter 19 for the first time created a statutory scheme for the regulation of surrogacy agreements in South Africa.

The formalities for a valid surrogacy agreement are provided for in Section 292 of the Act. Section 292 provides:

'(1) No surrogate motherhood agreement is valid unless-

- a) the agreement is in writing and is signed by all the parties thereto;
- b) the agreement is entered into in the Republic;
- c) at least one of the commissioning parents, or where the commissioning parent is a single person, that person at the time of entering into the agreement domiciled in the Republic;
- d) the surrogate mother and her husband or partner, if any, are at the time of entering into the agreement domiciled in the Republic; and
- e) the agreement is confirmed by the High Court within whose are of jurisdiction the commissioning parent or parents are domiciled or habitually resident.¹²⁹

¹²⁶ In other countries such as the UK there is a default legal assumption that the women giving birth to that child is the child's legal mother.

¹²⁷ Section 297(1)(a) of the Act provides that 'any child born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of birth of the child concerned'. Louw A (2009:356). However, section 298(1) of the Children's Act provides that a surrogate mother who is also a genetic parent of the child concerned may, at any time prior to the lapse of a period of sixty days after the birth of the child, terminate the surrogate motherhood agreement by filing written notice with the court. The effect of this as provided for in section 298(3) is that the surrogate mother incurs no liability to the commissioning parents for exercising her rights of termination in terms of this section, except for compensation for any payments made by the commissioning parents in terms of section 301.

¹²⁸ Section 301 of the Act prohibits payment in respect of surrogacy agreements. Section 305 stipulates the possible offences and respective punishments. The surrogate may only enter the agreement for purely altruistic reasons and the only compensation she is entitled to receive from the commissioning parents is compensation in respect of reasonable expenses. Carnelley M and Soni S (2008:41); Louw A (2009:350).

¹²⁹ Habitual residence is not defined in the South African legislation. The term habitual residence should be given its ordinary natural meaning with the reference to all facts of the particular case. The word habitual implies a stable territorial link- which may be achieved through length of stay or through evidence of a particularly close tie between the person and the place (Du Toit C (2009) 'The Hague Convention on the Civil Aspects of International Child Abduction' in Boezaart T (ed) *Child Law in South Africa*). In *Senior*

(2) A court may, on good cause shown, dispose with the requirement set in subsection (1) (d).

Section 293 (1) provides that the written consent of all parties to the agreement must be obtained i.e. the husband, wife or partner of the commissioning parent and the surrogate mother, before the court may confirm the agreement. Where such consent is unreasonably withheld and the husband, wife or partner is not the genetic parent of the child, the court may confirm such agreement.¹³⁰

Section 294 provides that a surrogate motherhood agreement is only valid if it is to be effected by the use of the gametes of either both the commissioning parents or at least one of the commissioning parents in cases where the latter is not possible. The *Ad Hoc* Committee felt that in cases where the single commissioning parent or both commissioning parents are infertile, adoption of a child will adequately serve the needs of the person or couple concerned.¹³¹ The SALC argued that it is in the best interests of the child to promote the bond between the child and the commissioning parents, and that it will also 'restrict undesirable practices such as shopping around with a view to creating children with particular characteristics'.¹³² This section however has been challenged in the matter of *AB and Another v Minister of Social Development as Amicus Curiae: Centre for Child Law*¹³³ on the grounds that section 294 infringes the rights of parents who cannot donate their own gametes. Basson J declared the section to be unconstitutional and thus invalid. However, the judgment must still be confirmed by the Constitutional Court. This case will be discussed in more detail later in the chapter.

The requirements for a valid surrogate motherhood agreement by the High Court are set out in section 295. The section provides that the commissioning parent(s) must be permanently and irreversibly unable to give birth to a child.¹³⁴ Thus, at least one commissioning parent must be infertile. The commissioning parents must be suitable

Family Advocate, Cape Town v Houtman 2004 (6) SA 274 (C) para [10], the court stated that one has to look at whether the person has a factual link with the requesting state, culturally, socially and linguistically to determine whether it was the person's country of habitual residence. It must be noted that this case dealt with the international abduction of a child.

¹³⁰ Children's Act 38 of 2005 s 293(3).

¹³¹ Louw A (2012:19-13).

¹³² SALC Project 65 para 8.2.6.

¹³³ *AB and Another v Minister of Social Development As Amicus Curiae: Centre for Child Law* 2016 (2) 27 (GP).

¹³⁴ Children's Act s 295(a).

persons to accept the parenthood of the child to be conceived and understand the legal consequences the agreement.¹³⁵

With regard to the suitability of the commissioning parent(s) to accept parenthood of the child, the *Ad Hoc* Committee¹³⁶ concurred with the SALC's recommendation¹³⁷ that all parties to a surrogate agreement should be subjected to a strict screening process before the agreement is implemented, and to a continuous process of counselling before and after the conclusion and implementation of the agreement. This recommendation was not, however, incorporated into the Children's Act.

The surrogate mother must also be competent, suitable to act as a surrogate mother and must also understand the legal consequences of the agreement.¹³⁸ The court must confirm that the agreement has been entered into for altruistic not commercial reasons.¹³⁹ The surrogate mother must have had at least one pregnancy and viable delivery and a living child of her own.¹⁴⁰ The agreement must include specific provisions for the child that are above all in his or her best interests.¹⁴¹

The recommendation of strict screening of parties to a surrogate motherhood agreement applies with even more force to the screening of the surrogate mother in order to ensure her suitability as a surrogate mother.¹⁴² The successful execution of the surrogate agreement is to a large extent dependent upon the surrogate mother being physically and psychologically suited to act as a surrogate mother.¹⁴³

Section 296 provides that the artificial fertilisation of the surrogate mother may not take place before the agreement is confirmed by the court and/or after the lapse of the 18 months from the date of confirmation of agreement.¹⁴⁴ Such fertilisation must be done in

¹³⁵ Children's Act s 295(b)(i)-(iii).

¹³⁶ Report of the *Ad Hoc* Committee para F6.

¹³⁷ SALC Project 65 para 8.2.3.

¹³⁸ Children's Act s295(c)(i)-(iii).

¹³⁹ Children's Act s295(c)(iv).

¹⁴⁰ Children's Act s295(v)-(vii).

¹⁴¹ Children's Act s295(d).

¹⁴² Louw (2012:19-17).

¹⁴³ Louw (2012:19-17).

¹⁴⁴ Children's Act 38 of 2005 s 296(1)(a)-(b).

accordance with the provisions of the National Health Act 61 of 2003.¹⁴⁵ The regulations¹⁴⁶ to the National Health Act,¹⁴⁷ provide for the removal and storage of gametes by competent persons at 'authorised institutions', the creation and keeping of gametes donor and recipient files, the requirement of artificial fertilisation and embryo transfer, the reporting of births and ownership of gametes, zygotes and embryos.

Section 297 (1) provides for the status of a child born of the agreement. It provides that for all purposes, a child born in terms of a valid surrogacy agreement is deemed the child of the commissioning parent(s) and the surrogate mother has no right of parenthood or care of the child, nor a right to contact with the child unless otherwise provided for.¹⁴⁸ Thus no claim for maintenance or of succession can arise against the surrogate mother or her family.¹⁴⁹

Section 297 (2) provides that if any surrogate motherhood agreement does not comply with the provisions of the Act, it will be invalid. Any child born as a result of any action taken in execution of such an arrangement is for all purpose deemed to be the child of the woman that gave birth to the child.

Section 298 (1) provides: in the case of partial surrogacy, a surrogate mother may at any time prior to a period of 60 days after the birth of the child terminate the agreement through notice to the court. The court must be satisfied that she has done so voluntarily understanding the effects thereof; and she will then only be liable for compensation for prior payments made in respect of her expenses by the commissioning parents.¹⁵⁰

Section 299 provides that if the agreement is terminated before the birth of the child, the child shall be deemed as an offspring of the surrogate mother.¹⁵¹ No rights vest in the commissioning parents, unless they are acquired through adoption processes and no claim for maintenance may arise.¹⁵² If the agreement is terminated after birth, all parental rights which the commissioning parents may have obtained are terminated and

¹⁴⁵ Children's Act 38 of 2005 s 296(2).

¹⁴⁶ Regulations Relating to Artificial Fertilisation of Persons published in *Government Gazette* 35099 of 2 March 2012.

¹⁴⁷ 61 of 2003.

¹⁴⁸ Children's Act 38 of 2005, s 297(1)(a)-(d).

¹⁴⁹ Children's Act 38 of 2005, s 297(1)(f).

¹⁵⁰ Children's Act 38 of 2005, s 298 (2)-(3).

¹⁵¹ Children's Act 38 of 2005, s 299(a).

¹⁵² Children's Act 38 of 2005, s 299(d).

vest in the surrogate. Effectively, the implication of a partial surrogacy agreement is that the position of parentage is held in abeyance. The surrogate is in fact the legal mother of the child to be born of the agreement pending her decision to renege on or abide by the agreement.

Section 300 provides that the surrogate agreement may be terminated through a termination of the pregnancy carried out in terms of the Choice on Termination of Pregnancy Act¹⁵³ and the decision to undergo an abortion lies solely with the surrogate mother.

Section 301 provides that all payments in respect of surrogacy agreements are prohibited. No surrogate agreement may be entered into with the result that a party agrees to receive or to give a reward or compensation in money or in kind.¹⁵⁴ The only forms of compensation that will be permitted will be those which are directly related to those expenses incurred in the fertilisation and pregnancy of the surrogate, the birth of the child and the confirmation of the agreement by the court; any loss of earnings suffered by the surrogate as a result of the agreement; and insurance for the surrogate in cases of death or disability.¹⁵⁵

Section 301 (3) provides for the reasonable compensation for any person who renders *bona fide* legal and medical assistance with a view to the confirmation of a surrogate agreement or in the execution of such an agreement.

Section 302 provides that no person may artificially fertilise or render such assistance in an artificial fertilisation unless the agreement has been confirmed by the court. No person may in any way for, or with a view to, compensation, make known that any person is or may be willing to enter into a surrogate mother agreement.

Section 303 prohibits any person from artificially fertilising a woman 'in the execution of a surrogate motherhood agreement or render assistance in such artificial fertilisation unless that artificial fertilisation is authorised by a court in terms of the provisions of this Act'.

¹⁵³ Choice on Termination of Pregnancy Act 92 of 1996.

¹⁵⁴ Children's Act 38 of 2005 s 301(1).

¹⁵⁵ Children's Act 38 of 2005 s 301(2).

Section 305 provides that a person who contravenes the provisions of s 301, 302 and 303 mentioned above, is guilty of an offence and liable to a fine or imprisonment for a period not exceeding 10 years, or both a fine and imprisonment.¹⁵⁶ This section will be discussed further under the heading “The Criminal Aspect of International Surrogacy Agreements” in Chapter three.

Taken as a whole, Chapter 19 indicates that the legislature has been cautious and requires extensive control over the surrogacy process. However with the lack of regulations, interpreting the legislation has been found to be quite problematic.

2.4. Reported South African cases concerning Surrogacy

Cases relating to surrogate motherhood agreements demonstrate that the Children’s Act is not as clear as it could have been regarding what is required of the parties to such agreements. Some of the requirements that give rise to uncertainty will now be considered in more detail. The discussion will incorporate a brief evaluation of surrogacy judgments and recommendations and reviews regarding these judgements.

2.4.1. *Ex Parte Applications for the Confirmation of three Surrogate Motherhood Agreements 2011 6 SA 22 (GSJ)*

The first reported judgment was *Ex Parte Applications for the Confirmation of three Surrogate Motherhood Agreements*.¹⁵⁷ In this case the court postponed the applications *sine die* to give the applicants an opportunity to rectify their applications to enable the court to consider the matters on their merits. The court held that for a surrogacy agreement to be valid there must be complete and full compliance with all the provisions set out in Chapter 19 of the Children’s Act.¹⁵⁸ Failure to do so would render the agreement invalid, resulting in the wishes of the parties not materialising.¹⁵⁹ The court noted that each surrogacy arrangement is unique and the agreement should be adapted according to the circumstances and the persons involved. Apart from the agreement itself, parties have to provide the court with the relevant evidence to ensure that they

¹⁵⁶ Section 305(1)(b) read with s305(6). A person convicted of this offence more than once can be imprisoned for 20 years: s305(7).

¹⁵⁷ *Ex Parte Applications for the Confirmation of three Surrogate Motherhood Agreements 2011 6 SA 22 (GSJ)* (hereinafter referred to as “*Ex Parte 2011*”).

¹⁵⁸ Children’s Act 38 of 2005.

¹⁵⁹ Carnelley M and Soni S (2011) ‘Surrogate Motherhood Agreements’ *De Rebus* 31 30.

(and their circumstances) meet the statutory requirements.¹⁶⁰ The judgment did not deal with any social or ethical arguments regarding surrogacy, but the judgment provided practical guidance, including:

- Surrogate motherhood agreements are generally not regarded as urgent matters;¹⁶¹
- The court's confirmation of the agreement is not a mere rubber stamp and will not be granted as a matter of course;¹⁶²
- The court, as upper guardian of all minor children, has a constitutional and international law duty to ensure that the interests of the children are paramount and the court takes this duty seriously;¹⁶³
- The success of an application will depend on the evidence provided to the court of the facts on which the application is based, to enable the court to make the statutorily required conclusions;¹⁶⁴ and
- Any and all expert reports must be in depth, reliable and provide a detailed factual exposition to support any recommendations made by the expert. These facts and evidence must relate to the general and specific appropriateness of the relevant parties, their financial resources and emotional stability and irreversibility of the sterility of the commissioning parents.¹⁶⁵

2.4.2. *Ex Parte WH 2011 6 SA 514 (GNP)*

In Ex Parte WH,¹⁶⁶ a confirmation application was brought by a male same-sex couple allegedly domiciled in South Africa. The commissioning couple appeared to have met the statutory requirements.¹⁶⁷ However, there was no information before the court concerning the origin of the donor-egg, except that it was not to be that of the surrogate mother.¹⁶⁸ Unfortunately, the judgment is silent on the identity of the sperm donor. This

¹⁶⁰ Carnelley and Soni (2011:30).

