

Surrogacy in South Africa: Should we reconsider the current approach?

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OPSOMMING

Surrogaatmoederskap in Suid-Afrika: Moet ons die huidige benadering heroorweeg?

Surrogaatmoederskap word streng in Hoofstuk 19 van die Kinderwet gereguleer. In die bietjie meer as twee jaar sedert die Wet in werking getree het, is nog net twee sake oor surrogaatmoederskap gerapporteer. Die artikel ondersoek 'n aantal aspekte rakende surrogaatmoederskap wat, na aanleiding van die mees onlangse uitspraak in *Ex parte WH*,¹ problematies blyk te wees. Die uitspraak in hierdie saak is gerapporteer met die uitsluitlike doel om riglyne neer te lê vir applikante wat in die toekoms by die hof aansoek doen om goedkeuring van 'n surrogaatmoederskapooreenkoms. Die artikel evalueer, in die eerste plek, die algemene rol van die regbank in verrigtinge waar aansoek gedoen word om die goedkeuring van 'n surrogaatmoederskapooreenkoms. Die verskil in die benadering wat deur die hof gevolg moet word wanneer die beste belang van die kindstandaard op 'n kind wat nog gebore staan te word, eerder as 'n reeds bestaande kind, toegepas word, word uitgewys. Die toepaslikheid van die regbank as die aangewese gesag om surrogaatmoederskapooreenkoms goed te keur, word ondersoek. Moontlike alternatiewe word oorweeg maar uiteindelik nie aanbeveel nie. Die kwessie van kommersiële surrogaatmoederskap word oorweeg om te besluit of die volgehoue verbod daarvan haalbaar is, gegewe die probleme wat ondervind word met die afdwinging van die verbod, nie alleen in ander jurisdiksies nie maar ook oënskynlik in Suid-Afrika. Na aanleiding van die vreemde burgerskap van die opdraggewende ouers in die *WH*-saak word die toenemende voorkoms van internasionale surrogaatmoederskapooreenkoms bespreek. Suid-Afrika se benadering in hierdie verband word uitgelê. Die tekortkominge in die reg van die opdraggewende ouers se lande van herkoms om volle ouerlike status aan hulle toe te ken ondanks 'n Suid-Afrikaanse hofbevel tot dien effek, word uitgewys. Die artikel sluit af deur 'n beroep te doen op die wetgewer om aanvullende statutêre maatreëls daar te stel om te verseker dat die goedkeuringsproses konsekwent gehanteer word en dat kommersiële surrogaatmoederskap met groter verdraagsaamheid en buigsamheid beoordeel word.

1 INTRODUCTION

The provisions contained in Chapter 19 of the Children's Act² for the first time created a statutory scheme for the regulation of surrogacy in South Africa. The main features of this surrogacy model include the following: The requirement of a court-sanctioned surrogate motherhood agreement prior to the artificial fertilisation of the surrogate mother; the automatic vesting of legal parenthood in the

1 2011 6 SA 514 (GNP).

2 38 of 2005, hereafter the Children's Act.

intending commissioning parents³ at the subsequent birth of the commissioned child;⁴ and the outlawing of commercial surrogacy.⁵ In the little over two years that the Act has been in operation,⁶ only two cases⁷ have been reported dealing with the issue, and in both cases the court focused exclusively on the pre-authorisation process. The courts are yet to be called upon to settle a dispute arising from the termination of a surrogate motherhood agreement. It is thus evident that the deluge of disputed surrogacy arrangements with which it was anticipated the courts would have to deal, have not materialised.⁸ However, the improbability of complications does not diminish the importance of surrogacy laws. Increasingly, countries have either already enacted surrogacy-specific laws or are contemplating legislation to regulate the practice.⁹ The challenge posed by surrogacy would thus no longer appear to be a decision on whether or not to regulate surrogacy but, rather, to decide on how best to regulate surrogacy.

Although the two reported judgments¹⁰ do not address some of the more controversial aspects of the surrogacy model implemented in South Africa,¹¹ the cases do create a platform from which to review some of its features.¹² The article focuses on the judgment in *Ex parte WH*,¹³ delivered with the express

3 Although the Children's Act employs the term "commissioning parents", many other countries use the term "intending parents". These terms will be used interchangeably throughout the article.

4 Hereafter referred to as the resultant child.

5 Ss 292, 296, 297 and 301 read with s 295(c)(v), respectively.

6 Ch 19 of the Children's Act became operational on 1 April 2010.

7 *In re Confirmation of Three Surrogate Motherhood Agreements* 2011 6 SA 22 (GSJ) and *Ex parte WH* 2011 6 SA 514 (GNP).

8 The much-publicised birth in Tzaneen of the Ferreira-Jorges surrogate triplets, borne by their grandmother in Oct 1987, sparked fears of an increasing prevalence of surrogacy in SA. The South African Law Commission (abbreviated as SALC, since renamed the South African Law Reform Commission or SALRC) consequently initiated an investigation into the possibility of regulating surrogacy in SA. The increased use of surrogacy as another assisted reproductive method was also anticipated as a result of, *inter alia*, the increasing number of women who are or become infertile, the diminishing number of children available for adoption as a result of the widespread use of contraceptives, and the legalisation of abortion in the Choice on Termination of Pregnancy Act 92 of 1996: SALC *Report on surrogate motherhood* Project 65 (1992) paras 2.1.1, 4.6.2 and 4.6.3; Pretorius *Surrogate motherhood: Legal issues* unpublished LLD thesis UNISA (1991) 3.

9 See Hague Conference on Private International Law "A preliminary report on the issues arising from international surrogacy arrangements" 9. The report was drawn up by the Permanent Bureau of the Conference, Preliminary Document No 10 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference. The report is available at <http://bit.ly/17vQOUX> (accessed 13 Feb 2013) and will henceforth be referred to as HcH (2012).

10 *In re Confirmation of Three Surrogate Motherhood Agreements* 2011 6 SA 22 (GSJ) and *Ex parte WH* 2011 6 SA 514 (GNP).

11 Such as the untenable and arguably unconstitutional differentiation between full and partial surrogate mothers: Louw *The acquisition of parental responsibilities and rights* (unpublished LLD thesis UP 2009) 385–387.

12 A sentiment shared by Carnelley "*Ex parte WH* 2011 6 SA 514 (GNP)" 2012 *De Jure* 179, who focuses on two statutory requirements relating to surrogate agreements, ie the genetic origin of the commissioned child and the payment provision. The position of SA couples who enter into a surrogate motherhood agreement with a foreign surrogate mother is also addressed. All three issues are compared to the legal position in England and Wales.

13 2011 6 SA 514 (GNP).

purpose of providing guidance to parties applying for the confirmation of a surrogate motherhood agreement in South Africa. The dualistic role played by the judiciary in confirmation proceedings is appraised with reference to a statement made by the court in *Ex parte WH*.¹⁴ Attention is drawn to the difference in the approach that has to be followed by the courts when applying the best interest of the child standard to a resultant child, rather than an existing child. The appropriateness of the judiciary as the approving authority of surrogate agreements is investigated. Possible alternatives are considered, but ultimately not recommended. The issue of commercial surrogacy is considered and its continued prohibition questioned, given the myriad of problems encountered in the enforcement of the prohibition, not only in other jurisdictions but also apparently in South Africa. Because of the foreign citizenship of the commissioning parents in the *WH* case, the article, in the final instance, discusses the rising phenomenon of international surrogate arrangements. South Africa's stance on foreign surrogate arrangements is outlined. The effect of the non-recognition of the parental status of the commissioning parents in *WH* in their countries of birth is discussed. The adoption of the child is tendered as the only solution to overcome the uncertainty of the commissioning parents' parental status in their countries of birth. The article concludes by proposing supplementary statutory measures to ensure that confirmation proceedings are handled in a consistent manner and to allow for greater tolerance and flexibility in the appraisal of commercial surrogate arrangements.

2 JUDGMENT IN *EX PARTE WH*¹⁵

Briefly, the factual background against which the judgment was delivered involved an application for the approval of a surrogate motherhood agreement in terms of section 295 of the Children's Act.¹⁶ Because of their sex, the all-male commissioning couple could not have children genetically related to both of them, except *via* the process of surrogacy.¹⁷ The commissioning parents were introduced to the potential surrogate mother through an agency known as Baby-2-Mom.¹⁸ The surrogate mother, a divorcee with two children born from her previous marriage, had a life partner to whom she was engaged.¹⁹ A report by a clinical psychologist was furnished to attest to the suitability of the commissioning couple²⁰ and the surrogate mother.²¹ The surrogate mother was considered suitable, notwithstanding the fact that she ostensibly had a difficult childhood and was less privileged than the commissioning parents.²²

The Deputy Judge President constituted the court in *Ex parte WH*²³ for the express purpose of providing guidance, ensuring consistency and developing a uniform practice in future matters of this nature. The Bar, the Law Society and

14 Para 72.

15 See also Carnelley 2012 *De Jure* 181–183.

16 Without such approval the agreement would be invalid and unenforceable: s 292(e).

17 *Ex parte WH* 2011 6 SA 514 (GNP) para 16.