¹⁶¹ *Ex Parte 2011* para 6.

¹⁶² *Ex Parte 2011* para 12.

¹⁶³ *Ex Parte 2011* para 16.

¹⁶⁴ *Ex Parte 2011* para 28.

¹⁶⁵ *Ex Parte 2011* para 17 .

¹⁶⁶ *Ex Parte WH 2011 6 SA 514 (GNP)*

¹⁶⁷ *Ex Parte WH 2011 6 SA 514 (GNP)* para 19- 22

¹⁶⁸ *Ex Parte WH 2011 6 SA 514 (GNP)* para 22. The court required that details and proof of payment of any compensation for services rendered be provided, either to the surrogate herself or the intermediary, the donor, the clinic or any third part involved in the process; further, that copies of all agreements

is unfortunate because, prior to the case of *AB and Another v Minister of Social Development as Amicus Curiae: Centre for Child Law* (discussed below), the Act required that at least one of the commissioning parents must be genetically linked to the child; if the court did not have this evidence before them, and if it is found that none of the commissioning parents are genetically linked to the child, the agreement would have been invalid.¹⁶⁹

Furthermore, the couple were of Dutch and Danish nationality respectively. They had been staying in South Africa for just over a year. Unfortunately, the court did not investigate in any detail whether the couple was domiciled in South Africa. The court simply accepted their allegation that they were domiciled in South Africa in spite of the fact that, for a foreign national to be domiciled or habitually resident in South Africa, they are obligated to follow certain requirements.¹⁷⁰

Furthermore, even though the Court confirmed the application, seeking recognition of the commissioning parents' parental status in their countries of birth (in this case Dutch and Danish), turned out to be a problem.¹⁷¹ In the Netherlands the courts have refused to recognise legal parentage established in terms of foreign birth certificates where no mother is mentioned on the birth certificate.¹⁷² A Danish citizenship is not acquired by the child born out of marriage between a Danish father and a non-Danish mother.¹⁷³ Danish law, therefore, would make it impossible for the commissioning father in the *Ex Parte WH* case¹⁷⁴ to apply for Danish citizenship on behalf of the child born to the

between surrogate and any intermediary or any other person who is involved in the process be furnished; and information as to whether any of the commissioning parents have been charged with or convicted of a violent crime or a crime of a sexual nature; Sloth- Nielsen J (2013) "Surrogacy, South African Style" available at <http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/1275/Sloth-NielsenSurrogacySouthAfricanStyle2013.pdf?sequence=1> .

¹⁶⁹ Children's Act 38 of 2005, s 294.

¹⁷⁰ Applications for permanent residency in South Africa are considered in terms of section 25 (Permanent Residence); section 26 (Direct Residency Permits) and section 27 (Residency on other grounds Permits) of the Immigration Act 13 of 2002 and read with Regulation 23 and 24 of the Immigration Regulations 2014. Section 1(2) of the Domicile Act 3 of 1992 provides: 'A domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period.'

¹⁷¹ Louw (2013) "Surrogacy in South Africa: Should we reconsider the current approach?" 76 *THRHR* 587.

¹⁷² Louw (2013:587).

¹⁷³ Vink and De Groot (2010) "Birthright citizenship: Trends and regulations in Europe" EUDO Citizens Observatory and Robert Schuman Centre for Advanced Studies in collaboration with Edinburgh University Law School 11.

¹⁷⁴ If he turns out to be the biological father after undergoing a paternity test.

surrogate mother. Louw¹⁷⁵ suggests that the only way in which the commissioning parents in the *Ex Parte WH* case could overcome the problem was to adopt the child.¹⁷⁶ For the commissioning parents in the *Ex Parte WH* case, the enabling surrogacy legislation in South Africa could thus not secure their parental status in their countries of origin.¹⁷⁷

The author submits that it is unfortunate that the court in *Ex Parte WH* failed to provide guidelines on how to investigate whether the commissioning couple was domiciled in South Africa. The problem with this is that the court ignored the statutory requirements for a valid surrogacy motherhood agreement in South Africa and accepted the word of the couple that the requirement has been met. The couple in *Ex Parte WH* might have not been domiciled in South Africa. This lays a good foundation for my argument that South Africa should consider the possibility of a foreign national couple entering into a surrogacy motherhood agreement post-confirmation by the Court, or foreign nationals using South Africa's surrogacy services or South Africans going abroad.

2.4.3. *Ex Parte MS and Others* 2014 (3) SA 415 (GP)

In *Ex Parte MS*¹⁷⁸ the court was seized with a retrospective confirmation application of a surrogate motherhood agreement concluded after fertilisation. Section 296(1), read with sections 303 and 305 of the Act, provides that the artificial fertilisation of the surrogate mother may not take place before the agreement is confirmed by the court. A person who renders assistance or artificially fertilises a woman without the court having authorised the artificial fertilisation, commits an offence and, if convicted, is punishable with a fine or imprisonment for a period of ten years or both.¹⁷⁹ The issue before the court was whether it was possible for the court to confirm a surrogate motherhood agreement after fertilisation.¹⁸⁰

¹⁷⁵ Louw A (2013:564).

¹⁷⁶ Louw (2013:587); The necessity of obtaining an adoption order is deemed ironic because this is exactly what the Children's Act sought to avoid by the regulation of surrogacy in Ch 19. Vink and De Groot (2010) 18–19.

¹⁷⁷ Louw (2013:587).

¹⁷⁸ *Ex Parte MS and Others* 2014 (3) SA 415 (GP).

¹⁷⁹ Children's Act 38 of 2005, s305(6).

¹⁸⁰ *Ex Parte MS and Others* 2014 (3) SA 415 (GP) para 4.

Keightley AJ held that the Act did not provide a definite answer to this question.¹⁸¹ Although the Act expressly prohibits artificial fertilisation of the surrogate mother prior to the surrogacy agreement being confirmed by the court, the Act was silent as to how the validity of such an agreement is affected by non-compliance.¹⁸² Thus, in the opinion of the court, it had the discretion to confirm a surrogate motherhood agreement in circumstances where the fertilisation occurred before the confirmation.¹⁸³ It was also held that it would be contrary to section 28(2) of the Constitution¹⁸⁴ (the best interests of the child) if the court did not have the discretion to retrospectively confirm such surrogate motherhood agreement. Therefore the court had to retain the discretion to do so if the court was satisfied that it would be in the best interest of the child to be born.¹⁸⁵

Ex Parte MS is another example of how South African courts tend to ignore the basic statutory requirements. It also proves once again that guidelines are needed for the interpretation of the Act. Furthermore, it also shows that the court may be seized with surrogacy agreements that will not be valid because they do not meet the requirements.

2.4.4 *AB and Another v Minister of Social Development; as Amicus Curiae: Centre for Child Law 2016 (2) 27 (GP)*

The applicants in this matter challenged the constitutional validity of the provisions of section 294 of the Act on the grounds that the genetic link requirement violates the first applicant's rights to equality, dignity, reproductive, health care, autonomy and privacy. The applicants submitted that, although it is accepted that most people prefer to use their own gametes in order to establish a genetic link with a child, there is no justification for the limitation of these rights on this basis.¹⁸⁶ The respondent submitted that the requirement that a genetic link must exist between the commissioning parent and the child is not unconstitutional and that the provision should not be declared invalid.¹⁸⁷

¹⁸¹ *Ex Parte MS and Others* 2014 (3) SA 415 (GP) para 30.

¹⁸² *Ex Parte MS and Others* 2014 (3) SA 415 (GP) para 30.

¹⁸³ *Ex Parte MS and Others* 2014 (3) SA 415 (GP) para 56.

¹⁸⁴ The Constitution of Republic of South Africa, 1996.

¹⁸⁵ *Ex Parte MS and Others* 2014 (3) SA 415 (GP) para 55.

¹⁸⁶ *AB and Another v Minister of Social Development; as Amicus Curiae: Centre for Child Law 2016 (2) 27 (GP)* ("*AB v Minister of Social Development*") para 8.

¹⁸⁷ *AB v Minister of Social Development* para 11.

The genetic link requirement made it impossible for the first applicant to conclude a surrogate motherhood agreement and consequently made it impossible for her to become a parent. The first applicant suffers from a medical condition resulting in her being unable to give birth to a child and she is also unable to donate her own gametes. She is neither married nor is she in a sexual relationship with a person who is able to donate gametes.¹⁸⁸

Basson J argued that the different viewpoints of the parties of what is meant by surrogacy lies at the heart of the dispute.¹⁸⁹ She submitted that the applicants regard the concept of surrogacy to mean the provision of an opportunity to persons who cannot give birth themselves to become parents irrespective of whether the child will be genetically related to the parents or not. The respondent regards the concept of surrogacy to mean an opportunity to persons who cannot give birth themselves to have a genetically related child.¹⁹⁰

The respondent identified nine purported purposes of the genetic link requirement in support of its view that there is a rational nexus between the purpose and the genetic link requirement. They are the following: the best interests of the child; prevention of the commodification and trafficking of children; promotion of the child's rights to know its genetic origin and to information about the process involved in his or her conception; prevention of the creation of so called "designer" children and of shopping around for gametes with the intention of creating children with particular characteristics; prevention of commercial surrogacy; prevention of the potential exploitation of surrogate mothers; prevention of circumvention of adoption law; promotion of adoption and prevention of a negative impact on the adoption process.¹⁹¹

Basson J discussed the reasons advanced by the applicants as to why they are of the view that the genetic link requirements in the context of surrogacy amount to infringement of rights. She submits that the genetic link requirement clearly constituted discrimination on the basis of equality,¹⁹² human dignity,¹⁹³ reproductive autonomy,¹⁹⁴

¹⁸⁸ *AB v Minister of Social Development* para 9.

¹⁸⁹ *AB v Minister of Social Development* para 31.

¹⁹⁰ *AB v Minister of Social Development* para 31.

¹⁹¹ *AB v Minister of Social Development* para 62.

¹⁹² *AB v Minister of Social Development* para 76.

privacy,¹⁹⁵ and access to health care.¹⁹⁶ Judge Basson submitted that the genetic link requirement violates person's human rights on a very personal and intimate level.¹⁹⁷ She further submitted that the respondent failed to prove that there is a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to achieve.¹⁹⁸

Basson J declared section 294 to be inconsistent with the Constitution and therefore invalid. She was also of the view that the declaration of invalidity of the genetic link should not be suspended to provide the legislature time to investigate the matter and attempt to obtain public opinion. The case was set down for confirmation of the declaration of constitutional invalidity in February 2016. At the time of submission of this thesis, judgment from the Constitutional Court was still awaited.¹⁹⁹

Lewis, through her own analysis of section 294 and by applying section 36 of the Constitution,²⁰⁰ submitted that the limitation caused by section 294 is unjustifiable and without a constitutionally acceptable purpose, as this provision denies infertile persons the right to make decisions regarding reproduction.²⁰¹ She further submits that the Children's Act expressly discriminates against infertile persons and such discrimination is unfair.²⁰²

This view is support by Van Niekerk,²⁰³ who is of the opinion that the section limits an infertile person's right to make decisions regarding reproduction in the context of

¹⁹³ *AB v Minister of Social Development* para 89.

¹⁹⁴ *AB v Minister of Social Development* para 92.

¹⁹⁵ *AB v Minister of Social Development* para 95.

¹⁹⁶ *AB v Minister of Social Development* para 99.

¹⁹⁷ *AB v Minister of Social Development* para 102.

¹⁹⁸ *AB v Minister of Social Development* para 87.

¹⁹⁹ This dissertation was submitted on the 09th of November 2016.

²⁰⁰ The Constitution of the Republic of South Africa, 1996 s 36 provides that "the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – a) The nature of the right; b) The importance of the purpose of the limitation; c) The nature and extent of the limitation; d) The relation between the limitation and its purpose; and e) Less restrictive ways to achieve the purpose."

²⁰¹ Lewis (2011: 109).

²⁰² Lewis (2011:109)

²⁰³ Van Niekerk C (2015) "Section 294 of the Children's Act: Do Roots Really Matter? Vol 18 No 2 PER available at <http://dx.doi.org/10.4314/pej.v18i2.11>.

surrogacy where the person is incapable of providing a genetic link.²⁰⁴ She further submits that the limitation of such a person's right is unreasonable and unjustifiable given the nature and extent of the limitation.²⁰⁵ She reasons that the relationship between the limitation and its purpose is tenuous at best, and that there are less restrictive ways to accomplish the purpose behind the limitation.²⁰⁶

Despite the fact that the case law has cleared up some uncertainties regarding the law of surrogacy, many legal problems remain. The courts are yet to be asked to settle a dispute arising from the termination of a surrogate motherhood agreement and other disputes that may arise from a surrogacy agreement. The courts' attempt at providing guidance to parties who wish to make use of surrogacy as a way of procreation in some of the above cases is laudable, more so considering the fact that there are as yet no regulations to Chapter 19 of the Children's Act.²⁰⁷

2.5. What is referred to a 'good cause shown' in section 292(2) of the Children's Act 38 of 2005? How would it be challenged or enforced in South Africa?

Section 292(1)(b) of the Act provides that no surrogate agreement is valid unless 'the agreement is entered into in the Republic' and in accordance with section 292(1)(d): 'the surrogate mother and her husband or partner, if any, are at the time of entering into the agreement domiciled in the Republic...'. However according to section 292 (2), '[a] court may, on good cause shown, dispose with the requirements set out in subsection 1(d)'.

'Good cause' generally means a legally sufficient reason for a court action or ruling. The definition varies according to the circumstances of each case.²⁰⁸ Louw²⁰⁹ provides that with regards to section 292(2) of the Act, commissioning parent(s) may use a relative as a surrogate mother.

²⁰⁴ Van Niekerk (2015:13).

²⁰⁵ Van Niekerk (2015:13).

²⁰⁶ Van Niekerk (2015:13).

²⁰⁷ It is noteworthy that Regulations have been proposed in amendments drafted by a team from the Centre for Child Law. However, the proposed Regulations have not yet been introduced to Parliament.

²⁰⁸ US Legal available at <http://definitions.uslegal.com/g/good-cause/> [accessed on 01 October 2015].

²⁰⁹ Louw A (2007) 'Surrogate Motherhood' in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* 19-1.

The author of this dissertation is of the view that the aforementioned exception is a gateway to confusion and uncertainty regarding international surrogacy in South Africa. Currently, there is neither case law nor are there guidelines explaining the rationale for the exception or the circumstances in which it might apply. The author submits that the exception is also a gateway to the possibility of international surrogacy agreements being entered into South Africa. Therefore, the author places emphasis on how important it is for South African legislature and courts to discuss this possibility and how to protect the best interests of the children born from surrogate agreements that had not been granted pre-authorisation by our courts.

2.6. Conclusion

The purpose of this chapter has been to lay a foundation regarding surrogate motherhood agreements and legislation in South Africa. Additionally, the discussion was intended to lay a foundation for the examination of the framework needed to establish the extent to which South African's legal system recognises or might recognise an international surrogacy agreement.

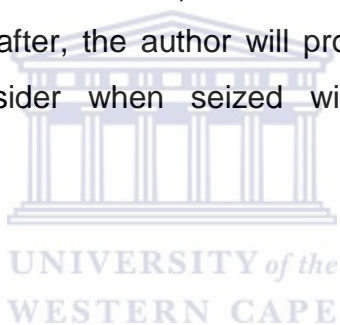
The first part of this chapter dealt with the legislative history of surrogacy prior to 2003. It was noted that due to the highly publicised case of the Ferreira- Jorge triplets of Tzaneen in 1987 and the realisation that surrogacy was being practiced in South Africa, the SALC recognised a need for legislation that would clarify the positions of all parties to a surrogacy agreement, and most importantly, elucidate the legal status of children born of these agreements.

Subsequently, the author provided an overview of Chapter 19 of the Children's Act. The overview served only to contextualise the discussion of the provisions of the Act. The author then discussed the reported surrogacy judgments and came to the conclusion that these cases demonstrate that the Children's Act is unclear regarding what is required of the parties to such agreements. However, despite the fact that the cases have cleared up some uncertainties regarding the law of surrogacy, many legal problems remain. The courts are yet to be seized to settle a dispute arising from many aspects of a surrogate motherhood agreement. The courts attempt to provide guidance to parties who wish to make use of surrogacy as a way of procreation in some of the

above cases is laudable, more so considering the fact that there are no regulations to the Children's Act relevant to surrogacy.

The chapter further explores the 'good cause shown' clause provided for in section 292(2) of the Act. "Good cause shown" was suggested to mean that the commissioning parents could ask a foreign relative to be a surrogate mother. The author submitted that this exception is a gateway to confusion and uncertainty regarding international surrogacy in South Africa.

In the next chapter, the author will explore situations that a South African court might be seized with by making reference to international case law. The next chapter will also examine South African legislation that may be applicable to the children born of commissioning parents who entered into international surrogacy agreements such as the South African Citizenship Act 88 of 1995,²¹⁰ the Birth and Deaths Registration Act²¹¹ and the Domicile Act.²¹² Thereafter, the author will provide recommendations to what approach courts should consider when seized with an international surrogacy agreement.



²¹⁰ South African Citizenship Act 88 of 1995.

²¹¹ Birth and Deaths Registration Act 51 of 1992.

²¹² Domicile Act 3 of 1992.

CHAPTER 3: SOUTH AFRICAN LEGISLATION AND ITS INFLUENCE ON THE COURT'S DISCRETION

3.1 Introduction

The Constitution of the Republic of South Africa provides that 'every child has the right to a name and nationality from birth'.²¹³ The right is not restricted to South African citizens but must be able to be enjoyed by all children in South Africa irrespective of their parents' nationality and legal status in South Africa.²¹⁴

In many instances, there may be uncertainty about who the child's legal parents are or which nationality the child should be accorded. This chapter will examine South African legislation that may be applicable to the children born of commissioning parents (whether the commissioning parents are South Africans or foreign nationals) who entered into international surrogacy agreements. The discussion will consider the South African Citizenship Act 88 of 1995, the Birth and Deaths Registration Act 51 of 1992, and the Domicile Act 3 of 1992. These acts may provide a gateway for the commissioning parents to obtain an order granting them responsibilities and rights in respect of a child born from a surrogate mother. The author will examine how the birth registration of a child is conducted in South Africa with a view to examine what might occur in relation to the birth registration of a child born of international surrogacy. Furthermore, the author will examine the criminal aspect of international surrogacy.

3.2 Legal framework on birth registration, nationality and statelessness in South Africa

The following are the mechanisms in place to promote birth registration, access to citizenship, to protect stateless children and to resolve undetermined citizenship status in South Africa. There are limited legal mechanisms in place for the protection of stateless children or children at risk of statelessness in South Africa. However, the legislation discussed below covers some protection needs of children. The section serves only as a brief overview of the law that may be applicable to children born from a surrogate motherhood agreement.

²¹³ The Constitution of the Republic of South Africa 1996, s 28(1) (a).

²¹⁴ Proudlock P (2014) South Africa's Progress in Realising Children's Rights: A Law Review., Children's Institute, University of Cape Town & Save the Children 10.

3.2.1 South African Constitution

The Bill of Rights, at Chapter 2 of the South African Constitution establishes the rights that constitute fundamental human rights in South Africa. A number of provisions of the Bill of Rights apply to both citizens and non-citizens equally, protecting all individuals' innate humanity regardless of their nationality or status in the country.²¹⁵

The Constitution states in section 28(1) (a): 'Every child has the right to a name and a nationality from birth'²¹⁶. This right exists for citizens and non-citizens alike. It is noteworthy that the Constitution protects the right to nationality from birth – it goes further than even the African Charter on the Rights and Welfare of the Child, which only protects the child's right to acquire a nationality (unless the child is stateless at birth, in which case the ACRWC protects the child's right to acquire the nationality of the birth country).²¹⁷

Section 28(2) of the Constitution²¹⁸ requires that a child's best interests have paramount importance in every matter concerning the child. This was enunciated in *S v M (Centre for Child Law as Amicus Curiae)*,²¹⁹ amongst other cases, where the court held that the paramountcy principle, read with the right to family care, requires that the interests of the children who stand to be affected receive due consideration. In terms of the African Charter on the Rights and Welfare of the Child and art 9 of the Convention on the Rights of the Child, the four principal values of the Convention are – non-discrimination; best interests of the child standard (incorporated in the Children's Act); right to life; survival and development; and respect for the views of the child. Thus, South Africa not only has a constitutional obligation but also an international obligation to provide these children with the right to nationality so they can experience life and develop as human beings in South Africa.

²¹⁵ The Constitution of the Republic of South Africa, 1996 s9.

²¹⁶ The Constitution of the Republic of South Africa 1996, s 28(1) (a).

²¹⁷ Article VI of the 1999 African Charter on the Rights and Welfare of the Child; George J and Elphick R (2014) Promoting Citizenship and Preventing Statelessness in South Africa: A Practitioner's Guide available at http://www.pulp.up.ac.za/pdf/2014_13/2014_13.pdf 20.

²¹⁸ The Constitution of the Republic of South Africa, 1996.

²¹⁹ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

In the case of *Minister of Welfare and Population Development v Fitzpatrick*²²⁰ the court declared s 18(4) (f) of the Child Care Act²²¹ invalid because it prohibited the adoption of a South African child by non-citizens. The court found the law too restrictive because it limited the best interests of the child, which would sometimes be achieved through being adopted by non-South African parents. As Goldstone J pointed out in *Fitzpatrick*,²²² s 28(1) is not exhaustive of children's rights:

'Section 28(2) requires that a child's best interest have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and s 28(2) must be interpreted to extend beyond these provisions. It creates a right that is independent of those specified in s 28(1).'²²³

The author submits that a court, if faced with an international surrogate motherhood agreement (which is seemingly prohibited on the face of the Children's Act), will take into account the child's best interests by weighing the circumstances of the surrogate mother and the commissioning parents before declaring the international surrogate motherhood agreement invalid and enforceable. There may be many situations in which the surrogate mother cannot afford to care for the child. The child would then be placed in alternative care. Yet, there are persons who are willing to take care of all the child's needs and protect the child. The court might find that by denying recognition of legal parentage to the commissioning parents might unjustifiably violate the child's right to parental care and right to a nationality or citizenship.²²⁴

The Constitution protects the right of every child to 'a' nationality, not necessarily to South African nationality.²²⁵ The Constitution also prohibits deprivation of nationality, in section 20 where it states simply: '*No citizen may be deprived of citizenship*' (emphasis

²²⁰ *Minister of Welfare and Population Development v Fitzpatrick and others*, [2000] (3) SA 422 (CC).

²²¹ Child Care Act 74 of 1983.

²²² *Minister of Welfare and Population Development v Fitzpatrick and others*, [2000] (3) SA 422 (CC).

²²³ *Minister of Welfare and Population Development v Fitzpatrick and others*, [2000] (3) 422 (CC) [17].

²²⁴ The court in *Fitzpatrick* found that the South African law was too restrictive because it limited the best interests of the child, which would sometimes be achieved through being adopted by non-South African parents and as important as the subsidiarity principle was, it was less important than the best interests of the child.

²²⁵ The Bill of Rights also protects the fundamental rights that flow from nationality, such as the right to equality (section 9), the right to freedom of movement (section 21), the right to freedom and security of person (section 12), and again, importantly, the right to human dignity (section 10).

added). However, the South African Citizenship Act²²⁶ is more explicit in section 2(2), which provides that any person born on the territory who is stateless is entitled to South African citizenship by birth, provided the birth is registered in accordance with South African law.²²⁷ Section 2(2) will be discussed in further detail below.

3.2.2 South African Citizenship Act 88 of 1995

The South African Citizenship Act 88 of 1995 (“Citizenship Act”), governs the acquisition and loss of South African citizenship. South African citizenship by birth is accessible through this Act to persons born on the territory to a citizen²²⁸ or to permanent residents,²²⁹ persons born abroad to a South African citizen;²³⁰ and people born on the territory without access to any other nationality.²³¹ Citizenship by descent is given to children adopted by South African citizens.²³²

The following citizens must first register their birth ‘in accordance with the Births and Deaths Registration Act’ 51 of 1992 (“BDRA”) in order to access citizenship – namely:

- (1) those born on the territory who are stateless,²³³
- (2) those born on the territory, to parents admitted for permanent residence,²³⁴ who live in the Republic until age 18,²³⁵
- (3) those adopted by a South African citizen,²³⁶ and

²²⁶ South African Citizenship Act 88 of 1995.

²²⁷ The importance of one’s nationality only increases when a person reaches adulthood. An identity document becomes necessary to do just about anything to improve one’s position in life, such as furthering one’s education, getting a job, opening a bank account, applying for financing, buying a car and a house and much more.

²²⁸ South African Citizenship Act 88 of 1995, s 2(1) (b).

²²⁹ South African Citizenship Act 88 of 1995, s 2(3).

²³⁰ South African Citizenship Act 88 of 1995, s 2(1) (b). Note that in 2010 amendments to the Citizenship Act, persons born outside South Africa to citizens are now citizens by birth, whereas under previous law such persons were citizens by descent.

²³¹ South African Citizenship Act 88 of 1995, s 2(2).

²³² South African Citizenship Act 88 of 1995, s 3. It is presumed, that the child did not have South African citizenship status at the time of adoption.

²³³ South African Citizenship Act 88 of 1995, s 2(2).

²³⁴ A permanent residence permit allows a person to live permanently in South Africa, while remaining a citizen of another country. According to the Immigration Amendment Act this permit can be issued on condition that the holder is not prohibited (because of disease, outstanding criminal conviction, previous deportation, association with terrorism or possession of fraudulent permits/passport) and not undesirable (declared incompetent, un-rehabilitated insolvent, fugitive from justice or previous criminal convictions).

²³⁵ South African Citizenship Act 88 of 1995, s 2(3).

²³⁶ South African Citizenship Act 88 of 1995, s 3.

(4) those born on the territory to parents *not* admitted to the Republic for permanent residence who live in the Republic until age 18.²³⁷ This category is discussed under the heading “Recent amendments” below.

A person born in or outside South Africa to a South African parent does not need to register his or her birth in order for citizenship to be granted by operation of law. Previously, birth registration was required for those born outside the country to be a citizen.²³⁸ However, this legal fact does not change the administrative requirements enforced by South African government, which does not in practice recognise citizens born abroad until they have completed the foreign birth registration process in terms of the BDRA. The birth registration provisions will be discussed in the next section.

Section 2(2) of the South African Citizenship Act²³⁹ provides as follows:

Any person born in the Republic and who is not a South Africa citizen by virtue of the provisions of subsection (1)²⁴⁰, shall be a South African citizen by birth, if –

(a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and

(b) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act 51 of 1992.

The author submits that section 2(2) is the only saving grace for stateless children born in South Africa. South Africa is one of few African countries that have this unique provision to prevent statelessness and to protect the right to a nationality. It is furthermore remarkable that South Africa grants this right *from birth* – there are no requirements such as a specific length of residence.²⁴¹ The only administrative requirement is that the birth is registered.