18 Para 18.

19 Para 21.

20 Para 19.

21 Para 21.

22 *Ibid.*

23 Para 9.

the Centre for Child Law were invited to make submissions as *amici curiae* to assist the court in achieving these objectives.²⁴ The guidance was deemed necessary in the light of the novelty of the new legislation,²⁵ the growing number of confirmation applications,²⁶ and problems identified in the first reported judgment dealing with the confirmation of three surrogate motherhood agreements.²⁷

After giving an overview of the development of the South African law on surrogacy,²⁸ the court refers to the international law in this regard.²⁹ Attention is drawn to the array of different legislative schemes found in countries around the world where surrogacy is allowed.³⁰ The court then addresses certain constitutional issues arising from surrogacy arrangements,³¹ including the best interests of the child³² and commercial surrogacy.³³ Before reaching its conclusion the court discusses the role of the court and the requirements for surrogacy agreements.³⁴ The court ultimately concludes that the commissioning parents had made out a proper case for granting the relief³⁵ and ordered the proposed surrogate motherhood agreement be confirmed as requested.³⁶ Further details of the judgment are provided as they become relevant in the course of the discussions that follow.

3 ROLE OF THE JUDICIARY WHEN CONFIRMING SURROGATE MOTHERHOOD AGREEMENTS AND THE APPLICATION OF THE BEST INTEREST STANDARD IN SUCH PROCEEDINGS

Justices Tolmay and Kollapen in *Ex parte WH*³⁷ describe the role of the court in confirming surrogate motherhood agreements in the following terms:

“While on the one hand it is enjoined to advance the spirit and the objectives of the Act without creating or placing any additional obstacles in the path of litigants who seek relief, on the other as upper guardian of all minor children it cannot simply be a rubber stamp validating the private arrangements between contracting parties.”

The statement seems to suggest that the court plays a dual role when confirming a surrogate agreement. On the one hand the court’s role is that of facilitator of surrogate agreements and, on the other, it plays the role of gatekeeper and protector of the rights of the parties and the children born as a result of the agreement. In its role as facilitator, the court recognises that it should not stand in the way of commissioning parents whose only option is to have a child by way of surrogacy. To this end, the court in *Ex parte WH*³⁸ recognised its duty in

24 Paras 10–12.

25 Para 41.

26 Para 3.

27 *In re Confirmation of Three Surrogate Motherhood Agreements* 2011 6 SA 22 (GSJ).

28 Paras 31–42.

29 Paras 43–53.

30 Para 45. Reference is made *inter alia* to the regulation of surrogacy in Israel (para 47); the Netherlands and Belgium (para 48); Canada (para 49); Australia (para 50); and the USA (para 51).

31 Paras 54–70.

32 Paras 56–63.

33 Paras 64–68.

34 Paras 71–78.

35 Para 79.

36 Para 80.

37 2011 6 SA 514 (GNP) para 72.

38 2011 6 SA 514 (GNP) para 63.

general to ensure that the constitutional rights of the commissioning parents and the surrogate mother are respected. These rights, as indicated by the court,³⁹ include the right to equal treatment before the law,⁴⁰ the right to have one's dignity respected,⁴¹ and the right to freedom and security of the person, including the right to make decisions concerning reproduction.⁴² In addition to these constitutional rights, the court in *Ex parte WH*⁴³ cautioned that care should be taken not to violate the rights of the commissioning parents in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act,⁴⁴ by unnecessarily invading their privacy or by setting the bar too high to become parents. According to the court,⁴⁵ this will entail a value judgment by the court confirming the surrogate agreement, taking into consideration the circumstances of the particular case.

In its role as gatekeeper, the court must in the first instance ensure that the validity requirements are complied with.⁴⁶ In terms of the Children's Act,⁴⁷ a court may not confirm a surrogate agreement unless it is satisfied, 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*, that the agreement should be confirmed. The requirement echoes the constitutional right of every child to the paramountcy of his or her best interests in every matter concerning the child.⁴⁸ The problem with the application of the best interest standard when confirming a surrogate motherhood agreement is that the court is called upon to protect the interests of a child who has not yet been conceived, and may not be conceived for another 18 months,⁴⁹ let alone born. In this regard, the court in *Christian Lawyers Association of SA v Minister of Health*⁵⁰ held that a foetus does not qualify as a "child" for purposes of interpreting section 28 of the Constitution. A foetus will likewise not qualify as a "child" for purposes of the Children's Act, where a child is defined as a "person" under the age of 18 years.⁵¹ While the High Court can interfere with the vesting of the mother's parental responsibilities and rights after conception but before the birth of the child,⁵² it is trite law that the High Court is not the upper guardian of children not yet *in esse*.⁵³ Wepener J, in *In re Confirmation of Three Surrogate Motherhood Agreements*,⁵⁴ explained that as the upper guardian of minors, judges are duty-bound to ensure

39 *Ibid.*

40 S 9(1) of the Constitution of the Republic of South Africa, 1996, hereafter the Constitution.

41 S 10 of the Constitution.

42 S 12 of the Constitution.

43 2011 6 SA 514 (GNP) para 63.

44 4 of 2000.

45 Para 63.

46 S 295.

47 S 295(e).

48 S 28(2) of the Constitution.

49 According to s 296(1) the surrogate mother may not be fertilised before the confirmation of the surrogate motherhood agreement and not after the lapse of 18 months from the date of confirmation.

50 1998 4 SA 1113 (T) 1121.

51 S 1(1) *sv* "child".

52 See *Shields v Shields* 1946 CPD 242 and *Pretorius v Pretorius* 1967 2 PH B17 (O).

53 See *Ex parte Odendaal* 1928 OPD 218 219; *Ex parte Swanepoel* 1953 1 SA 280 (A) 286D–E; *Ex parte Leandy* 1973 4 SA 363 (N) 366E; *Ex parte Watling* 1982 1 SA 936 (C) 942F–G.

54 2011 6 SA 22 (GSJ) para 16.

that the interests of the child *once born* are best served by the contents of the surrogacy agreement. However, the impact of applying the best interest standard to a resultant child, rather than to an existing child when confirming a surrogate agreement, was never considered by the court in either of the reported judgments.⁵⁵

Cohen⁵⁶ regards the focus on the best interests of the *resultant* child quite understandable, given the countless other areas of family law in which the protection of the best interests of *existing* children serves as a powerful organising principle justifying state intervention.⁵⁷ Justification for the parallel argument used in the context of reproduction – that unless the requirements are complied with, some harm will come to the *resultant* child – is, however, according to Cohen⁵⁸ “fallacious” and wholly misplaced. Cohen is in fact of the opinion that it is merely a smokescreen for justifying state intervention in the way people make decisions about whether, when, and with whom to reproduce. The author puts it thus:

“Unless the State’s failure to intervene would foist upon the child a ‘life not worth living’, any attempt to alter whether, when, or with whom an individual reproduces cannot be justified on the basis that harm will come to the resulting child, since but for that intervention the child would not exist.⁵⁹ To put the point in the language of distinctions . . . legislatures, judges, and scholars problematically treat the reasons justifying state interference with an individual’s right to remain the legal parent of an *existing* child as fully overlapping with the reasons justifying state interference with an individual’s (potential) right to become a genetic parent and bring a child *into existence*. The best interests argument acts as a smoke screen that prevents us from excavating the true justification for these kinds of interventions.”⁶⁰

55 While the issue of the best interests of the child is expressly dealt with under a separate heading, the court in *Ex parte WH* 2011 6 SA 514 (GNP) paras 56–63 does not seem to appreciate that the best interests of an existing child cannot be determined in the same way as the best interests of a resultant child. Carnelley 2012 *De Jure* 188 does not explore the issue either, but seems to appreciate that the best interests of the child standard cannot be used since the child has not yet been conceived.

56 Cohen “Regulating reproduction: The problem with best interests” 2011 *Minnesota LR* 423–426.

57 In SA the Constitution (s 28(2)) entrenches the paramountcy of the best interests of the child, which serves as a determining factor in countless decisions affecting children, including the granting of an adoption order (s 230(1) read with s 240(2)(a) of the Children’s Act), in determining which parent should have care upon divorce (in terms of s 6(1)(a) of the Divorce Act 70 of 1979 a court may grant a decree of divorce only if the court “is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances”), in determining when a child should be removed from its family of origin and put into child protective services (s 151(8) of the Children’s Act).

58 Cohen 2011 *Minnesota LR* 426–427. Professor Cohen is an assistant professor at Harvard Law School and a co-director of the Petrie-Flom Centre for Health Law Policy, Biotechnology and Bioethics.

59 Claims based on the ground of “wrongful birth” are not recognised in SA. See *Stewart v Botha* 2008 6 SA 310 (SCA) para 28.

60 Cohen 2011 *Minnesota LR* 426–427. The article, followed by a companion article, “Beyond best interests” 2012 *Minnesota LR* 1187, has sparked a furious debate in the US. See in this regard Alvaré “A response to professor I. Glenn Cohen’s regulating reproduction: The problem with best interests” 2012 *Minnesota LR* 8; Crawford “Authentic reproductive regulation” 2012 *Minnesota LR* 31; Mutcherson “In defense of future children: A response to Cohen’s beyond best interests” 2012 *Minnesota LR* 46; Cohen “Burying best interests of the resulting child: A response to professors Crawford, Alvaré, and Mutcherson” 2012 *Minnesota LR* Headnotes 1.

The strict regulatory surrogacy scheme implemented in South Africa was justified by the undesirability of not formally regulating surrogacy. The South African Law Commission⁶¹ found that the law governing the legal parentage of the parties to a surrogate arrangement was inadequate, uncertain and subject to judicial interpretation.⁶² The Law Commission⁶³ further argued that, if existing law were to be applied it would mean that the court would have to intervene *ex post facto* when problems arise. This was found to be unacceptable since judicial involvement would come at a time when it was too late to protect the parties concerned. The Commission concluded that the regulation of surrogacy would achieve certainty and restrict the abuses that go hand in hand with commercial surrogate motherhood. The Commission⁶⁴ argued that, in the absence of formal regulation, a *laissez-faire* approach would necessitate the application of the law of contract to surrogacy agreements which was thought to be undesirable. An outright ban on surrogacy was considered “short-sighted and self-defeating”⁶⁵ because it would drive the practice underground.⁶⁶ The aim of the legislature, therefore, was to create a comprehensive regulatory scheme that would give legal effect to the intention of the parties involved in the surrogacy arrangement, provide certainty as far as the child’s legal parentage was concerned and, as a result, protect the child conceived and born as a result of the agreement.