²³⁷ South African Citizenship Act 88 of 1995, s 4(3).

²³⁸ In terms of the Citizenship Act's former section 3(1)(b), prior to the South African Citizenship Amendment Act of 2010 (2010 Citizenship Amendment Act).

²³⁹ South African Citizenship Act 88 of 1995.

²⁴⁰ Section 2(1) of the Citizenship Act provides: any person (a) who immediately prior to the date of commencement of the South African Citizenship Amendment Act, 2010, was a South African citizen by birth; or (b) who is born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen, shall be a South African citizen by birth.

²⁴¹ George J and Elphick R (2014:84).

Unfortunately, children born to parents who are stateless, undocumented or irregular migrants are least likely to be able to register their children's birth due to lack of identification and fear of arrest. The combination of birth registration being required for children²⁴² and birth registration being impossible for parents without the requisite documentation or legal status means that both the registration of children and the safeguard against statelessness are contingent on the status of the parents.²⁴³ This, in return violates the child's fundamental constitutional right to a name²⁴⁴ and nationality from birth. LHR and the Institute for Statelessness provides that aforementioned restriction undermines the protection against statelessness found in Section 2(2) of the Citizenship Act,²⁴⁵ perpetuates the cycle of lack of documentation and legal status (including nationality) and undermines the right to an identity of all children.²⁴⁶

There are no regulations in place to guide and monitor the implementation of Section 2(2) of the Citizenship Act which provides for the acquisition of South African nationality of children born in the territory who would otherwise be stateless.²⁴⁷ In *DGLR and KMRG v The Minister of Home Affairs, The Director General of Home Affairs*,²⁴⁸ The High Court granted an order in which the applicant (who was born stateless in South Africa) was declared a South African citizen by birth and the Department of Home Affairs was ordered to make and implement a regulation to facilitate applications for nationality under Section 2(2) of the Act.²⁴⁹ The Department has to-date failed to implement this

²⁴² ...to benefit from the safeguard against statelessness.

²⁴³ Lawyers for Human Rights (LHR) and the Institute on Statelessness and Inclusion (the Institute) (2015) "Civil Society Submission on the right of every child to acquire a nationality under Article 7 CRC" 73rd Pre-Sessional Working Group (1 – 5 February 2016) available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0ahUKEwiZoqu_OjOAhVG_B8AKHbVMAdQQFgg4MAQ&url=http%3A%2F%2Fbinternet.ohchr.org%2FTreaties%2FCRC%2FShared%2520Documents%2FZAF%2FINT_CRC_NGO_ZAF_22427_E.docx&usg=AFQjCNEBGMxZFHj_PhAyw_rlqeTO0sgmMw 29.

²⁴⁴ The right to a name starts with birth and includes the right to be registered by the state in a birth register immediately after birth. Inclusion in the population register provides access to social grants, education and health and social services and facilitates the child's subsequent participation in the civil and political community by enabling her to apply for an ID and to vote.

²⁴⁵ Section 2(2) of the Citizenship Act refers to people who are born on the territory without access to any other nationality.

²⁴⁶ LHR and Institute (2015:29).

²⁴⁷ LHR and Institute (2015:29).

²⁴⁸ *DGLR and KMRG v The Minister of Home Affairs, The Director General of Home Affairs, The Deputy Director General of Civic Services and R Kruger N.O* (2014) (unreported)

²⁴⁹ *DGLR and KMRG v The Minister of Home Affairs, The Director General of Home Affairs, The Deputy Director General of Civic Services and R Kruger N.O* (2014) (unreported)

order.²⁵⁰ Instead, the Department appealed to the SCA but withdrew the appeal on the day of the hearing on Monday 5 September 2016.²⁵¹

The Citizenship Act was amended by the South African Citizenship Amendment Act 17 of 2010.²⁵² Under the amended Act, the importance placed on birthplace is removed; section 2(1) (b) now provides that: ... any person born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen, shall be a South African citizen by birth.

The recently amended Act provides at section 4(3) that a child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if – (a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and (b) his or her birth has been registered in accordance with the provisions of the BDRA²⁵³. At present, there are no regulations in place to guide and monitor the implementation of Section 4(3).²⁵⁴ Furthermore, the BDRA prevents the registration of the births of children of undocumented or irregular migrants, undermining Section 4(3), particularly in the absence of implementing regulations.²⁵⁵ The present situation can (and does) therefore lead to children being rendered stateless upon attainment of majority, with no access to any nationality.²⁵⁶

3.2.3. Births and Deaths Registration Act 51 of 1992

Birth registration is the key to nationality in South Africa. For all those who qualify for citizenship or permanent residence, it is the critical moment when a person is entered into the National Population Register. In order to obtain an ID in South Africa, one must first apply for a birth certificate and be issued with an ID number. Only at this point can a South African citizen apply for an ID and passport and conduct other civil registry activities, such as registering one's children's births, registering marriages and registering deaths.²⁵⁷

²⁵⁰ LHR and Institute (2015:29).

²⁵¹ Legalbrief 12/9/2016 available at <http://legalbrief.co.za/story/home-affairs-relents-on-stateless-child-2/>

²⁵² The 2010 amendments came into force on 1 January 2013.

²⁵³ Births and Deaths Registration Act 51 of 1992.

²⁵⁴ LHR and Institute (2015:5).

²⁵⁵ LHR and Institute (2015:5).

²⁵⁶ LHR and Institute (2015:5).

²⁵⁷ George J and Elphick R (2014:32).

The Department of Home Affairs (“DHA”) recently took a decision to cease issuance of abridged birth certificates; for all births after 4 March 2013, only unabridged birth certificates will be issued.²⁵⁸ The BDRA²⁵⁹ provides for birth registration of all children born on the territory, whether to South Africans or foreign parents. Children born in South Africa who do not qualify for citizenship are entitled to a birth certificate under the BDRA.²⁶⁰ However, they are issued birth certificates that do not include an ID number and the child is not entered into the National Population Register.²⁶¹

3.2.3.1 Who may register a child’s birth?

Where the child’s parents are married, the birth may be registered by either parent under the surname of the mother or father or under both of their surnames joined together.²⁶² Where the parents are not married, the mother must register the child.²⁶³ She can do so under her own surname and without including the father’s particulars,²⁶⁴ or with the father’s particulars if the father consents and acknowledges he is the father in writing on the birth notice form.²⁶⁵

The child can be registered under the father’s surname if the mother and father are both present at the office of the Department of Home Affairs at the times of application for registration, if the mother consents in writing (on birth notice form), and if the father acknowledges he is the father and consents in writing (on the birth notice form) to the child being registered under his name.²⁶⁶ This law applies to same-sex couples as well, both parties must be present and provide consent to what surname the child will be registered under.

Persons born abroad to South African nationals are entitled to South African citizenship by birth under section 2(1) (b) of the Citizenship Act.²⁶⁷ A child of a South African citizen

²⁵⁸ George J and Elphick R (2014:32).

²⁵⁹ Births and Deaths Registration Act 51 of 1992.

²⁶⁰ Births and Deaths Registration Act 51 of 1992.

²⁶¹ George J and Elphick R (2014:33).

²⁶² Birth and Death Registration Act 51 of 1992, s 9(1) –(2)

²⁶³ Birth and Death Registration Act 51 of 1992, s 10(2)(a) and Regulations on the Registration of Birth and Death 2014, reg 12(1).

²⁶⁴ Birth and Death Registration Act 51 of 1992, s 10(1) (a).

²⁶⁵ Birth and Death Registration Act 51 of 1992, s 10(1) (b) and s 10(2).

²⁶⁶ Birth and Death Registration Act 51 of 1992, s 10(1) (b).

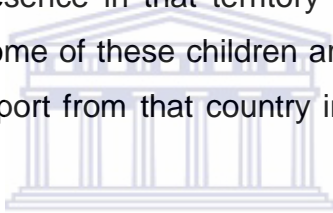
²⁶⁷ South African Citizenship Act 88 of 1995.

may apply for birth registration with the South African authorities within South Africa or in the country of their birth.²⁶⁸

Section 13 of the BDRA states: If a child of a father or a mother who is a South African citizen is born outside the Republic, notice of birth may be given to the head of a South African diplomatic or consular mission, or a regional representative in the Republic.

Regulation 11 states that: A notice of birth given for a child born of South African citizens outside the Republic as contemplated in section 13 of the Act shall be ... accompanied by ... an unabridged birth certificate or other similar document issued by the relevant authority in the country where the birth occurred.

However, some children who are born abroad are turned away from local Department of Home Affairs' offices on the advice that they may only register their birth at the South African consulate in their country of birth.²⁶⁹ This becomes problematic in instances where there is no consular presence in that territory or where the child is unable to return to the birth country.²⁷⁰ Some of these children are told to return to the country of their birth and apply for a passport from that country in order to register their births in South Africa.²⁷¹



There is no provision which requires this. It is also practice at the local offices to ask the applicant to obtain confirmation of the authenticity of the birth certificate from the country of birth.²⁷²

Given that a birth certificate 'issued by the relevant authority in the country in which the birth occurred' is a prerequisite to birth registration for children born abroad to citizens, access to citizenship for those born abroad is dependent on the functionality and ease of access to the birth registration system in the country of birth.²⁷³

The author submits that the abovementioned section 2(1)(b), section 13 and regulation 11 could be helpful in an international surrogacy case which involves South Africans seeking surrogacy abroad. However, they might come across difficulties if the country in

²⁶⁸ George J and Elphick R (2014:64).

²⁶⁹ George J and Elphick R (2014:64).

²⁷⁰ George J and Elphick R (2014:64).

²⁷¹ George J and Elphick R (2014:64).

²⁷² George J and Elphick R (2014:64). This is not required by the BDRA or regulations and is the responsibility of the office of application.

²⁷³ George J and Elphick R (2014:64).

which the child was born in recognises the surrogate mother as the legal mother (whether full or partial surrogacy). The surrogate mother's name as the child's legal parent will be on the birth certificate and not the commissioning mother. The commissioning parents will not be recognised as the child's legal parents. This has implications for the child's ability to become a citizen of a particular country and the child's ability to obtain documentation to enable him or her to gain entry to the commissioning parents' country of origin.²⁷⁴ As a result, the commissioning parents would have to go through an adoption procedure. In this event, international adoption requirements must be met.

The fact that citizenship is the basis for all other fundamental rights means that the BDRA should be read with flexibility to allow citizens born abroad to access citizenship even if they are unable to obtain a foreign birth certificate.²⁷⁵ This flexibility or discretion has been eliminated entirely by the 2010 amendments to the BDRA and regulations, in terms of which certain prescribed requirements²⁷⁶ must be met failing which the application will be rejected.²⁷⁷

In the end, legal parentage determines who may register a child's birth and citizenship of a child. Consequently, if South Africans obtain a child via surrogacy in a foreign country, they are bound to encounter instances where, if the foreign country were to confer legal parentage on one or both of the commissioning parents, their parentage might not be recognised in South Africa.²⁷⁸ and therefore the commissioning parents will be unable to register to child's birth and apply for the child's citizenship. The commissioning parents will have to seek alternative solutions such an international adoption.²⁷⁹

²⁷⁴ Henaghan M (2013) "International Surrogacy Trends: How Family Law is Coping" *Australian Journal of Adoption* Vol 7 No 3 4; Heaton (2015:27).

²⁷⁵ George J and Elphick R (2014:65).

²⁷⁶ In order to register a birth within 30 days, the applicants must complete form DHA- 24 at a DHA office. According to the regulations the following supporting documents are required: proof of birth, attested to by a medical practitioner who attended to the birth or examined the mother or the child after the birth. If the birth did not occur at a health institution, then an affidavit must be submitted by a South African citizen, who witnessed the birth of the child; biometrics of the child (palm, foot or fingerprint) and fingerprints of the parents certified copy of the identity document of the mother or father or both parent and certified copy of a valid passport and visa or permit if one parent is non- SA citizen.

²⁷⁷ George J and Elphick R (2014:65).

²⁷⁸ Heaton (2015:40).

²⁷⁹ International adoption entails that adoption of a child whose nationality differs from that of the adoptive parents, irrespective of the country of residence of the various parties.

3.3 Applying for a Passport

If the commissioning parents want to remove the child from South Africa to their country of origin to obtain an adoption there, they will probably encounter their first hurdle when they attempt to obtain a passport for the child from the South African authorities.²⁸⁰ The application for the passport must be accompanied by the child's birth certificate²⁸¹ and the personal particulars of the parents or legal guardian of the child who applied for the passport must be verified from the South African population register.²⁸² In the event that a child born of invalid surrogacy has no legal relationship with the commissioning parents, their names would not appear on the birth certificate. The certificate would identify the surrogate mother as the child's mother. If the surrogate mother is a party to a marriage or civil union, her husband or civil union partner would be registered as the child's father.²⁸³ The information set out on the birth certificate would alert the authorities to the fact that persons who are not the legal parents or guardians of the child are applying for a passport for a child. This would, in all probability, result in an investigation into the circumstances surrounding the child's birth, which would alert the authorities to the invalid surrogacy.

3.4 Domicile in South Africa

Domicile is the place where a person is legally deemed to be constantly present for the purpose of exercising her or his rights and fulfilling his or her obligations, even in the event of her or his factual absence.²⁸⁴

Although one of the elements of domicile is that normally it is also the permanent residence of the person concerned, residence in the ordinary sense of the word as the place where one eats and sleeps is not necessarily the same as domicile in the legal

²⁸⁰ Every South African citizen is entitled to a South African passport: s 21(4) of the Constitution; s 3 of the South African Passports and Travel Documents Act 4 of 1994. Therefore, the applicants would approach the South African authorities for a passport for the child if the child is a South African citizen. Because the surrogate motherhood agreement is invalid, the surrogate mother is the child's mother for all purposes, and if she is a South African citizen, the child has South African citizenship by birth. The child also has South African citizenship if he or she was born in South Africa and he or she does not have, or is not entitled to, citizenship or nationality of any other country, and his or her birth has been registered in South Africa in accordance with the Births and Deaths Registration Act:

²⁸¹ Reg 3(2)(b)(ii) of the South African Passports and Travel Documents Regulations issued under the South African Passports and Travel Documents Act.