The question posed by Cohen is, however, whether the strict requirements and the suitability criteria prescribed by the Children’s Act can in all respects be justified with reference to what is assumed would be in the best interests of the resultant child. For example, if the surrogate mother is competent and found in all respects to be suitable to act as a surrogate mother, is it necessary that she, in addition, be required to have a documented history of at least one pregnancy and a viable delivery and to have a living child of her own?⁶⁷ The requirement that the surrogate mother should have given birth to a child before would have been sufficient to ensure that she knows what it would mean to give up a baby. If the surrogate mother has given birth to a child, she would obviously have had a pregnancy and a viable delivery (whatever that may mean). If the child is no longer alive, her motives for becoming a surrogate mother should be investigated, but should this automatically make her unsuitable? Furthermore, why may the artificial fertilisation of the surrogate mother not take place later than 18 months after the confirmation of the surrogate agreement?⁶⁸ It is a well-known fact that artificial fertilisation procedures are time-consuming and multiple attempts may be needed to conceive. By reasoning that a time limit would avoid circumstances changing too much after the confirmation of the agreement also does not hold sway – surely circumstances, such as the death or separation of the commissioning parents, can change at any time.⁶⁹

61 As it was then called. See fn 7 above.

62 SALC *Report on surrogate motherhood* (1992) para 7.2.1.

63 *Idem* para 7.2.2.

64 *Idem* para 7.3.

65 *Idem* para 7.4.1.

66 *Idem* para 7.4.2.

67 S 295(c)(vi) and (vii).

68 S 296(1)(b).

69 See Louw (2009) 354–355.

It is also fallacious to assume that a partial surrogate who is genetically related to the child may find it more difficult to give up her baby than a (full) surrogate mother who is not so related. The Children's Act⁷⁰ differentiates between these types of surrogate mothers based on their biological connection (or absence thereof). In terms of the Act, a partial surrogate may terminate the agreement, while a full surrogate is obliged to hand over the child after birth.⁷¹ As well, biology alone cannot explain why parental rights upon termination of the agreement should vest in the surrogate mother and her husband or partner, if she has any, but if she is single she shares parental rights with the commissioning father.⁷² The prohibition against commercial surrogate arrangements, which places restrictions on both the surrogate mother and the commissioning parents, may also be considered unnecessary, as will be shown in paragraph 5 below. In addition, the genetic link requirement imposed on commissioning parents⁷³ has come under fire because it excludes couples who are both infertile from using surrogacy. Such infertile couples are left with adoption as their only option, which may not always serve the needs of the couple in question. There may, for example, be a shortage of new-born babies and age disqualifications may also bar them from qualifying as suitable adoptive parents.⁷⁴ The questionable benefit for the intended child gained by imposing such overly-restrictive requirements and pre-determining such consequences would seem to lend credence to the views expressed by Cohen.⁷⁵

It goes without saying that the problem of applying the best interest standard to an intended child does not arise in countries such as the United Kingdom (UK) and Queensland, Australia, which do not have a pre-authorisation surrogacy scheme.⁷⁶ In the UK the approach to surrogacy is said to be ambivalent⁷⁷ – while surrogacy is generally discouraged in the UK and surrogate agreements will not be enforced, intending parents are nevertheless allowed to become the legal parents of a child born to a surrogate through the granting of a parental order in terms of the Human Fertilisation and Embryology Act of 2008 (HFEA).⁷⁸ The UK Surrogacy Arrangements Act of 1985 discourages surrogacy

70 S 298(1).

71 S 297 read with s 298.

72 S 299.

73 In terms of s 294, a surrogate motherhood agreement will not be valid and enforceable “unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, if the commissioning parent is a single person, the gamete of that person”.

74 Louw (2009) 342–343. While the Children's Act does not formally impose any age requirements on adoptive parents, it is generally assumed that the adopted family should mimic a natural family, also as far as the age of the adoptive parents is concerned.

75 Cohen 2011 *Minnesota LR* 423.

76 However, most of the states regulating surrogacy in the USA (Virginia, Texas, Utah, New Hampshire) and Greece (Hatzis “The regulation of surrogate motherhood in Greece” 9 available at <http://bit.ly/1780uqr>, accessed 14 March 2013) follow the same approach as SA, requiring a judicially pre-authorised surrogacy agreement for enforcement but in all of these countries only gestational surrogate contracts are legal and enforceable.

77 Freeman “Does surrogacy have a future after Brazier?” 1999 *Medical LR* 1 20.

78 S 54(1)(a) of the HFEA. Similar to the genetic requirement in terms of SA law, the gametes of at least one of the applicants must have been used to bring about the creation of the embryo: S 54(1)(b). Where the conditions for the parental order are not satisfied, eg the

in two ways: First of all, by making surrogacy arrangements unenforceable in the UK⁷⁹ and, secondly, by criminalising certain acts relating to surrogacy arrangements. These acts include – negotiating or facilitating surrogacy arrangements on a commercial basis and the publication or distribution of an advertisement indicating a willingness to act as a surrogate or expressing a need for a surrogate mother.⁸⁰ Recommendations by the Brazier Committee on the UK surrogacy laws in 1998,⁸¹ calling for greater and tighter regulation of surrogacy, have never been implemented.⁸² The only changes that have been implemented relate to the granting of a parental order in such cases. The HFEA now expressly allows the intended parents to apply to court not less than six weeks,⁸³ but not later than six months after the birth of the child for the making of the parental order.⁸⁴ A parental order allows the child to be treated in law as the child of the applicants.

In much the same way, the application for a parentage order in terms of the Surrogacy Act (2010) of Queensland, Australia⁸⁵ may be made not less than 28 days and not more than 6 months after the child's birth.⁸⁶ The Queensland Act similarly does not require approval of the surrogacy arrangement prior to the surrogate mother being artificially fertilised, but the court may make the parentage order after the birth of the child only if it is satisfied that all requirements in terms of the Act have been complied with.⁸⁷ These requirements are similar to those required by the South African Children's Act for the confirmation of a surrogate motherhood agreement.⁸⁸

However, having elected to implement a pre-authorisation scheme, the South African courts must anticipate at the time of confirming the surrogate agreement

birth mother refuses her agreement, the time limit has passed or neither of the commissioning parents is genetically related to the child, the status of the parent can be acquired by adoption, a residence order or special guardianship: See Masson *et al* *Cretney Principles of family law* (2008) 892–894; Carnelly and Soni "A tale of two mummies. Providing a womb in South Africa: surrogacy and the legal rights of the parents within the Children's Act 38 of 2005. A brief comparative study with the United Kingdom" 2008 *Speculum Juris* 36 48–51; Carnelley 2012 *De Jure* 180–181.

79 S 1A of the Surrogacy Arrangements Act.

80 S 3 of the Surrogacy Arrangements Act.

81 Brazier *et al* *Surrogacy: Review for Health Ministers of current arrangements for payments and regulation* Report Cm 4068 HMSO (1998). The report, commonly referred to as the Brazier Report, is available at <http://bit.ly/11qS0Wn> (accessed 22 Nov 2012).

82 Masson *et al* (2008) 885–886.

83 S 54(7).

84 S 54(3).

85 S 20 of the Surrogacy Act 2010 (Queensland).

86 S 21(1)(a) of the Surrogacy Act 2010 (Queensland). Provision is also made for late applications with leave of the court (in this case the Queensland Children's Court): S 21(1)(b).

87 S 22(2) of the Surrogacy Act 2010 (Queensland).

88 These requirements, very importantly, also include proof that the parties obtained independent legal advice about the surrogacy arrangement and its implications and obtained counselling from an appropriately qualified counsellor about the surrogacy arrangement and its social and psychological implications (s 22(2)(e)). Additional requirements have to be complied with in the case of multiple births (s 24). South Australia follows a similar approach in terms of its Family Relationships Act of 1975. In terms of this Act a parentage order can be applied for when the child is between 4 weeks and 6 months old, but the order will only be granted if a "recognised" surrogacy agreement which complies with a number of requirements listed in the Act (s 10HA(2)) had been concluded.

what would eventually be in the child's interest when he or she is born. A child-centred approach as envisaged by the Constitutional Court in *S v M (Centre for Child Law as Amicus Curiae)*,⁸⁹ is thus not possible. It is generally agreed that the determination of an *existing* child's best interests "cannot be determined in the abstract or in advance".⁹⁰ As a result, the check-list of factors mentioned in the Children's Act⁹¹ to provide guidance in such cases cannot be applied. The only practical way in which to determine the best interests of a resultant child is to ensure that the surrogate mother and the commissioning parents are suitable persons to assume their respective roles, and that all reasonably foreseeable eventualities have been provided for in the agreement.⁹² Consideration must be given to, for example, what is to happen in the case of the death, divorce or separation of the commissioning couple,⁹³ or the birth of a child with disabilities. The test to determine the best interests of the resultant child is thus also child-centred but in an adapted different way. Difficult as it may be, the court should endeavour to ensure that when the child is eventually born, his or her interests were protected as far as was reasonably possible at the time of confirmation given the information available to the court.⁹⁴ Furthermore, as acknowledged by the court in *Ex parte WH*,⁹⁵ the best interest standard should not be used as a ruse to impose (further) restrictions on people's procreative choices. The courts should thus not deny people their right to make procreative choices based on what the legislator or the court *presumes* would be in the best interests of the children born as a result of such choices.⁹⁶

89 2007 2 SACR 539 (CC), also reported as 2008 3 SA 232 (CC). According to the court (para 24): "A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned."

90 *P v P* 2007 5 SA 94 (SCA) 99D-E; Ferreira "The best interests of the child: From complete indeterminacy to guidance by the Children's Act" 2010 *THRHR* 201 208.

91 S 7.

92 See clauses 12 and 13 of the draft surrogate motherhood agreement proposed by Carnelley and Soni "Surrogate motherhood agreements" 2011 *De Rebus* 30 33.

93 S 295(d) of the Children's Act requires the parties to include in the agreement "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".

94 The court in *Ex parte WH* 2011 6 SA 514 (GNP) para 79 concluded: "We are satisfied that arrangements for the care and welfare of the child to be born, including the stability of the home environment and the provision for the child's needs in the event of death of the commissioning parents or divorce or separation have been more than adequately provided for."

95 2011 6 SA 514 (GNP) para 72.

96 It could perhaps also be argued that the surrogacy provisions in the Children's Act do not protect the interests of the resultant child adequately because the provisions create a measure of uncertainty as far as the confirmation of surrogate agreements is concerned. Despite the extensive list of statutory requirements that must be satisfied, the court still has the final say on the matter. Thus, notwithstanding compliance with all the statutory requirements, the court may in theory still refuse to confirm the surrogate agreement if it is ultimately not convinced that the agreement should be confirmed (having regard to "the personal circumstances and family situations of all the parties concerned, but above all the interests of the child to be born" as provided for in s 295(e)). The Act thus seems to require strict adherence to narrowly defined requirements but then leaves a back door of discretion open if, in the court's opinion, the confirmation would not be in the resultant child's best interest.

4 ALTERNATIVE APPROVING AUTHORITY FOR SURROGATE AGREEMENTS?

The High Court was chosen as the approving authority of surrogate agreements in South Africa. This is because the agreement eventually affects the status of the parties and the child. The child who is conceived and born as a result of the surrogate agreement is for all purposes in law deemed to be the child of the commissioning parents⁹⁷ and not the surrogate mother and her spouse, as would normally be the case for an artificially-conceived child.⁹⁸

As indicated earlier (in paragraph 2), the judgment in the *WH* case was delivered for the sole purpose of providing guidance for future applications relating to the confirmation of surrogate agreements. However, the judgment seems to be problematic and inconsistent in a number of ways, including:

- (a) While the court, in the first place, views it obligatory for parties in general to state where the gametes for the artificial fertilisation of the surrogate mother will come from,⁹⁹ the court had no problem in confirming the agreement in the *WH* case without such information.¹⁰⁰ The lack of information regarding the origin of the donor eggs to be implanted in the surrogate mother was not deemed necessary for the determination of the matter.¹⁰¹ The precise origin of the sperm was also not revealed.¹⁰² The origin of the gametes is important, not only to ensure the conception of a healthy infant,¹⁰³

While investing the court with such residual discretionary powers is not uncommon in legislation, it may be problematic in the context of confirmation proceedings. Since it is so difficult to determine what would be in a resultant child's best interests, it is not entirely clear on what grounds the court would be able to exercise its residuary discretion. Unless perhaps it is argued that the refusal may be justified on the basis that the parties have not in the agreement sufficiently catered for eventualities that are reasonably foreseeable as far as the child is concerned. The vagueness of s 295(e) in which the discretionary powers of the court are outlined also makes it difficult to ascertain how (in)flexible the Children's Act was meant to be as far as the regulation and confirmation of surrogate agreements are concerned. The ambivalence found in this regard in the Children's Act would seem to be reflected by the approach adopted by the court in the *WH* case, as will be shown in the following paragraphs.

97 S 297(1)(a).

98 S 40 of the Children's Act, which regulates the rights of children conceived by artificial fertilisation.

99 Para 68.

100 Carnelley 2012 *De Jure* 183 has a similar problem with the court's handling of this issue.

101 Para 22.

102 The applicants in the case, a same-sex couple, had formalised their union in terms of the Civil Union Act 17 of 2006. They decided that both partners would provide the sperm for the artificial fertilisation process and elected not to be informed which one of them was the biological parent. In this way both the sperm donors (the commissioning parents) had an equal chance of being the real father! The author was given access to this information contained in a legal opinion provided to the applicants by Prof Skelton, Director of the Centre for Child Law, with the express permission of Prof Skelton and the applicants themselves. The legal opinion was requested by the commissioning couple to support their application to adopt the child born in consequence of the surrogate arrangement. The adoption was necessary in order to ensure the commissioning couple's parental status in their respective countries of birth, as discussed in para 6 below. Obviously a DNA test would ultimately be necessary should the parties wish to determine the paternity of the child.

103 Any artificial fertilisation of a surrogate mother in the execution of an agreement confirmed by the court must be done in accordance with the provisions of the National Health

continued on next page

but also to enable the child born in consequence of the arrangement to access medical and other information regarding his or her genetic parents as provided for in section 41 of the Children's Act. While noting the importance of the fact that the surrogate mother's gametes would not be used during the fertilisation process,¹⁰⁴ the court did not consider the impact of the fact that the arrangement to be confirmed would amount to a full surrogate arrangement. The import of this is significant. Once the agreement is confirmed, a full surrogate mother who is not genetically related to the resultant child cannot terminate the agreement and refuse to hand over the child. The position of a partial surrogate mother, that is, one that is genetically related to the resultant child, is different. In the case of such a partial surrogate mother, a "delayed direct parentage" model is applicable, giving the surrogate mother 60 days from date of birth to terminate the agreement and keep the child.¹⁰⁵ Related to the issue of the gametes and their origin, is the court's call for submissions on the situation where the genetic material used is not that of the parties.¹⁰⁶ While it is a requirement by law that at least one of the commissioning parents be genetically related to the child,¹⁰⁷ the surrogate mother need not be so related.¹⁰⁸ Where none of the parties is genetically related to the child it is considered a commissioned adoption and, consequently, not authorised.¹⁰⁹ Since the approach to be followed in such cases is not uncertain, it is difficult to understand why the court would have needed guidance on this aspect in the first place.

- (b) While recognising the ease with which commercial surrogacy can be camouflaged,¹¹⁰ the court was prepared to confirm the agreement, despite the fact that no details were given regarding the specifics in respect of the R20 000 expenditure paid to the mother.¹¹¹ The possibility of the less privileged surrogate mother being exploited, which according to the court "is a real and ever present danger"¹¹² in South Africa, is also not investigated. Moreover, despite stating it as a requirement,¹¹³ no explanation is given of what (besides the financial compensation) could have motivated the surrogate mother to act as a surrogate for the applicants.¹¹⁴

Act 61 of 2003: S 296(2) of the Children's Act. The regulations pertaining to the artificial fertilisation of persons and the general control of gametes in terms of the National Health Act 61 of 2003 (GN R175 in GG 35099 of 2 March 2012), requires the person removing the gametes to open a donor file with all the relevant information and ensures that the risk of transmission of infections such as HIV or Hepatitis is minimised.

104 *Ex parte WH* 2011 6 SA 514 (GNP) para 22.

105 S 298 of the Children's Act. However, all surrogate mothers retain the right to terminate the agreement in terms of the Choice on Termination of Pregnancy Act 92 of 1996: s 300(1) of the Children's Act.

106 *Ex parte WH* 2011 6 SA 514 (GNP) para 10.2.

107 S 294 of the Children's Act.

108 The Children's Act provides for both possibilities. See ss 298 and 299.

109 See Meyerson "Surrogacy agreements" in Murray (ed) *Gender and the new South African legal order* (1994) 123; Louw (2009) 343.

110 Para 64.

111 Paras 28 and 29.

112 Para 64.

113 Para 67.

114 *Ex parte WH* 2011 6 SA 514 (GNP) para 67. See also Carmelley 2012 *De Jure* 183 in this regard.

- (c) The role of the agency that was involved in the bringing together of the parties was not dealt with efficiently either.¹¹⁵ The eagerness with which the court accepted the *bona fides* of the agency¹¹⁶ is wholly at odds with the court's concerns about the abuses that can occur as a result of the involvement of agencies facilitating surrogate arrangements.¹¹⁷
- (d) The court in the *WH* case was also ambiguous in its advice on how to determine whether the commissioning parents would be suitable to accept the parenthood of the resultant child. First of all, the court seemed to have no problem with the fact that the same psychologist had prepared the suitability reports for both the surrogate and the commissioning parents.¹¹⁸ Furthermore, the conclusion reached by the court that the test for suitability should be objective¹¹⁹ is in direct conflict with a statement made in the preceding paragraph that "a court should have regard to the personal and character details of a commissioning parent in this regard".
- (e) Since applications for the confirmation of a surrogate agreement are invariably brought on an *ex parte* basis, the court is usually dependent upon the information placed before it by the applicants. The court is thus absolutely reliant on the "utmost" good faith of the applicants.¹²⁰ It is thus incumbent on the parties to provide the court with "proper and full details",¹²¹ and sufficient information to support any of the conclusions that the applicants contend for.¹²² "Vague and generic allegations" that do not support a conclusion may consequently render an application defective.¹²³ Yet, as has been shown, the court in *WH* was ultimately willing to accept allegations of just such a nature when it confirmed the agreement in this case.

The criticism levelled at the judgment in *Ex parte WH and Others*¹²⁴ has necessarily raised questions about the appropriateness of the judiciary as the approving authority of surrogate agreements.