²⁸² Regs 3(2)(b)(ii) and 3(3)(e) of the South African Passports and Travel Documents Regulations issued under the South African Passports and Travel Documents Act.

²⁸³ S 9(2) read with s 1(1) of the Births and Deaths Registration Act; s 13 of the Civil Union Act.

²⁸⁴ Heaton J (2012) *The South African Law of Persons* 39.

sense.²⁸⁵ To acquire a domicile in the legal sense the person must have the intention of settling at the particular place for an indefinite period.²⁸⁶

A person's *lex domicilii* plays a significant role in many fields of private law. A person's private law status is determined by the law of the place where he or she is domiciled.²⁸⁷

3.4.1 General principles governing domicile

Every person must have a domicile at all times.²⁸⁸ In other words, no one can ever be without a domicile. A change of domicile is never merely accepted. It must always be proved. Whether a person has acquired or lost a domicile is determined on a balance of probabilities.²⁸⁹ The author will now discuss the different types of domicile.

3.4.2 Domicile of origin

A person's domicile of origin is the domicile the law confers on the person at birth.²⁹⁰ The Domicile Act provides that no one loses his or her domicile until he or she has acquired another domicile, whether by choice or operation of law.²⁹¹ The Act further specifically provides that a person's domicile of origin does not revive,²⁹² although a person can have a domicile where his or her domicile of origin was if he or she acquires a domicile of choice there²⁹³ or if he or she does not have the capacity to acquire a domicile of choice and the law assigns a domicile to him or her²⁹⁴ at the place where his or her domicile of origin was because he or she is most closely connected with that place.²⁹⁵

²⁸⁵ Heaton J (2012:39).

²⁸⁶ Heaton J (2012:39).

²⁸⁷ Heaton J (2012:40).

²⁸⁸ Boezaart *Persons* 32; Clark in Van Heerden et al Boberg's Law of Persons and the Family 104; Eiselen in Robinson Law of Children and Young Persons 205; Van der Vyver and Joubert 84; Heaton J (2012:41).

²⁸⁹ Heaton J (2012:41).

²⁹⁰ Heaton J (2012:42).

²⁹¹ Domicile Act 3 of 1992, s3 (1).

²⁹² Domicile Act 3 of 1992, s3 (2).

²⁹³ Domicile Act 3 of 1992, s 1.

²⁹⁴ Domicile Act 3 of 1992, s2.

²⁹⁵ Heaton J (2012:42).

3.4.3 Domicile of choice

A domicile of choice is the domicile a person who has capacity to act has chosen for himself or herself by exercise of his or her free will.²⁹⁶

Section 1(1) of the Domicile Act provides that, regardless of sex or marital status, everyone who is of or over the age of 18 years and everyone under the age of 18 years who legally has the status of a major, is competent to acquire a domicile of choice, unless he or she lacks the mental capacity to make a rational choice. Section 1(1) indicates that the first requirement for acquiring a domicile of choice is that the person who wants to acquire such a domicile must be a major or have the status of a major.²⁹⁷

Section 1(2) of the Act sets further requirements for the acquisition of a domicile of choice. It provides that a domicile of choice is acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period.²⁹⁸ The section thus requires, firstly, that the person must actually settle at the particular place where he or she wants to acquire a domicile of choice and, secondly, that his or her presence there must be lawful.

3.4.4 Domicile by operation of law

Section 2(1) of the Domicile Act provides that anyone who does not have the capacity to acquire a domicile of choice is domiciled at the place with which he or she is most closely connected. Minors cannot acquire a domicile of choice. To them the law assigns a domicile by operation of law for as long as their minority continues, and that domicile is the place with which the particular person is mostly closely connected. Section 2(2) contains the rebuttable presumption that if a minor normally has his or her home with one or both of his or her parents, the parental home is the minor's domicile. The Act expressly provides that the term parents include a child's adoptive parents and parents who are not married to each other.

3.5 The Criminal Aspect of International Surrogacy Agreements

As mentioned in Chapter two, section 305 of the Children's Act provides that a person who contravenes the provisions of s 301, 302 and 303, is guilty of an offence and liable

²⁹⁶ Heaton J (2012:42).

²⁹⁷ Heaton J (2012:43).

²⁹⁸ Heaton J (2012:43).

to a fine or imprisonment for a period not exceeding 10 years, or both a fine and imprisonment. In the general law of contract, any act carried out in contravention of a statutory provision will have the effect of being null and void.²⁹⁹

Section 297(2) of the Children's Act deals with the consequences of an invalid surrogacy agreement. It provides that any surrogacy agreement that does not comply with the provision of the Children's Act is invalid and any child born as a result of any action taken in execution of such arrangement is for all purposes deemed to be the child of the woman that gave birth to that child. This section does not however, criminalise invalid surrogacy agreements.

In the case of *Ex Parte: Ms & Others*,³⁰⁰ Acting Judge Keightley submitted that the Children's Act does not provide what the consequences of non-compliance with the provisions will be on the validity of a written agreement subsequently entered into between the parties.³⁰¹ She provides that the Act is also silent on whether the court has the power to validate such an agreement under section 292.³⁰² She further submits that the common law principle that an agreement to commit an unlawful act is not enforceable.³⁰³ However, she provides that the principle is not determinative of the issues that arise from the case.³⁰⁴ Thereafter, by considering the child's best interests and various other fundamental rights enshrined in the Constitution, she found that the Children's Act does not preclude a court³⁰⁵ from confirming a surrogacy agreement subsequent to the artificial fertilisation of a surrogate mother in exceptional circumstances, and when the best interest of the child demand confirmation.³⁰⁶ Therefore, the agreement with the subsequent confirmation by the High Court will be valid and enforceable.

As the law stands, an international surrogacy agreement concluded in South Africa by foreign nationals or South Africans entering into an agreement in another country is

²⁹⁹ This is not a hard and fast rule. The court will consider the subject matter of the prohibition, the purpose of the legislation, the available remedies in the case of breach, the nature of the mischief the provision aimed to avoid, and any inconvenience that may flow from finding that the agreement is invalid. Du Bois F and Others (2007) Wille's principles of South African Law 9ed 761; Lewis (2011:145).

³⁰⁰ *Ex Parte MS and Others* 2014 (3) SA 415 (GP) (*Ex Parte MS*).

³⁰¹ *Ex Parte MS* para 30.

³⁰² *Ex Parte MS* para 30.

³⁰³ *Ex Parte MS* para 31.

³⁰⁴ *Ex Parte MS* para 34.

³⁰⁵ *Ex Parte MS* para 56.

³⁰⁶ *Ex Parte MS* para 57.

entered into in contravention of the Children's Act. Furthermore, any conduct which flows out of such agreement which amounts to a contravention, would result in the agreement being invalid, but not a crime/

This consequence is often not taken into consideration, when the commissioning parents and the surrogate mother conclude the surrogacy agreement. Thus, when the commissioning parents gain a child through surrogacy, they often find that the road home is fraught with difficulties,³⁰⁷ as shown in the international case law discussed below.

As discussed above in paragraph 3.3, the application for the passport must be accompanied by the child's birth certificate and the personal particulars of the parents who applied for the passport must be verified from the South African population register. This cannot be done if South Africa does not recognise the commissioning parents as the child's legal parents. Therefore, the child will not be able to enter South Africa with a South African passport. This may lead to commissioning parents forging birth certificates and fraudulently registering themselves as the legal parents of a child born from an international surrogacy agreement. In addition to the above, commissioning parents have resorted to smuggling a child into countries.³⁰⁸

Later in this thesis, the author will show that South Africans' are relocating and having their legal parentage disputed. Therefore, it can be submitted that if a South African court is faced with an international surrogacy agreement that child is already born. The child is arguably seen as the commissioning parent(s) legal child in the other country. Therefore, if the child is sent back to the other country, the child will be parentless and even stateless. If we apply the current legal position regarding international surrogacy, the child will be parentless and stateless in South Africa as well.

Therefore, the author submits again that it is important for the South Africa authorities to consider the possibility of international surrogacy agreement. There are many factors that that come into play regarding international surrogacy agreement. Factors such as: strict laws and the reasons behind those strict laws; public policy; the best interests of the child; rights of the commissioning parents and surrogate mother rights as well as the

³⁰⁷ Margalit Y (2013) "From Baby M to Baby M(anji): Regulating International Surrogacy Agreements" 57.

³⁰⁸ HCCH Preliminary Document 11 (March 2011) para 6; Margalit (2013: 16). In one such case a Belgian same sex couple was prosecuted for trying to smuggle their child from Ukraine into Poland.

criminal aspect of international surrogacy as a consequence of an international surrogacy agreement.

3.6 Conclusion

Section 28 of the Constitution provides that every child has the right to a name and a nationality from birth and a right to family care or parental care. Section 28 further provides that a child's best interests are of paramount importance in every matter concerning the child. An international surrogate motherhood agreement falls within the scope of 'every matter concerning the child'. Thus, the author submits that the court, if faced with an international surrogate motherhood agreement, must take into account the child's best interests by weighing the circumstances of the surrogate mother and the commissioning parents before declaring the international surrogate motherhood agreement invalid and enforceable. The court might find that by denying recognition of legal parentage to the commissioning parents might unjustifiably violate the child's right to parental care.

Thereafter, the author explored the South African legislation that may be applicable to the children born of commissioning parents (whether the commissioning parents are South Africans or foreign nationals) who entered into international surrogacy agreements. The author enumerated the requirements of birth registration in South Africa to show the birth registration process in South Africa and if the Act might be applicable to international surrogacy agreements.

The author concluded that the South African Citizenship Act 88 of 1995 has provided children born to South African or foreign nationals living in South Africa some sort of protection against statelessness. Section 2(2) of the Citizenship Act provides that any person born on the territory who is stateless is entitled to South African citizenship by birth, provided the birth is registered in accordance with South African law. As the law stands, a child born from an international surrogacy agreement will be the child of the surrogate mother because the agreement would not be confirmed by the High Court and thus the agreement would not be enforceable. The author expostulates against the current position of South African law because of the possibility of the surrogate mother not wanting the child. In a situation where the surrogate mother cannot afford to take care of the child, the commissioning parents (whether South Africans or foreign

nationals) are willing to provide the child with the parental care that the child needs. In both instances denying the recognition of legal parentage of the commissioning parents in respect of the child, unjustifiably violates his or her constitutional rights.

The South African Citizenship Act provides that children born abroad to South African nationals are entitled to South African citizenship by birth. Section 13 of the Births and Deaths Registration Act states that if a child born of a South African father or mother is born outside the Republic of South Africa, notice of the child's birth may be given to the head of a South African consular mission. This notice must be accompanied by an unabridged certificate. Furthermore, section 2(1) (b) of the Citizenship Act provides that persons born outside the Republic of South Africa to a South African parent are citizens by birth. The author submitted that these two sections might be helpful in cases of international surrogacy. However, it depends on whether the country in which the surrogate-born child recognises the surrogate mother or the commissioning mother as the child's legal mother/parent.

Thereafter, the author looked at the criminal aspect of international surrogacy agreements. Section 305 of the Children's Act provides that a person who contravenes the provisions of s 301, 302 and 303, is guilty of an offence and liable to a fine or imprisonment for a period not exceeding 10 years, or both a fine and imprisonment. The author submitted that the court may need to determine whether the international surrogacy agreement is null and void and whether the parties to the agreement are liable to a fine or imprisonment.

The next chapter will examine potential situations that South African courts may be seized with by observing international case law.

CHAPTER 4: CONSEQUENCES OF INTERNATIONAL SURROGACY AGREEMENTS

“...lack of a properly supported and regulated framework for arrangements, of this kind has inevitably, lead to an increase in these cases before the Family Court.”³⁰⁹

4.1 Introduction

Throughout the author’s research, the author found that South African courts did not have precedents, guidelines or legislation governing international surrogacy. One of the main consequences of international surrogacy relates to the possibility of a surrogate born child suffering from not being legally recognized as the legal child of his or her commissioning parents. As a result, the child can be left with no parents and no nationality. The unfortunate result of non-recognition of the parent-child relationship causes a number of serious consequences for the rights and welfare of the child. As discussed in Chapter 3, the Constitution provides that ‘every child has the right to a name and nationality from birth’.³¹⁰

This chapter will examine potential situations that South African courts may be seized with by observing international case law. Lastly, the author will provide recommendations regarding what approach South African courts should take regarding international surrogacy agreements.

4.2 Potential Situations that a South African Court might be seized with

The author will now explore several cases in this field that will demonstrate that the problems of the parentless and stateless child are inherent in international surrogacy agreements. The author therefore compiled several ‘what if’ situations that could surface based on examples drawn from international case law.

4.2.1 Scenario 1

A South African court may be presented with a situation where foreign nationals residing in South Africa have the desire to have a surrogate mother with the same nationality as themselves. However, this potential surrogate mother is not domiciled in South Africa.

³⁰⁹ Justice Russel in *H v S (Surrogacy Agreement)* [2015] EWFC 36 para 2 available on <http://www.bailii.org/ew/cases/EWFC/H CJ/2015/36.html>

³¹⁰ The Constitution of the Republic of South Africa 1996, s 28(1) (a).