In countries such as Israel¹²⁵ and Western Australia, the approval is initially done by a multi-disciplinary body and then the parental status of the intending parents is confirmed with a parentage order issued by the court after the birth of the child. In terms of the 1996 Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Act of Israel,¹²⁶ the Approvals Committee is

115 As also discussed by Carnelley 2012 *De Jure* 184–185.

116 Paras 13 and 30.

117 Para 64.

118 Paras 21 and 77.3.

119 Para 70.

120 *Ex parte WH* 2011 6 SA 514 (GNP) para 73.

121 *In re Confirmation of Three Surrogate Motherhood Agreements* 2011 6 SA 22 (GSJ) para 16.

122 *Ex parte WH* 2011 6 SA 514 (GNP) paras 56–63.

123 Para 74.

124 2011 6 SA 514 (GNP).

125 One of the first very few countries in the world that adopted a comprehensive legislative scheme to regulate surrogacy: Weisberg *The birth of surrogacy in Israel* (2005) 5. Other countries include Greece, Australia and several states in the United States of America such as Virginia, New Hampshire and Illinois. See HccH (2012) 15.

126 According to Weisberg (2005) 4, the Act is sometimes also referred to as the "Embryo-Carrying Agreements Law", which is a more literal translation of the Hebrew title. An unofficial translation of the Act can be found in Annexure B (at 219) of the same book. The Act has been in operation since March 1996.

appointed by the Minister of Health and consists of a multi-disciplinary panel of seven members.¹²⁷ The Surrogacy Act 2008 of Western Australia provides for the prior approval of the surrogate motherhood arrangement by a Council, called the Western Australian Reproductive Technology Council, established under section 8 of the Human Reproductive Technology Act 1991 (HRT Act).¹²⁸ The Surrogacy Act of Western Australia sets out the requirements for a surrogacy arrangement and prescribes the processes.¹²⁹ Similar to the Approvals Committee in Israel, the Council is inter-disciplinary in nature. Not all countries with a pre-authorisation scheme therefore require *judicial* confirmation of the surrogate agreement.

Recommendations made by the South African *Ad hoc* Committee on Surrogate Motherhood, which to a large extent informed the surrogacy provisions in the Children's Act, are insightful in this regard.¹³⁰ Under the heading "Counselling and screening",¹³¹ the *Ad hoc* Committee recommended, in short, that all parties to the surrogacy agreement be subjected to a strict screening process before the agreement is implemented and a continuous process of counselling is followed

127 According to Weisberg (2005) 196, the Approvals Committee initially sat once or twice a month but, because of a decreasing demand, now meets only monthly. Approval may be granted conditionally if necessary. If any surrogate mother (partial surrogacy is prohibited in Israel) should wish to withdraw from the agreement and retain the custody of the child, the court will not approve the withdrawal unless it is satisfied that there has been a change of circumstances which justifies the birth mother's withdrawal of her consent and that this is not likely to have an adverse effect on the child's welfare. The court may not, however, approve a withdrawal from a surrogate motherhood agreement after the parentage order has been made. If the court approves the withdrawal it must also determine the birth mother's status as the child's mother and guardian and may also make provision for the child's status and relationship with the intended parents or to one of them.

128 The HRT Act regulates all assisted reproductive technology practices in Western Australia. The Commissioner of Health, subject to the Minister for Health, administers this Act. The HRT Act received Royal Assent on 8 October 1991 and came into full operation on 8 April 1993.

129 The 2009 Regulations to the HRT Act outline the requirements for an application, including medical assessments, psychological assessments, counselling requirements and legal advice for surrogacy participants. A parentage order cannot be granted without the Council having previously approved the arrangement.

130 After its first investigation into the regulation of surrogacy, the SALC published a report on surrogate motherhood (*Report on surrogate motherhood* Project 65 (1992)) in which it proposed a Bill on Surrogate Motherhood. The SALC's *Report on surrogate motherhood* was subsequently referred to a Parliamentary *Ad Hoc* Select Committee for further investigation and report. After consolidating the input of a variety of role players through written representations, public hearings, study tours conducted through SA, the USA and the UK, the *Ad Hoc* Select Committee completed its final report in 1999. The Report of the *Ad Hoc* Committee on *Report of the SALC on surrogate motherhood* (1999) was tabled in Parliament in March 1999 and referred to the Minister of Justice for further action. In the meantime the SALC had launched its investigation into the *Review of the Child Care Act* with the publication of a First Issue Paper 13 Project 110 in April 1998. To give effect to the vision of a single comprehensive children's statute, the SALC ultimately recommended in its Report on the *Review of the Child Care Act* Project 110 (2002) that the provisions contained in the previously "Proposed Bill on Surrogate Motherhood" be incorporated in a new comprehensive children's statute, duly amended as suggested by the *Ad Hoc* Select Committee and the Law Commission itself. The final provisions contained in the Children's Act are therefore the result of a protracted process of investigation and evaluation.

131 Report of the *Ad Hoc* Committee (1999) para F6.

before and after the conclusion and implementation of the surrogate agreement.¹³² The Committee recommended that the screening takes place six months prior to the agreement “as it is of cardinal importance that the parties’ social and psychological backgrounds are compatible and to determine their suitability for a surrogacy arrangement”.¹³³ Of special importance is the recommendation that the screening be done “by a State body or private bodies approved by legislation”, and that members of such a body include, *inter alia*, a social worker, a psychologist, a psychiatrist, a lawyer and a minister of religion.¹³⁴ According to the Committee’s recommendations,¹³⁵ the task of the screening body would have been to prepare a report on the fitness and suitability of the parties. The submission of the report to the court would have been a prerequisite for the confirmation of the agreement. The Committee also provided a detailed but open-ended check-list of factors or evidence pertaining to the surrogate mother and the commissioning parents that would have had to be contained in the report.¹³⁶

A multi-disciplinary body, committee or council consisting of experts in the field¹³⁷ may be an attractive alternative to the courts as the approving authority for surrogate agreements. Not only could the expertise of the body facilitate the screening of the parties, but it could be a considerably less costly procedure.¹³⁸ On the other hand, prior approval by such a body could very easily become a cumbersome bureaucratic process and create new hurdles for commissioning parents to overcome. Moreover, screening by such a body would necessitate the granting of a parental order after the birth of the child to secure the parental status of the commissioning parents.¹³⁹ South African law does not currently provide for the equivalent of a parental order. The closest to such an order would be a combined order in terms of sections 23 and 24 of the Children’s Act, conferring full parental responsibilities and rights on the commissioning parents.¹⁴⁰

132 *Idem* para 6(1).

133 *Ibid.*

134 *Idem* para 6(3).

135 *Idem* para 6(4).

136 *Idem* paras 6(5) and 6(6). As far as the surrogate mother was concerned, these factors and evidence included the physical and psychological suitability of the surrogate mother, her motivation for entering into the agreement, the fact that the surrogate mother is financially secure, proving that she is not using the arrangement as a source of income, the family circumstances of the surrogate mother and the interests of any descendant or adopted child of the surrogate mother (para 6(5)(a)–(e)). In respect of the commissioning parents the list included much the same evidence as mentioned in relation to the surrogate mother (para 6(6)(b)–(d)), but also included evidence as to “the incapacity of the commissioning parents to give birth to a living child or children and the permanency and irreversibility of that incapacity” (para 6(6)(a)).

137 In the nature proposed by the *Ad hoc* Committee and found in Israel and Western Australia.

138 Some commentators suggested that as an alternative to the court, the Family Advocate’s Office “will make the process less cumbersome and less costly than court proceedings”: *Report of the Ad Hoc Committee* (1999) para E6(4)(f).

139 This is currently the *modus operandi* in countries such as the UK. For an explanation of the way in which surrogacy is regulated in the UK, see para 3 above; Carnelley and Soni 2008 *Speculum Juris* 48–51; Carnelley 2012 *De Jure* 180–181.

140 S 23 allows the court to assign contact and care to interested persons. Commissioning parents would without a doubt qualify as interested persons. S 24 allows for the assignment of guardianship to such interested persons. For a detailed exposition, interpretation and application of these sections, see *CM v NG* 2012 4 SA 452 (WCC). The case concerned a dispute regarding the legal parentage of an artificially conceived child. The court

While such an order would for practical purposes place the commissioning parents in the same position as, for example, adoptive parents, they would not “for all purposes” in law be deemed to be the parents of the child.¹⁴¹ This means, for example, that the child will not qualify as a descendant/child for purposes of the law of intestate succession,¹⁴² the child would not automatically assume the name of the commissioning parents and no impediment to marriage or sexual intercourse would be created between the commissioning parents and the child born as a result of the surrogate arrangement.¹⁴³

Substituting the judiciary as the gatekeeper of surrogate arrangements in South Africa is therefore not recommended. However, as also proposed by the *Ad hoc* Committee on Surrogate Motherhood, the process relating to the screening of the parties needs to be refined. One possibility is to involve the Office of the Family Advocate, created in terms of the Mediation in Certain Divorce Matters Act.¹⁴⁴ The latter Act was originally intended to safeguard the interests of dependent minor children in divorce proceedings by requiring the Family Advocate to institute an enquiry and to furnish the court with a report and recommendations on the best interests of the child or children in question.¹⁴⁵ The involvement of the Family Advocate in cases requiring the determination of the child’s best interests has, however, become considerably wider in scope in terms of the Children’s Act.¹⁴⁶ Recommending the involvement of an already overburdened, understaffed and underfunded Family Advocate’s Office¹⁴⁷ would thus not seem to be feasible. Perhaps another possibility would be to require agencies or even infertility clinics or units to be accredited by the state before matching and

assigned full parental responsibilities and rights to the same-sex life partner of the biological mother of the child. The assignment was considered in the best interest of the child given the close bond that had developed between the child and the life partner of the mother.

141 Compare the effect of an adoption order in terms of s 242 of the Children’s Act.

142 A child can only inherit intestate from his or her natural parents or adoptive parents in terms of s 1(4)(e) of the Intestate Succession Act 81 of 1987.

143 See Louw (2009) 396–399 explaining the difference between adoption and the assignment of full parental responsibilities and rights by means of a combined ss 23 and 24 order.

144 24 of 1987.

145 S 4(1) of the Mediation in Certain Divorce Matters Act 24 of 1987.

146 In terms of the Children’s Act, the Family Advocate may become involved in any of the following circumstances: Where there is a dispute between the unmarried parents of a child concerning the automatic acquisition of parental responsibilities and rights by the father of the child (s 21(3)); when registering a parental responsibilities and rights agreement to see if the agreement is in the best interests of a child (s 22(5)); during an investigating into the best interests of a child in applications for contact or care (s 23), or in applications for the suspension, termination, extension or limitation of any or all parental responsibilities and rights (s 29(5)); when assisting parents to draw of a parenting plan (s 33(5)(a)); when providing mediation services in cases of lay-forums aimed at settling a matter out of court (s 49(1)(a)) and, lastly, when investigating the circumstances of a child or his or her care-givers at the request of the children’s court (s 62(1)). The Family Advocate also acts as the central authority in SA for purposes of applying the Hague Convention on International Child Abduction (s 276 of the Children’s Act).

147 See in this regard Van Zyl “The Family Advocate: 10 years later” 2000 *Obiter* 372; Glasser “Can the Family Advocate adequately safeguard our children’s best interests?” 2002 *THRHR* 74.

screening intending parents and surrogate mothers,¹⁴⁸ as required in the case of an adoption.¹⁴⁹ This would address some of the most serious concerns expressed by the court in the *WH* case regarding the use of intermediaries or agencies that facilitate surrogate arrangements.¹⁵⁰ In this way the state could streamline and regulate the process leading up to the application for confirmation of the surrogate agreement. Tighter regulation of the process must, however, not lead to additional hurdles being placed in the path of intending parents wishing to procreate with the help of a surrogate mother, and should therefore be considered with caution. As mentioned earlier, ideally a balance should be struck between the right of intending parents and surrogate mothers to make decisions regarding the manner in which they choose to procreate, on the one hand, and the protection of the best interests of the resultant child, on the other.

5 LIFTING THE COMPLETE BAN ON COMMERCIAL SURROGACY

Following the example of most countries in the world,¹⁵¹ South Africa prohibits commercial surrogacy for fear that it would lead to the commodification of babies because it could amount to baby selling if the surrogate mother stands to gain financially from the arrangement.¹⁵² Ensuring that the surrogate mother is not motivated by purely financial considerations furthermore would at least limit, according to the South African Law Reform Commission,¹⁵³ the possible

148 In accordance with the practice found in the UK where staff at infertility units provides services relating to the counselling and screening of parties involved in a surrogacy arrangement, the *Ad Hoc* Committee considered the possibility of formally licensing and registering suitably qualified and equipped infertility units in SA to perform surrogacy pregnancies: *Report of the Ad Hoc Committee* (1999) para E3(2)(g). The Committee considered the proposal of allowing existing or future IVF units to apply for registration that would be granted after examining the credentials and standard of the units. The Committee concluded that registration would ensure constant high standards of medical practice as well as professional people with the necessary experience performing this delicate procedure and would obviate the need for commercial agencies. The Committee was of the opinion that state-funded clinics should be established to assist infertile women who cannot afford to enter into a surrogacy agreement in accordance with the constitutional right to health care services, including reproductive health care in terms of s 27(1)(a) of the Constitution: *Report of the Ad Hoc Committee* (1999) para E9(9)(d).

149 S 250 of the Children's Act. See also Louw "Adoption of children" in Boezaart (ed) *Child law in South Africa* (2009) 160–162. Wepener J's suggestion in *In re Confirmation of Three Surrogate Motherhood Agreements* 2011 6 SA 22 (GSJ) para 16 that screening methods used in the adoption process could be employed for purposes of determining the suitability of the parties to a surrogate agreement must, however, be accepted with caution. Except for ultimately having the same effect – conferring legal parentage on the applicants – the process ensuring the protection of an existing child in the case of an adoption is very different from the process aimed at ensuring the future protection of an intended child born as a result of a surrogate motherhood agreement. It is important to remember that the original aim of the law was to avoid the intrusive screening process followed in the case of an adoption. Consequently there would be no point in making the approval process relating to the surrogate motherhood agreement as cumbersome as the screening process in the case of the adoption of a child.

150 Paras 30 and 66.

151 HccH (2012) 3.

152 SALC *Report on surrogate motherhood* (1992) paras 2.5 and 8.2.8.

153 *Idem* para 2.4.5. The SALC furthermore, held the view that the mere fact that compensation would only be enforceable in the case of legal surrogate motherhood, and then only to actual expenses and losses relating to the fulfilment and execution of the surrogate agreement, is already a strong disincentive for a prospective surrogate mother who is profit-orientated.

exploitation of economically-disadvantaged women by the wealthier members of the community. It could also pre-empt problems from arising in the event of the commissioning person or couple refusing to pay the agreed amount or to take the child, leaving the surrogate mother with an extra mouth to feed.¹⁵⁴ Criticism against this view was already voiced long before the Children's Act came into operation. Lupton was of the opinion that it is unfair and paternalistic for the law to deny women the freedom to decide how best to utilise their procreative ability and to fulfil their role in life.¹⁵⁵ Meyerson¹⁵⁶ argued quite forcefully that the prohibition of commercial surrogacy enforces moralistic beliefs that pose no real risk of harm to children,¹⁵⁷ and deems it an unjustifiable limitation on the surrogate mother's freedom of choice. Cockrell,¹⁵⁸ moreover, argued that the prohibition on commercial surrogacy might amount to an unjustified restriction on the constitutional right of the potential surrogate mother to engage in "economic activity" which was provided for in section 26(1) of the Interim Constitution.¹⁵⁹ Despite the fact that the Constitution, 1996 only recognises a right of every citizen "to choose their trade, occupation or profession",¹⁶⁰ it does not detract from what Van Heerden¹⁶¹ regards as the main point made by Cockrell, that –

"any restriction on the right to engage in a surrogacy agreement must be justified on some basis other than pure moralism or paternalism¹⁶² if it is to survive constitutional scrutiny. It has been forcefully argued that the prohibition on paid surrogacy is in fact difficult to justify on any such basis."¹⁶³

154 *Ibid*; *Ex parte WH* 2011 6 SA 514 (GNP) para 64.

155 Lupton "The right to be born: Surrogacy and the legal control of human fertility" 1988 *De Jure* 36 40. Clark "Surrogate motherhood: Comment on the South African Law Commission's report on surrogate motherhood (Project 65)" 1993 *SALJ* 769, does not support the blanket prohibition of commercial surrogacy either, suggesting (at 776): "With careful court monitoring and scrutiny for possible bribery and exploitation, the potential threat of abuse . . . might be averted."

156 Meyerson (1994) 132. Meyerson did, however, propose (143) that any fee paid to the surrogate should be approved by the state to prevent exploitation.

157 The lack of empirical research justifying the conclusion that commercial surrogacy is harmful to the resultant children has also been referred to by Millbank "The new surrogacy parentage laws in Australia: Cautious regulation or '25 brick walls'?" 2011 *Melbourne Univ LR* 165 168–169 in general, and at 194 in particular. The problems relating to the use of the best interest standard of the resultant child have already been discussed in para 3 above.

158 Cockrell "The law of persons and the Bill of Rights" in *Bill of Rights compendium* (1996) para 3E38. A later updated version of these comments contained in para 3E28 of the loose-leaf publication, which appeared in March 2000, does not contain any direct reference to commercial surrogacy.

159 The interim Constitution of the Republic of South Africa, Act 200 of 1993, the predecessor of the Constitution.

160 In s 22 of the Constitution.

161 Van Heerden "Legitimacy, illegitimacy and the proof of parentage" in Van Heerden *et al* (eds) *Boberg's Law of persons and the family* (1999) 348 fn 80.

162 See Meyerson (1994) 123–134, taking great pains to show the ineffectiveness of such arguments.

163 In the USA, New Jersey became the first state to address commercial surrogacy in the case of *In re Baby M* 537 A2d 1227 (1988). See Krim "Beyond Baby M: International perspectives on gestational surrogacy and the demise of the unitary biological mother" 1996 *Annals of Health Law* 193ff. The New Jersey Supreme Court ruled in this case that "the payment of money to a 'surrogate' mother was illegal, perhaps criminal, and potentially degrading to women" (1234). The extent to which commercial surrogacy is recognised and regulated in the USA is canvassed by Drabiak *et al* "Ethics, law, and

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In addition to the problematic issue of justifying the prohibition of commercial surrogacy and the possible unconstitutionality thereof, the prohibition is also difficult to enforce. The court in *Ex parte WH*¹⁶⁴ warns that commercial surrogacy can quite easily be disguised and payments in contravention of the law can just as easily be included under the guise of legal and legitimate payments.¹⁶⁵ Moreover, the distinction between commercial surrogacy and altruistic surrogacy is by no means clear-cut.¹⁶⁶ If a surrogate is unemployed prior to conception but can claim “reasonable expenses”, including loss of earnings for the arrangement,¹⁶⁷ one wonders whether this arrangement is still “altruistic”.¹⁶⁸ The prohibition on commercial surrogacy may also drive the practice underground.¹⁶⁹ The objections against the prohibition on commercial surrogacy have gained momentum in recent times,¹⁷⁰ after it became clear that restrictions placed on infertile couples in this regard could force commissioning couples to seek surrogate mothers elsewhere,¹⁷¹ in countries with a more flexible approach to commercial surrogacy,¹⁷² or with no restrictions at all on the practice of surrogacy, as in India.