The court may be seized with the challenge of determining whether this situation falls within the 'good cause shown' clause and determine whether the agreement would be valid in terms of section 295 of the Children's Act.

In 2014 and in the United Kingdom (hereafter "UK"), a parental order application was made by a married gay couple who became commissioning parents of child conceived through surrogacy in the UK.³¹¹ One father was a South African and the other was British. The surrogate mother was the British father's sister.³¹² The commissioning parents lived in South Africa. The case report confirms that the fathers' application was issued soon after the child's birth in August 2013 in UK. Thereafter, the couple took the child to South Africa and returned to the UK for the final hearing. The case is silent on where the commissioning fathers decided to stay after the final hearing. The case is also silent on whether the fathers are recognized as the child's legal parents in South Africa or how the parents were able to bring the child into South Africa.

The main issue for the UK court to resolve was whether the British father remained domiciled in the UK, even though he had lived in South Africa since 2007.³¹³ In this case, the court held that if a person leaves their domicile of origin to reside in another country with the intention of living there for some indefinite period, he will not necessarily lose his domicile of origin if he intends to return, at some point, to the country that he left. The Court found that the British father had retained his domicile in the UK.

Furthermore, the fathers met all of the other requirements under the UK law³¹⁴ and were therefore granted a British parental order in February 2014.³¹⁵

³¹¹ Wood C (2014) "International surrogacy case update – the importance of domicile over residence in Parental Order applications" available at <https://www.kingsleynapley.co.uk/news-and-events/blogs/family-law-blog/international-surrogacy-case-update-the-importance-of-domicile-over-residence-in-parental-order-applications>.

³¹² Wood (2014:1).

³¹³ Wood (2014:1).

³¹⁴ The Human Fertilisation and Embryology Act, (HFE. Act 1990) applies to all of the United Kingdom and is the Act which regulates parental orders. Other aspects of surrogacy are regulated by the Surrogacy Arrangements Act 1985. Section 30 of the HFE Act 1990, allows the courts to make an order providing for a child to be treated in law as the child of a couple if certain conditions are met as follows: the child is genetically related to at least one of the commissioning couple; the surrogate mother has consented to the making of the parental order (or is incapable of doing so or cannot be found) no earlier than six weeks after the birth of the child; the commissioning couple are married to each other and are both aged 18 years or over; the commissioning couple have made the application within six months of the child's birth; no money other than reasonably incurred expenses has been paid in respect of the surrogacy arrangement unless authorised by the court; the child is living with the commissioning couple; and the commissioning couple are domiciled in the United Kingdom, the Channel Islands or the Isle of Man.

The facts of the abovementioned case may be used as an example of what ‘good cause shown’ as stipulated in section 292(2) of the Children’s Act and discussed in Chapter 2, could possibly mean. Louw,³¹⁶ submitted that ‘good cause shown’ could mean that the commissioning parents may use a relative as a surrogate mother. In this case, the commissioning parents were residing in South Africa. One of the commissioning fathers was domiciled in South Africa, the other domiciled in the UK. They chose to use the British father’s sister as a surrogate mother. As the author mentioned above, the case is silent on why they chose the use the surrogate mother, whose gametes were used and where the commissioning parents decided to reside after the court granted the parental order. As surrogacy laws in South African stands, it is unclear as to whether this surrogacy agreement will be considered as valid and enforceable in South Africa.

4.2.2 Scenario 2

There may be situation where a South African court has confirmed a surrogacy agreement involving foreign nationals or South Africans. Unfortunately when these foreign nationals return back to their place of birth or when South Africans intend to relocate to their partner’s place of birth, the parental order in South Africa may not be recognised in the other country. This could also be an issue for South Africans living abroad who have a child born from a surrogacy agreement in another country. The issue that arises is whether the commissioning parents would be recognised as the legal parents of the child even though the agreement was confirmed in South Africa or the other country. The following international case is an example of a situation where a surrogacy agreement was declared valid in South Africa however, it still required a court application to confer parental status in the UK.

In *Re A (Foreign Surrogacy: South Africa)* [2015] EWHC 1756,³¹⁷ an application for a parental order in relation to a minor child, cited as “A” was brought. One of the commissioning parents is domiciled in the UK. The surrogate mother is domiciled in South Africa.³¹⁸ “A” was born in South Africa following a surrogacy agreement. She was

³¹⁵ Wood (2014:1).

³¹⁶ Louw A (2007:7).

³¹⁷ A (Foreign Surrogacy: South Africa) [2015] EWHC 1756 (Fam) available at <http://www.bailii.org/ew/cases/EWHC/Fam/2015/1756.html>.

³¹⁸ Surrogate mother (cited as “C”) worked for the commissioning parents in South Africa. At the time when the commissioning parents were considering the arrangements to have a second child there were difficulties in the surrogate who had been used for B’s (a previous surrogate born child) conception. As a result, C offered to be the surrogate mother.

conceived following IVF treatment with an embryo created from sperm from the commissioning father and an egg from a third party donor.³¹⁹

This was the second application for a parental order brought by the commissioning parents. They made a previous application in relation to their surrogate born child, “B”.³²⁰ He was born in April 2011, again in South Africa, but with a different surrogate mother.³²¹

The Court considered whether the application met the requirements under the UK law.³²² For this dissertation, it is important to note that the UK Court was addressed on the South African surrogacy procedure by a Mr Duffett and he described in his report the procedures that took place in South Africa.³²³ On 29th October 2013, the Cape Town High Court had confirmed the surrogate motherhood agreement entered into between the parties with a direction that the child born of the surrogate mother, in accordance with the agreement, is for all purposes the child of the commissioning parents from the moment of birth.³²⁴ It was further ordered that both of the commissioning parents have full parental rights and responsibilities of the child, and that the surrogate mother has no rights of parenthood or care and that the child would have no claim for maintenance against her.³²⁵ Further, the order made provision that no adoption procedures would need to be followed as the child would be registered as the child of both commissioning parents.³²⁶ Thereafter, the couple with the child decided to relocate to the UK.

³¹⁹ A [2015] EWHC 1756 (Fam) para 2.

³²⁰ A [2015] EWHC 1756 (Fam) para 3.

³²¹ A [2015] EWHC 1756 (Fam) para 3.

³²² Section 54 of the Human Fertilisation and Embryology Act, 2008 provides as follows; On an application made by two people, the court may make an order providing for a child to be treated in law as the child of the applicants if— (a)the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination, (b)the gametes of at least one of the applicants were used to bring about the creation of the embryo, and (c)the conditions in subsections (2) to (8) are satisfied. (2)The applicants must be—(a)husband and wife, (b)civil partners of each other, or (c)two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other. (3)Except in a case falling within subsection (1), the applicants must apply for the order during the period of 6 months beginning with the day on which the child is born. (4)At the time of the application and the making of the order— (a)the child's home must be with the applicants, and (b)either or both of the applicants must be domiciled in the United Kingdom or in the Channel Islands or the Isle of Man. (5)At the time of the making of the order both the applicants must have attained the age of 18. (6)The court must be satisfied that both— (a)the woman who carried the child, and (b)any other person who is a parent of the child but is not one of the applicants have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.

³²³ A [2015] EWHC 1756 (Fam) para 11.

³²⁴ A [2015] EWHC 1756 (Fam) para 15

³²⁵ A [2015] EWHC 1756 (Fam) para 15.

³²⁶ A [2015] EWHC 1756 (Fam) para 15.

The author submits that the Judge in the UK Court held that the commissioning father retained his domiciled status in the UK. However, the domicile status of the other commissioning father was not considered but it was assumed by the Court that he was domiciled in South Africa. The author further submits that section 292(1)(c) of the Children's Act,³²⁷ which provides that at least one of the commissioning parents must be domiciled in South Africa may have created a loophole for international surrogacy in South Africa. It raises the risk of limping relationships that arises when surrogacy agreement is valid in South Africa where it was concluded but is invalid elsewhere. One of the differences in the aforementioned case and the case discussed under scenario one (1) is the uncertainty of whether subsequent to the granting of the parental order, the commissioning parents reside in the UK or South Africa. Regarding the case discussion below, if the commissioning parents went back to South Africa, there's further uncertainty regarding whether the surrogacy agreement was brought before the High Court for consideration. In addition, it is unclear whether the commissioning fathers are recognised as the surrogate born child's legal parents in South Africa and whether the child fundamental rights are protected in South Africa.

The Family Court of Australian court dealt with the recognition of legal parentage in the case of *Carlton & Bissett and Anor* [2013] FamCa 143.³²⁸ The court had to determine whether the second applicant (Mr Bissett) was a legal parent under the terms of the Family Law Act 1975 of children born pursuant to an international surrogacy agreement. The application was brought by Mr Carlton on behalf of Mr Bissett; the application concerned two children born through an altruistic surrogacy arrangement entered into between Mr Bissett and the surrogate Ms Schmitt (hereafter referred to "the surrogate mother) in 2009 in South Africa.³²⁹ Mr Bissett and the surrogate mother were both domiciled in South Africa. The applicant was domiciled Australia.³³⁰ The children were born in South Africa in October 2010 and have lived with Mr Bissett in South Africa since then.³³¹

³²⁷ Children's Act 38 of 2005.

³²⁸ *Carlton & Bissett* [2013] FamCa 143 available at <http://www.austlii.edu.au/au/cases/cth/FamCA/2013/143.html>

³²⁹ The surrogacy agreement was made an order of court in the High Court on the 27th September 2010. As consequence of the court's ratification of the agreement by s297(1)(a) of the Children's Act, the children are "for all purposes" Mr Bissett's children. South Africa issued birth certificates for each child which record Mr Bissett as their sole parent. *Carlton & Bissett and Anor* [2013] FamCa 143 para 1-2.

³³⁰ The applicant met the respondent during the pregnancy.

³³¹ *Carlton & Bissett and Anor* [2013] FamCa 143 para 4.

After the children were born, Mr Bissett met Mr Carlton and in 2012, Mr Bissett and the children relocated to Australia and lived with the Mr Carlton.³³² Mr Carlton then applied to the Family Court of Australia in Sydney for an order declaring that Mr Bissett was the parent of the child. The significant issue before the court was whether Mr Bissett was a parent.³³³ Judge Ryan found that Mr Bissett was a parent within the meaning of the *Family Law Act 1975*³³⁴ and that it was in the children's best interest to continue to live with the applicant and Mr Bissett.³³⁵

Judge Ryan of the Australian Court noted that, in order to determine legal parentage of children born of surrogacy agreement, the application of the law of the country where the children were born in, must be considered and applied if such law is not considered to be against public policy.³³⁶ The Judge was satisfied that Mr Bissett was recognized by South African law as the children's father. The court further held that, Mr Bissett with Mr Carlton would take on a parental role in the children's lives.

It appears from the above three international cases that South Africans are involved in court applications regarding international surrogacy agreements, in which their legal parentage is being questioned. It appears that ordinary rules of private international law will apply in a situation where commissioning parents who had a child by a valid surrogacy agreement in South Africa, settled in another country. It appears that the commissioning parents will be the legal parents of the child when South African law is applicable law, unless it is against the other country's public policy. However, there is yet to be a dispute of this nature in South African courts. If South African courts decide not to apply ordinary rules of private international law, the court should consider the best interests of the child principle. This principle was considered in the international cases discussed below.

³³² *Carlton & Bissett and Anor* [2013] FamCa 143 para 6.

³³³ *Carlton & Bissett and Anor* [2013] FamCa 143 para 12.

³³⁴ *Family Law Act 1975* available at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/

³³⁵ *Carlton & Bissett and Anor* [2013] FamCa 143 para 11.

³³⁶ *Carlton & Bissett and Anor* [2013] FamCa 143 para 17.

In *Re: X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam),³³⁷ A British couple entered into an international surrogacy agreement with a Ukrainian surrogate mother who gave birth to twins.³³⁸ The British court was concerned that the child was at risk of being “marooned stateless and parentless whilst the applicants could neither remain in the Ukraine nor bring the children to the home.”³³⁹ Ultimately, the court relied on the best interests of the child standard to recognize the child as a legitimate child of the commissioning parents, and therefore a citizen of the United Kingdom.³⁴⁰

The *Mennesson v France*³⁴¹ and *Labassee v France*³⁴² cases both concerned children born to surrogate mothers in the United States of America, for French commissioning parents. The matters stemmed from France’s refusal to register the children’s birth despite American court orders recognising the commissioning parents as the children’s legal parents.³⁴³ This rendered the children’s legal status highly uncertain. The refusal to register their births in France triggered day-to-day difficulties for the children, ranging from a lack of nationality, to their ability to access social security and education.³⁴⁴

The *Mennesson*³⁴⁵ and *Labassee*³⁴⁶ couples applied on behalf of their children to the European Court, alleging violations of their rights to respect for family and private life.³⁴⁷ While acknowledging that the lack of French citizenship posed challenges for the family, the court did not find these challenges insurmountable: the family was still able to live together as a unit, and enjoy family life.³⁴⁸ Additionally, the court stressed that a “wide margin of appreciation” had to be left to the countries in creating surrogacy laws, in view

³³⁷ *Re: X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam) available at <http://www.nataliegambleassociates.co.uk/uploads/Leading%20Cases/Re%20X%20and%20Y%202008.pdf>.

³³⁸ *Re: X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam) para 4.

³³⁹ *Re: X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam) para 10.

³⁴⁰ *Re: X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam) para 23.

³⁴¹ *Mennesson v France* (Application No 65132/11).

³⁴² *Labassee v France* (Application No 65941/11).

³⁴³ *Mennesson v France* (Application No 65132/11) para 24; Achmad C (2014) “European Court of Human Rights: France violated child rights in International Surrogacy cases” available at <http://leidenlawblog.nl/articles/european-court-of-human-rights-france-violated-child-rights-in-international>

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³⁴⁴ Achmad C (2014:1).

³⁴⁵ *Mennesson v France* (Application No 65132/11).

³⁴⁶ *Labassee v France* (Application No 65941/11).

³⁴⁷ *Mennesson v France* (Application No 65132/11) para 43.

³⁴⁸ *Mennesson v France* (Application No 65132/11) para 95; Bala N (2014) “The Hidden Costs of the European Court of Human Rights’ Surrogacy Decision” *The Yale Journal of International Law Online* Fall 2014 available at <https://prezi.com/imp7znxvhlx4/the-hidden-costs-of-the-european-court/> 13.

of the difficult ethical issues involved and the lack of consensus on these matters in Europe.³⁴⁹

However, with respect to the children's right to respect for private life, the court found that "respect for private life requires that everyone should be able to work out the details of their identity as a human being, which includes the legal parent-child relationship", and that an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned."³⁵⁰

The European Court recognised that it is conceivable that "France may wish to deter its nationals from going abroad to take advantage of methods of assisted reproduction that are prohibited on its own territory."³⁵¹ However, the European Court ultimately granted greater weight to the interests of the child.³⁵²

In *Paradiso and Campanelli v Italy*³⁵³, the commissioning parents were Italian nationals who entered into a surrogacy agreement with a woman in Russia through a Russian surrogacy agency.³⁵⁴ The child was conceived through an IVF procedure. The commissioning parents travelled back to Italy with the intention of registering the child's birth there.³⁵⁵ The Italian authorities refused the registration and initiated criminal proceedings against the commissioning parents for fraud.³⁵⁶ Pursuant to this, the Italian authorities placed the child in a children's home for adoption.³⁵⁷

The European Court considered in particular that the public policy considerations underlying the Italian authority's finding that the commissioning parents had attempted to circumvent laws in Italy could not take precedence over the best interests of the child. This was regardless of the absence of any biological relationship and the short period during which the commissioning parents had cared for him.³⁵⁸ Reiterating that the

³⁴⁹ *Menesson v France* (Application No 65132/11) para 73; Bala (2014:13).

³⁵⁰ *Menesson v France* (Application No 65132/11) para 96; Bala (2014:13).

³⁵¹ *Menesson v France* (Application No 65132/11) para 99; Bala (2014:13). The European Court tolerated the refusal of the principle of surrogacy but restricts its significance by appearing to distinguish it according to the existence or not of a biological link between the child and one or both commissioning adults.

³⁵² *Menesson v France* (Application No 65132/11) para 99- 100; Bala (2014:13).

³⁵³ *Paradiso and Campanelli v Italy* (Application No. 25358/12).

³⁵⁴ *Paradiso and Campanelli v Italy* (Application No. 25358/12) para 6.

³⁵⁵ *Paradiso and Campanelli v Italy* (Application No. 25358/12) para 10-11.

³⁵⁶ *Paradiso and Campanelli v Italy* (Application No. 25358/12) para 12.

³⁵⁷ *Paradiso and Campanelli v Italy* (Application No. 25358/12) para 13.

³⁵⁸ The European Court found that there had been family and private life between the commissioning parents and the child and that the domestic courts did not provide relevant and sufficient reasons for

removal of a child from the family setting was an extreme measure that could be justified only in the event of immediate danger to that child, the European Court concluded that, in the present case, the conditions justifying a removal had not been met.³⁵⁹

All things considered, it appears that some courts will apply the ordinary rules of private international law or the courts will take a child-centred approach. With regards to rules of private international law, the courts will determine whether legal parentage exists between the commissioning parents and the child by applying the laws of the country where the child was born. A child-centred approach will consider child-based rights such as the right to a nationality and right to a family by taking measures to ensure that the surrogate born child does not run the risk of becoming stateless and parentless.

4.2.3 Scenario 3

A single parent, whether South African or a foreign national enters into an international surrogacy in South Africa or in another country. A single parent is prohibited from entering into a domestic surrogacy agreement in South Africa, if he or she would not be genetically linked to the child. This was one of the issues challenged in the *AB v Minister of Social Development* case,³⁶⁰ discussed in chapter 2 above. One of the arguments addressed to the court was that the requirement of the genetic link discriminates against single parents because the implication of section 294 of the Children's Act is that in instances where a single commissioning parent or both commissioning parents are infertile they are excluded from pursuing surrogacy as an option. The author will now restate what was previously mentioned in Chapter 2 for the purposes of this scenario.

In the case of *AB v Minister of Social Development*, the applicants challenged the constitutional validity of the provisions of section 294 of the Children's Act on the grounds that the genetic link requirement violates various fundamental rights. The genetic link requirement made it impossible for the first applicant to conclude a surrogate agreement and consequently made it impossible for her to become a parent. It was argued by the applicants that the concept of surrogacy means to create an

interfering with the family life. The European Court criticised the Italian authority's decision to separate the child from the commissioning parents. *Paradiso and Campanelli v Italy* (Application No. 25358/12) para 79- 85.

³⁵⁹ *Paradiso and Campanelli v Italy* (Application No. 25358/12) para 86- 87.

³⁶⁰ *AB and Another v Minister of Social Development As Amicus Curiae: Centre for Child Law* 2016 (2) 27 (GP).

opportunity to persons who cannot give birth themselves to become parents irrespective of whether the child will be genetically related to the parent or not.

The case centred on the best interests of the child. The Surrogacy Advisory Group as *amicus curiae*, relied on the expert opinions of leading international and local psychologists. These experts all stated that a parent–child genetic link is not essential for a child’s well-being. Judge Basson accepted this expert evidence and concluded as follows:

‘A family cannot be defined with reference to the question whether a genetic link between the parent and the child exists. More importantly, our society does not regard a family consisting of an adopted child or adopted children as less valuable or less equal than a family where children are the natural or genetically linked children of the parents. A family can therefore not be defined by genetic lineage. The legislature should therefore, in my view, take due cognisance of the advances made in fertility and reproductive technology and with that comes the obligation to redefine the traditional view of the family.’³⁶¹

The following case is not an exact example of the aforementioned example, but it reflects the unfortunate result of non-recognition of the parent-child relationship even in cases where a genetic link exists between the commissioning parent and the child. In the case of *Baby Manji*,³⁶² a Japanese couple used a gestational surrogate mother with a donor egg in India, but divorced before the baby was born.³⁶³ The commissioning mother did not want the surrogate born child but the commissioning father did.³⁶⁴ However, at the time, Japanese law did not recognize surrogacy and Indian law would not allow a single man to adopt a baby.³⁶⁵ In order to be recognized as the legal parent, the father had to conduct an uphill legal battle both in Japan, which did not recognize the legality and enforceability of the surrogacy agreement, and in India, due to India’s strict prohibition on a single intending father adopting a female baby, especially when the parent is not Hindu.³⁶⁶ As a result, the baby was stuck in India for almost six months

³⁶¹ *AB v Minister of Social Development* para 46.

³⁶² *Baby Manji Yamada vs Union of India & Anr* on 29 September, 2008 available at <https://indiankanoon.org/doc/854968/>.

³⁶³ *Baby Manji Yamada vs Union of India & Anr*, 2008 para 2.

³⁶⁴ *Baby Manji Yamada vs Union of India & Anr*, 2008 para 2.

³⁶⁵ *Baby Manji Yamada vs Union of India & Anr*, 2008 para 3.

³⁶⁶ *Baby Manji Yamada vs Union of India & Anr*, 2008 para 3.

waiting for her Japanese passport following her recognition as the legal daughter of the Japanese father.

The author submits that non-recognition of a parent-child relationship leads to various disadvantages for children. They might not be registered because they legally do not have parents (in the event that the surrogate mother does not want the child). While we cannot deny the importance of our genes, it is dangerous and often inaccurate to view a person's genetic link as the supreme determinant of parenthood.³⁶⁷ Elevating the gene over any other contributing factor ignores the roles our environment and relationships play in shaping our being. Society may recognize and value the genetic link between a parent and child without making it the decisive factor in determining parenthood.³⁶⁸ The genetic bond between a parent and child is given special legal treatment not simply because of the genetic link, but because of the unique responsibilities associated with the bond.

In conclusion and in light of the above analysis, a strong trend emerges - that of a contradiction between the written law and actual practices. Countries have failed to address the fact that these arrangements happen internationally and inconsistent regulations and cases are the result.³⁶⁹ At the center of these disputes is the need to protect the rights of the child. It has been shown that no matter the domestic regime in place regarding surrogacy, whether permitted or not, states are continually faced with these types of agreements.

The author submits that given the continuing growth of international surrogacy and the wide range of human rights challenges it presents, it is important for South African authorities and courts to consider the possibility of international surrogacy occurring in South Africa or being pursued by South Africans abroad. Hopefully, the South African courts take a child-centered approach, building on the views established in the above discussed international case law and it is proposed that they do not adopt a strict interpretation of our current laws. As it was stated in *S v M*³⁷⁰ a 'truly child-centred approach requires an in depth consideration of the needs and rights of the particular

³⁶⁷ Hisano E (2011) "Gestational Surrogacy Maternity Disputes: Refocusing on the Child" *Lewis and Clark Review* Vol15.2 530.

³⁶⁸ Hisano (2011:530).

³⁶⁹ Keating R (2014) "Left in Limbo: The Need To Regulate International Surrogacy Agreements" available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/trinclr17&div=7&id=&page=76>.

³⁷⁰ *S v M* (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC)

child in the 'precise real-life situation he or she is in.'³⁷¹ The 'precise real-life situation' of a child born of a surrogacy agreement is that he/she is brought into the world as a result of a real desire of their commissioning parents to have him/her.³⁷²

The author suggests that the South African Parliament either re-drafts or provides clearer guidelines regarding surrogacy and the possibility of international surrogacy agreements.

4.3 The Possible Way Forward

With the above discussion in mind, the author will now provide recommendations to the South African courts by making reference to the current law in place.

4.3.1. Inclusion of adequate provisions and inspection by authorities

Section 295(1)(d) of the Children's Act³⁷³ provides that a court may not confirm a surrogate agreement unless (amongst other requirements) 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. The aim of the provision is to ensure that the parties consider the care of the child. Although para (d) obliges the parties to reach consensus on the care of the child, the word 'including' would seem to mean that the examples provided for in the provision should not be considered a *numerus clausus*.³⁷⁴

Section 295(1)(e) of the Act provides that, '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.' The aforementioned section is evidently an all-encompassing provision obliging the court to consider whether, in the light of all circumstances of the parties concerned, the confirmation of the agreement would probably be in the best interests of the child.³⁷⁵ It

³⁷¹ Boezaart T (2010) "Child Law in South Africa 283; Lewis (2011:123).

³⁷² Lewis (2011:123).

³⁷³ Children's Act 38 of 2005. The provision refers to surrogacy agreement concluded by commissioning parents and a surrogate mother both domiciled in South Africa.

³⁷⁴ Louw A (2007) 'Surrogate motherhood' in Davel CJ and Skelton A *Commentary on the Children's Act* 19-19.

³⁷⁵ Louw A (2007:19-19).

reiterates and confirms the paramountcy of the child's best interest as entrenched in section 28(2) of the Constitution.³⁷⁶

The author submits that if the aforementioned provisions can be applied to international surrogacy agreements, it may be a start to a regulated international surrogacy framework in South Africa. Furthermore, it would be possible to dictate, upon birth, the child's nationality and the required visa to be transferred to the commissioning parent(s). In *Carlton & Bissett and Anor* [2013] FamCa 143 (discussed above), the commissioning parents, gave oral evidence regarding the strength of their relationship and the high quality of care afforded to the children.³⁷⁷ The effect of their evidence was that the applicants, Mr Bissett and Mr Carlton were committed to each other as partners and to the children as parent and in loco parentis (respectively). They had set up a 'child focused family' in which the children's interests and needs had a priority.³⁷⁸ The substance of their evidence was that whatever they needed to do in order to provide for the children would be done.³⁷⁹

The author submits that the courts should always consider the best interests of the child born from an international surrogacy agreement. The courts may exercise their discretion by hearing evidence regarding the strength of the commissioning parent's relationship to each other and to the child(ren) and how they plan on raising the child(ren). By doing this, a court may decide whether it is in the best interests of the child to live with the commissioning parent(s) before declaring the agreement invalid.

4.3.2. Suitability of commissioning parents

Before ordering the international surrogacy agreement null and void, the courts should first look at the suitability of the commissioning parents. In practice, such suitability is determined by a screening process conducted by psychologists and social workers, usually at the expense of the commissioning parents.³⁸⁰ Section 295(1)(b) of the Act³⁸¹

³⁷⁶ Louw (2007:19-19).

³⁷⁷ *Carlton & Bissett and Anor* [2013] FamCa 143 para 8

³⁷⁸ *Carlton & Bissett and Anor* [2013] FamCa 143 para 8

³⁷⁹ *Carlton & Bissett and Anor* [2013] FamCa 143 para 9.

³⁸⁰ Lewis (2011:26).

³⁸¹ Children's Act 38 of 2005.

stipulates that the commissioning parents must be competent to enter into the agreement; they must be suitable persons to accept the responsibility of parenting of the child born of the agreement. Additionally, the commissioning parents must be able to understand and accept the rights, obligations and legal consequences which flow from the surrogacy agreement.

The author agrees with the above mentioned requirements by the Children's Act and further submits that same criteria could be used by South African courts considering in international surrogacy agreements before finding a contract null and void. The author further submits that the court should consider the reasons the commissioning parent(s) has for concluding an international surrogacy agreement and should require statements or oral evidence from the commissioning parent(s) setting out: evidence in relation to the strength of their relationship; ways in which the children's interests and needs have priority and their involvement in the children's day to day care.³⁸² In *Carlton & Bissett and Anor* [2013] FamCa 143, the Judge held that 'those who screened and assessed Mr Bissett in South Africa as suitable for this surrogacy agreement would be pleased to learn how well the children fare. The psychological assessment undertaken as part of that process is in evidence which provides ample evidence for confidence in Mr Bissett's parental capacity.'³⁸³

4.3.3 Best interests of the child

The author has discussed the best interests of the child principle and has illustrated the importance of such principle in the paragraphs above. The involvement of a child is a strong justification for regulating this area.