For purposes of granting a parental order in terms of the UK HFEA,¹⁷³ the court must, *inter alia*, be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants, “unless [otherwise] authorised by the court”.¹⁷⁴ The latter qualification consequently enables a court in the UK to exercise its discretion in so far as the authorisation of payments is concerned.¹⁷⁵ Because of this discretion, it has been

commercial surrogacy: A call for uniformity” 2007 *J of Law, Medicine and Ethics* 300 308, who call for uniform federal standards to “prevent harmful jurisdictional-forum shopping by decreasing the possibility for agencies to exploit potential surrogates, parents, and discrepancies in the law for their own financial gain”. For a comparative analysis of surrogacy laws in the USA and the UK for purposes of a proposed model statute for Louisiana, see Garrity “Comparative analysis of surrogacy law in the United States and Great Britain – a proposed model statute for Louisiana” 2000 *Louisiana LR* 809.

164 2011 6 SA 514 (GNP) para 64.

165 Listed in s 301(2) of the Children’s Act.

166 See also Millbank 2011 *Melbourne Univ LR* 193–194, referring to other authors (mentioned in notes 173 and 174) who have suggested that the distinction is “confusing and untenable and that ‘payment’ is not an effective proxy for exploitation, which can and should be addressed in other ways”.

167 S 301(2)(b) of the Children’s Act allows for claims for loss of earnings suffered by the surrogate mother.

168 See Glossary of terms annexed to HccH (2012).

169 Speaking about the approach to surrogacy in the UK, Freeman 1999 *Medical LR* 20, is of the opinion that “[i]f parliament agrees with Brazier and denies women the opportunity to be financially rewarded for surrogacy services, unregulated surrogacy with all the evils attendant upon such underground activities will emerge”.

170 See eg Patton “Buying a newborn: Globalization and the lack of federal regulation of commercial surrogacy contracts” 2010 *Univ of Missouri-Kansas City LR* 507 529–531; Millbank 2011 *Melbourne Univ LR* 206–207; HccH (2012) 7.

171 Also called “reproductive tourism”: Horsey and Sheldon “Still hazy after all these years: The law regulating surrogacy” 2012 *Medical LR* 67 79. See also Millbank 2011 *Melbourne Univ LR* 190–191.

172 Such as the UK and Israel, as explained in more detail below.

173 S 54(1)(a) of the HFEA.

174 S 54(8) of the HFEA.

175 The Gestational Surrogacy Act in Illinois, USA, allows for commercial surrogacy contracts with *ex post facto* judicial approval. According to s 25(d) of this Act, a gestational

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suggested that the approach in the UK is broader and more flexible than in most other countries curtailing payments to surrogate mothers.¹⁷⁶ The flexibility in the UK's approach to surrogacy has been both commended and criticised. On the positive side, the approach would allow intending parents to be granted legal parentage even where reasonable expenses have been exceeded, for example in cases of children born overseas as a result of paid surrogacy. The UK courts have in several cases¹⁷⁷ been willing to do exactly that, arguing that the welfare (best interests) of the child clearly trump any public policy considerations banning commercial surrogacy.¹⁷⁸ The UK approach to payments has been considered worthy of emulation in both Australia¹⁷⁹ and the United States of America.¹⁸⁰ Critics, however, decry the approach as making a mockery of the ban on commercial surrogacy. It is argued that, if parental orders are to be granted based on the best interests of the child, regardless of whether the ban on commercial surrogacy has been contravened, the only "punishment" for practicing commercial surrogacy (*ie* the refusal to grant a parental order to intending parents), is removed.¹⁸¹ It effectively means that people who pay more expenses know that the chances are that those deals will be ratified afterwards. As a result the UK's attempt to entrench the prohibition on commercial surrogacy has been said to "lack legal teeth", "cuts against concerns for child welfare" making it "visibly ineffective".¹⁸²

The problems experienced in the UK with regard to the enforcement of the ban on commercial surrogacy are, however, unlikely to arise in South Africa. The pre-authorisation requirement in terms of the Children's Act,¹⁸³ makes the surrogacy model adopted in South Africa far more inflexible. The court does not have the discretion to authorise payments other than those listed in section 301 of the Children's Act.¹⁸⁴ If the court for that reason cannot confirm the agreement,

surrogacy contract shall be presumed enforceable for purposes of State law even though it contains an agreement of the intended parents to pay the gestational surrogate reasonable compensation or reimburse the gestational surrogate for reasonable expenses (including, without limitation, medical, legal, or other professional expenses) related to the gestational surrogacy and the gestational surrogacy contract.

176 See Millbank 2011 *Melbourne Univ LR* 198.

177 *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam); *Re S (Parental Order)* [2009] EWHC 2977 (Fam); *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam); *Re IJ (Foreign Surrogacy Agreement Parental Order)* [2011] EWHC 921 (Fam); *In Re X and Y (Parental Order: Retrospective Authorisation of Payments)* [2011] EWHC 3147 (Fam) and *D and L (Surrogacy)* [2012] EWHC 2631 (Fam). See also Carnelley 2012 *De Jure* 187–188.

178 Horsey and Sheldon 2012 *Medical LR* 80; Millbank 2011 *Melbourne Univ LR* 198.

179 See Millbank 2011 *Melbourne Univ LR* 200–2006, discussing the complex and uncertain position of children born overseas through surrogacy.

180 Millbank 2011 *Melbourne Univ LR* 206–207.

181 Horsey and Sheldon 2012 *Medical LR* 80. The reason for such an expectation is explained by Millbank 2011 *Melbourne Univ LR* 200: "[i]t would be difficult to imagine a set of circumstances in which, by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make a parental order".

182 Horsey and Sheldon 2012 *Medical LR* 87. See also Freeman 1999 *Medical LR* 20 and Carnelley 2012 *De Jure* 188.

183 S 292(1)(e) read with s 296(1)(a).

184 In terms of s 301(2), the following payments are allowed: (a) compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the

the agreement will be invalid and unenforceable.¹⁸⁵ The surrogate mother, as the woman who gave birth to the child, will be the legal parent of the child.¹⁸⁶ South African law, moreover, does not have the equivalent of a parental order, as explained earlier.¹⁸⁷ Thus, apart from adopting the child, the commissioning parents would be unable to acquire full parental status in respect of the child they commissioned.

The Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Act of Israel allows the Approvals Committee to approve commercial surrogate arrangements. The payments provision¹⁸⁸ allows approval of

“monthly payments to the birth mother in order to cover real expenditures connected with the implementation of the agreement, including costs of legal counselling and insurance, as well as compensation for inactivity, suffering, lost income or temporary loss of earning ability, or any other reasonable compensation”.

Despite the liberal approach to commercial surrogacy in Israel, the implementation thereof has not been without its problems. There are contradicting views regarding the extent to which the Israeli laws are capable of allowing surrogate mothers to be adequately compensated for their gestational services, on the one hand, and protecting them against exploitation, on the other. Weisberg,¹⁸⁹ for example, shows the success of the laws implemented in Israel with reference to the stories of women who actually became surrogate mothers. However, according to a more recent Status Report published by the Clinic for Legal Feminism at the University of Haifa,¹⁹⁰ the law is unsatisfactory because it fails to ensure that surrogate mothers are adequately compensated for their gestational services.¹⁹¹ According to the Report,¹⁹² this is especially true in the case of low-income women who become surrogates, where limits are imposed on the size of the payment that they can receive to reduce their motivation for applying to render such a potentially harmful service. The Report¹⁹³ regards these limits inappropriate and, rather than protecting the women from physical exploitation, regards them as contributing to their financial exploitation. The Report¹⁹⁴ is also critical

birth of the child and the confirmation of the surrogate motherhood agreement; (b) loss of earnings suffered by the surrogate mother as a result of the surrogate motherhood agreement; (c) insurance to cover the surrogate mother for anything that may lead to death or disability brought about by the pregnancy. Reasonable payments for *bona fide* professional legal or medical services rendered with a view to the confirmation or execution of a surrogate motherhood agreement are also lawful (s 301(3)).

185 S 292(1)(e) of the Children's Act.

186 S 297(2). The parental status of the surrogate's spouse or partner vis-à-vis the child in the case of an invalid agreement is not addressed in the Children's Act.

187 See para 4 above.

188 S 6 of the 1996 Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Act.

189 Weisberg (2005) 201, with reference to interviews with Israeli surrogate mothers themselves.

190 Lipkin and Samama in Rosenbluth (ed) *Surrogacy in Israel: Status report 2010 and proposals for legislative amendment* (2010). The report is available at <http://bit.ly/17vUNRt> (accessed 15 March 2013).

191 The clinic recommended as a first option a total ban on the practice of surrogacy: Lipkin and Samama (2010) 3 and 17.