These recommendations will lessen the burden on courts and commissioning parents/surrogate mothers, especially because we do not have case law or regulations governing international surrogacy agreements. Statutory regulations that contemplates

³⁸² In the case of *Carlton & Bissett and Anor* [2013] FamCa 143 para 8, the court heard oral evidence setting out the seriousness of the commissioning parents relationship and how they planned to raise the children.

³⁸³ *Carlton & Bissett and Anor* [2013] FamCa 143 para 10.

the possibility of international surrogacy agreements and parental and responsibility rights of commissioning parents could help courts if faced with such agreements.³⁸⁴

In light of the above discussion, the argument for a system of regulation for international surrogacy agreements in South Africa gains relevance. As such, the combination of the inadequacy of current instruments to deal with international surrogacy, coupled with the difficulties which have been observed by examining reported South African case law, and the involvement of an innocent party (the child) without any choice at all in the matter necessitates the consideration of the possibility of international surrogacy and statutory regulations in the event that it occurs.

4.4 Conclusion

This chapter reflected the potential consequences of international surrogacy in South Africa. The author looked at the legal position of South Africans entering into an international surrogacy agreement and of foreigners entering into an international surrogacy agreement in South Africa. The author explored considerations that the court may consider when seized with an international surrogacy agreement case.

In support of the submission that the South African courts should take a child rights based approach to international surrogacy agreements in South Africa, the author made brief reference to the international case law judgments on international surrogacy and proved that even if a country prohibits surrogacy or international surrogacy, there may still be a possibility of such an agreement occurring and, therefore, safeguards should be implemented to protect children born from surrogate agreements.

Lastly, having regard to the all the submissions made in this chapter and the submissions made in chapter two, the author provide recommendations for the appropriate manner in which to legislate international surrogacy agreements in South Africa. The author suggests that administrative and judicial authorities could inspect the agreement and ensure that the terms do not harm the child and that the child is recognised as the legal child of the commissioning parents. Before ordering the international surrogacy agreement invalid and unenforceable, the courts should first look

³⁸⁴ Cartine M (2014) "Surrogacy and Silence: Why State Legislatures Should Attempt to Regulate Surrogacy Contracts" available at http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1417&context=student_scholarship 14.

at the suitability of the commissioning parents, how they intend to raise the child(ren) and finally consider the best interest of the child as paramount importance.

It is suggested that statutory regulations that contemplate international surrogacy should be formulated, as a source of reference, which will assist a court when faced with determining the issue of parentage of a surrogate born child, and consequently, his or her nationality. The author suggests that the South African Parliament either re-drafts or provides clearer guidelines regarding surrogacy and the possibility of international surrogacy agreements.



CHAPTER 5: CONCLUSIONS

This research sought to investigate the extent to which South Africa recognises international surrogacy agreements. The objectives as provided for in Chapter 1 were to examine South Africa's approach to confirming surrogacy agreements with an international dimension, whether entered into in South Africa and/or abroad.

In Chapter two, the author examined the Chapter 19 of the Children's Act for the purpose laying a foundation regarding surrogate motherhood agreements in South Africa. A brief discussion regarding the relevant terminology was presented, and thereafter the historical background of surrogacy in South Africa was examined. It was shown that, prior to the promulgation of the Children's Act, no legislation expressly provided for surrogacy agreements in South Africa. Although it was said that surrogacy was regulated indirectly by the Human Tissue Act, the Child Care Act and the Children's Status Act, the aforementioned laws were not ideal because it excluded unmarried women from acting as surrogates.

The absence of specific legislation governing surrogacy led to the Report of the *Ad Hoc* Committee on the Report of the South Africa Law Commission on Surrogate Motherhood in 1999. The underlying thread running throughout the *Ad Hoc* Committee's recommendations were that surrogacy should not be banned but must be recognised and regulated through legislation. Furthermore, it was submitted that in all situations of surrogacy, the best interests of the child must be of principle consideration.

Thereafter, the author provided an overview Chapter 19 of the Children's Act. Section 292(1)(b)-(e) of the Children's Act sets out the requirements for a validity of a surrogate agreement. The validity of the agreement is governed by South African law if it was concluded in South Africa, and at least one of the commissioning parents and the surrogate mother and her husband or partner must be domiciled in South Africa at the time of entering into the agreement.

The meaning and interpretation of domicile as a connecting factor is governed by the Domicile Act and discussed in Chapter 3. The requirement relating to surrogacy agreements concerning domicile may be disposed of on good cause shown. 'Good cause shown' as it relates to Chapter 19 of the Children's Act has yet to be defined and

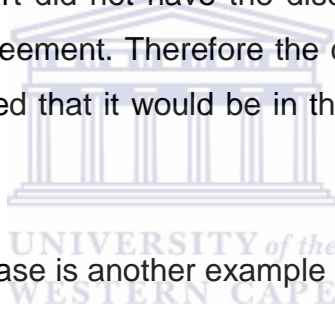
interpreted. The author submitted that 'good cause shown' is a gateway to confusion and uncertainty regarding international surrogacy in South Africa. For this reason, the author places emphasis on how important it is for South African legal authorities to discuss the possibility of how to protect the best interests of the child born from surrogacy agreements with an international dimension such as where one or both parties do not appear to be domiciled in South Africa.

Subsequently, the author discussed reported judgments decided by South African courts. The *Ex Parte Applications for the Confirmation of three Surrogate Motherhood Agreements* 2011 6 SA 22 (GSJ) judgment provided practical guidance. This includes that surrogate motherhood agreements are generally not regarded as urgent matters. The court's confirmation of the agreement is not a mere rubber stamp and will not be granted as a matter of course. The court, as upper guardian of all minor children, has a constitutional and international law duty to ensure that the interests of the children are paramount and the court takes this duty seriously. The success of an application will depend on the evidence provided to the court of the facts on which the application is based, to enable the court to make the statutorily required conclusions. Any and all expert reports must be in depth, reliable and provide a detailed factual exposition to support any recommendations made by the expert. These facts and evidence must relate to the general and specific appropriateness of the relevant parties, their financial resources, emotional stability and the irreversibility of the sterility of the commissioning parents.

In Ex Parte WH 2011 6 SA 514 (GNP), a confirmation application was brought by a male same-sex couple allegedly domiciled in South Africa. The couple were of Dutch and Danish nationality respectively. In this case, court simply accepted the couple's allegation that they were domiciled in South Africa. The author submitted that it is unfortunate that the court failed to provide guidelines on how to investigate whether the commissioning couple was indeed domiciled in South Africa. The problem with this is that the court ignored the statutory requirements for a valid surrogacy motherhood agreement in South Africa. The author submitted that the circumstances of this case lays a good foundation for her argument that South Africa should consider the possibility of a foreign national couple entering into a surrogacy motherhood agreement and

seeking confirmation by the court, or of foreign nationals using South Africa's surrogacy services, as well as South Africans going abroad to seek surrogacy services.

In *Ex Parte MS and Others* 2014 (3) SA 415 (GP), the court was seized with a retrospective application for confirmation of a surrogate motherhood agreement concluded after fertilisation had already taken place. The issue before the court was whether it was possible for the court to confirm a surrogate motherhood agreement after fertilisation. Keightley AJ held that the Children's Act did not provide a definitive answer to this question. Although the Act expressly prohibits artificial fertilisation of the surrogate mother prior to the surrogacy agreement being confirmed by the court, the Act was silent as to how the validity of such an agreement is affected by non-compliance. Thus, in the opinion of the court, it had the discretion to confirm a surrogate motherhood agreement in circumstances where the fertilisation occurred before the confirmation. It was also held that it would be contrary to section 28(2) of the Constitution (the best interests of the child) if the court did not have the discretion to retrospectively confirm such surrogate motherhood agreement. Therefore the court had to retain the discretion to do so if the court was satisfied that it would be in the best interest of the child to be born.



The author submitted that this case is another example of how South African courts tend to ignore the basic statutory requirements. The author submitted further that the case proves once again that guidelines are needed for the interpretation of the Children's Act.

In the case of *AB v Minister of Social Development*, the applicants challenged the constitutional validity of the provisions of section 294 of the Children's Act on the grounds that the genetic link requirement violates various fundamental rights. The genetic link requirement made it impossible for the first applicant to conclude a surrogate agreement and consequently made it impossible for her to become a parent. It was argued by the applicants that the concept of surrogacy means to create an opportunity to persons who cannot give birth themselves to become parents irrespective of whether the child will be genetically related to the parent or not. The case was set down for confirmation of the declaration of constitutional invalidity in February 2016, but judgment from the Constitutional Court is still awaited.

This case was also discussed in Chapter four where the author discussed various scenarios of international surrogacy agreements. In this specific scenario, the author submitted non-recognition of a parent-child relationship leads to various disadvantages for children. They might not be registered in a country because they legally do not have parents (in the event that the surrogate mother does not want the child). The genetic bond between a parent and child is given special legal treatment not simply because of the genetic link, but because of the unique responsibilities associated with the bond.

In Chapter three, the author explored the South African legislation that may be applicable to the children born of commissioning parents (whether the commissioning parents are South Africans or foreign nationals) who entered into international surrogacy agreements. The author enumerated the requirements of birth registration in South Africa to show the birth registration process in South Africa and to determine whether the legislation might be applicable to international surrogacy agreements.

The author concluded that the South African Citizenship Act 88 of 1995 has provided children born to South African or foreign nationals living in South Africa some sort of protection against statelessness. Section 2(2) of the Citizenship Act provides that any person born on the territory who is stateless is entitled to South African citizenship by birth, provided the birth is registered in accordance with South African law. As the law stands, a child born from an international surrogacy agreement will be the child of the surrogate mother because the agreement would not be confirmed by the High Court and thus the agreement would not be enforceable. The author expostulates against the current position of South African law because of the possibility of the surrogate mother not wanting the child. In a situation where the surrogate mother cannot afford to take care of the child, the commissioning parents (whether South Africans or foreign nationals) are willing to provide the child with the parental care that the child needs. In both instances denying the recognition of legal parentage of the commissioning parents in respect of the child, unjustifiably violates his or her constitutional rights.

Problems often arise when the commissioning parent(s) attempt to return to their home country with the child. Problems may also arise when the commissioning parent(s) wish to register the child's foreign birth certificate in their home country or when they attempt to register a judicial or administrative order relating to the child's parentage in their country.

The author submitted that section 13 of the Births and Deaths Registration Act and section 2(1)(b) of the South African Citizenship Act might be favourable in cases of international surrogacy. However, it depends on whether the country in which the surrogate-born child recognises the surrogate mother or the commissioning mother as the child's legal mother/parent. These sections provide for notification to the head of South African consular mission of a child born of a South African father or mother outside the Republic of South Africa and persons born outside the Republic of South Africa to a South African parent are citizens by birth, respectively.

Thereafter, the author looked at the criminal aspect of international surrogacy agreements. Section 305 of the Children's Act provides that a person who contravenes the provisions of s 301, 302 and 303, is guilty of an offence and liable to a fine or imprisonment for a period not exceeding 10 years, or both a fine and imprisonment. The author submitted that the court needs to consider if seized with an international surrogacy agreement, whether it would be null and void and whether the parties to the agreement are liable to a fine or imprisonment.

Using the foundation established in Chapter two and three, Chapter four of this research demonstrated legal difficulties and potential rights infringed on or denied to the child born of an international surrogacy by examining international case law. The author submitted that examination of international case law will contribute to providing reasons why South African courts should implement safeguards in the context of international surrogacy agreements. The author submitted that South African courts do not have precedents, guidelines or legislation governing international surrogacy. The author further submitted that one of the main consequences of international surrogacy relates to the possibility of a surrogate born child suffering from not being legally recognized as the legal child of his or her commissioning parents. As a result, the child can be left with no parents and no nationality.

It was submitted that in light of the scenario and case analysis, a strong trend emerges - that of a contradiction between the written law and actual practices in the area. It has been shown that no matter the domestic regime in place regarding surrogacy, whether permitted or not, states appear to be continually faced with these types of arrangements. The author submitted that given the continuing growth of international surrogacy and the

wide range of human rights challenges it presents, it is important for South African authorities and courts to consider the possibility of international surrogacy occurring in South Africa. The author hopes that the South African courts take a child-centered approach, building on the views established in the international case law that was discussed in Chapter four, and that courts do not adopt a strict interpretation of our current laws.

Lastly, having regard to the all the submissions made in this thesis, the author provided recommendations for the appropriate manner in which to legislate international surrogacy agreements in South Africa. The author provided that judicial and administrative authorities could inspect the agreement and ensure that the terms do not harm the child and that the child is recognised as the legal child of the commissioning parents. Before ordering the international surrogacy agreement null and void; the courts should first look at the suitability of the commissioning parents and finally consider the best interest of the child as paramount importance.

It is suggested that statutory regulations that contemplates international surrogacy should be formulated, as a source of reference, which will assist a court when faced with determining the issue of parentage of a surrogate born child, and consequently, his or her nationality. The author further suggested that the South African Parliament either re-drafts or provides clearer guidelines regarding surrogacy and the possibility of international surrogacy agreements.

The aim of this research was to determine the extent in which South Africa recognises international surrogacy. However, to what extent is ultimately uncertain. It is time for the South African law to recognize the possibility of international surrogacy and to confront the prevailing issues stemming from international surrogacy agreements.

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