192 Lipkin and Samama (2010) 22.

193 *Ibid.*

194 *Ibid.*

of the practice in terms of which the greater share of the payment to the surrogate only becomes payable after a live baby is born after the 35th week of pregnancy. The result of the practice is that surrogate mothers who have a spontaneous abortion, or who do not become pregnant at all, receive a very low fee for their suffering and for the risks to which they were exposed. The Report¹⁹⁵ therefore proposes a cancellation of all legal limitations on the sum payable to the surrogate mother. Furthermore, in the case of surrogacy that is not performed for altruistic reasons, it is proposed¹⁹⁶ that no agreement should be allowed in which the sum falls below a minimum fee that will be determined according to the risks to which the surrogate mother will be exposed. Fair distribution of payments should be ensured, which will reflect the time invested and the degree of exposure to risks and physical discomfort at any given time.¹⁹⁷ In addition, contractual stipulations that limit the surrogate mother's right to make future claims should not be allowed.¹⁹⁸ The intended parents should bear the cost of risks for which the surrogate mother cannot be insured.¹⁹⁹

Based on the problems experienced in Israel, it is recommended that payments (including payments made for the gestational services provided by the surrogate) should be regulated in South Africa in terms of a set minimum and maximum fee. Alternatively, the approval of payments not expressly sanctioned by the Children's Act could be placed in the discretion of the court. Not only would such discretion introduce a measure of flexibility in the confirmation process, but it could also induce parties to become more open about the financial implications of their arrangement and give courts a better chance of preventing the exploitation of the surrogate mother.

6 INTERNATIONAL SURROGATE ARRANGEMENTS

6.1 Definition, background and problems

According to the Hague Conference on Private International Law (HccH),²⁰⁰ international surrogate agreements have become a "worldwide phenomenon". The HccH defines an international surrogate agreement as:

"A surrogate agreement entered into by intending parent(s) resident in one State and a surrogate resident (or sometimes merely present) in a different State. Such an arrangement may well involve gamete donor(s) in the State where the surrogate resides (or is present), or even in a third State. Such an arrangement may be a traditional or gestational surrogacy arrangement and may be altruistic or commercial in nature."²⁰¹

The problems occurring internationally as a result of the increasing use of international surrogacy arrangements include the often-uncertain legal parentage and nationality of the children born. According to the HccH,²⁰² children may be "marooned, stateless and parentless" in the state of their birth, with their families

195 *Idem* 23.

196 *Ibid.*

197 *Ibid.*

198 *Ibid.*

199 *Ibid.*

200 HccH (2012) 6. The report is to be followed up with a final report in April 2013 which will incorporate the views of members expressed at the 2012 council meeting and beyond.

201 Definition in Glossary annexed to HccH (2012).

202 HccH (2012) 4.

resorting to desperate, sometimes criminal, measures to attempt to take them “home”. Furthermore, if they are able to travel home, children may be left with “limping” legal parentage, with the consequent child protection concerns that this involves.²⁰³ As noted in the introduction of the HccH Report on International Surrogacy,²⁰⁴ these and other child protection issues arising as a result of such arrangements implicate the fundamental rights and interests of children. Examples of such rights include 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 right to acquire a nationality and to preserve his or her identity.²⁰⁵ According to the HccH Report,²⁰⁶ the evolution of international surrogacy arrangements can be attributed to a convergence of scientific (new ART techniques), demographic (increase in infertility), legal and social developments. The prohibitive or restrictive legal approach of many states to surrogacy (in particular, *commercial* surrogacy), combined with the liberal approach of a minority, means that prospective intending parents are often using surrogacy services abroad because they are prohibited or restricted at home.²⁰⁷ Other motivating factors suggested by the HccH Report may be lower costs or fewer perceived risks abroad.²⁰⁸ According to the Report, the growth in these “cross-border”²⁰⁹ arrangements is, in addition, undoubtedly facilitated by the Internet, other modern means of communication, and the ease of international travel.²¹⁰ A further layer of complexity, however, is the fact that the growth of international surrogacy in some states also results from the ready availability of poor surrogates.²¹¹ The Report²¹² sees the unease expressed by some, concerning the practice of engaging surrogates in states with emerging economies to bear children for more wealthy intending parents from other states, as having dimensions similar to those discussed in the preparatory reports on inter-country adoption. The Report²¹³ makes some tentative suggestions on how to address the difficulties regarding the legal parentage of children born as a result of international surrogacy arrangements and ensuring protection for the parties involved. One possible approach suggested by the Report²¹⁴ is to consider the issue within the broader context of a comprehensive future instrument concerning the private international law aspects of the establishment and contestation of legal parentage.

6.2 South Africa’s stance on international surrogacy arrangements

The underlying aim of the provisions included in the Children’s Act was to prevent couples from concluding surrogacy contracts in other jurisdictions where

203 See also Gruenbaum “Foreign surrogate motherhood: *Mater semper certa erat*” 2012 *Am J of Comparative Law* 475 500–503.

204 *Ibid.*

205 The Constitution guarantees similar rights for children in SA. See ss 9(3), 28(2), and 28(1)(a) of the Constitution.

206 HccH (2012) 6–7.

207 *Idem* 7.

208 *Ibid.*

209 *Ibid.*

210 *Ibid.*

211 *Ibid.*

212 *Ibid.*

213 *Idem* 25–30.

214 *Idem* 28.

the procedures are less cumbersome, while at the same time excluding the possibility of foreigners abusing legalised surrogate motherhood in South Africa.²¹⁵ In terms of the Children's Act, at least one of the commissioning parents must be domiciled in South Africa.²¹⁶ Although the surrogate mother and her husband or partner, if any, must as a general rule also be domiciled in the Republic at the time of entering into the surrogate agreement,²¹⁷ the Children's Act makes it possible for the courts to condone non-compliance with this requirement "on good cause shown". Whilst it is not certain what the courts would regard as "good cause", it is at least possible to envisage a situation where a court may be willing to condone the foreign domicile of the surrogate mother, based on the unavailability of a suitable surrogate in South Africa.²¹⁸ In this way pre-authorisation of an international surrogate arrangement by a South African court is thus not completely ruled out. However, should the commissioning parents (of which at least one is domiciled in South Africa) not obtain prior approval for such an arrangement, the surrogate mother, and not the commissioning parents, would be deemed to be the legal parent of the child in terms of South African law.²¹⁹

6.3 Ramifications for commissioning parents in *Ex parte WH*²²⁰

In the case of *WH* all the parties were domiciled in South Africa at the time of the confirmation of the agreement.²²¹ South African law would thus apply and place the parental status of the commissioning parents beyond doubt in South Africa. Seeking recognition of the commissioning parents' parental status in their countries of birth (in this case Dutch and Danish, respectively), however, turned out to be a problem. In the Netherlands the courts have refused to recognise legal parentage established in terms of foreign birth certificates where no mother is mentioned in the birth certificate.²²² Vink and De Groot²²³ describe the position under Danish law as remarkable – in case of birth abroad, outside of Denmark, Danish citizenship is not acquired by the child born out of wedlock of a Danish father and a non-Danish mother. Danish law, therefore, would make it impossible for the commissioning father in the *WH* case²²⁴ to apply for Danish citizenship on behalf of the child borne by the surrogate mother. Ironically, the only way in which the commissioning parents in the *WH* case could overcome the problem was to adopt the child.²²⁵ For the commissioning parents in the *WH*

215 Louw (2009) 337.

216 S 292(1)(c).

217 S 292(1)(b). Surrogate motherhood agreements concluded in other countries will thus not be enforceable in SA.

218 Louw (2009) 337.

219 S 292(1)(e) read with s 297(2). See also Carnelley 2012 *De Jure* 188.

220 2011 6 SA 514 (GNP).

221 Para 15.

222 See HccH (2012) 21 fn 125, referring to the "National report on surrogacy: The Netherlands" compiled by Curry-Sumner and Vonk.

223 See Vink and De Groot "Birthright citizenship: Trends and regulations in Europe" EUDO Citizens Observatory and Robert Schuman Centre for Advanced Studies in collaboration with Edinburgh University Law School (2010) 11. The study is available at <http://bit.ly/15mJRZP> (accessed 16 Nov 2012).

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

225 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. See also Vink and De Groot (2010) 18–19; Gruenbaum 2012 *Am J of Comparative Law* 503–504.

case, the enabling surrogacy legislation in South Africa could thus ultimately not secure their parental status in their countries of birth.

7 CONCLUSION

The court's attempt at providing guidance to parties who wish to make use of surrogacy as a way to procreate in *Ex parte WH*²²⁶ is laudable, more so considering the fact that the regulations to the Children's Act are silent on the issue. Without in any way implying that the confirmation of the agreement in this case was anything but justified, the court seemed to be ambivalent in its interpretation of some of the statutory requirements. The judgment displays a lack of appreciation for the importance of certain crucial aspects relating to the agreement and its confirmation. Moreover, the court failed to apply its own expressed criteria to the application being considered *in casu*. As a result, much of the benefit that could have been gained by the court in the *WH* case has been compromised. Enacting regulations to supplement the provisions contained in Chapter 19 of the Children's Act could ensure a consistent approach in confirmation proceedings. Consideration should be given to enacting measures that would prescribe the process to be followed in assessing the suitability of the parties. The involvement of agencies in surrogate arrangements should be addressed in express terms. The continued prohibition on commercial surrogacy should be reconsidered. Measures introducing more flexibility in this regard are recommended. If the superficial way in which the court appraised the surrogate agreement in the *WH* case becomes the norm, courts confirming surrogate agreements may very likely become exactly what they have tried at all costs to avoid – a rubber stamp for the private agreements between the parties.²²⁷

226 2011 6 SA 514 (GNP).

227 See *In re Confirmation of Three Surrogate Motherhood Agreements* 2011 6 SA 22 (GSJ) para 12 and *Ex parte WH* 2011 6 SA 514 (GNP) para 72. The implied criticism of the *WH* case in the conclusion reached by Carnelley 2012 *De Jure* 188 is much harsher: "What should be avoided is the seeming judicial-toleration of contraventions of the legislation as a result of lack of rigor in scrutinising the court documents, or worse still, deliberately maintaining a blind-eye thereto."