

Legal issues relating to the use of surrogate mothers in the practice of assisted conception

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The statutory regulation of surrogate motherhood in the Children's Act 38 of 2005 is fraught with practical, legal and ethical problems. Healthcare professionals specialising in assisted conception are often confronted with practical scenarios for which the Children's Act does not provide clear answers. The purpose of this article is to briefly examine some of these questions against the background of the relevant legislation and recent case law.

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Healthcare professionals specialising in assisted conception are often confronted with practical scenarios for which the Children's Act 38 of 2005, which regulates surrogate motherhood, does not provide clear answers. Consider the following scenario (resembling a real situation):

Dr X, a fertility specialist with consulting rooms in South Africa, is approached by Mr and Mrs A, the commissioning parents, who wish to enter into a contract with Miss B, a surrogate mother. It appears that Mrs A's infertility is irreversible and permanent. Mr and Mrs A are both domiciled in Lesotho, although Mrs A spends three weeks a month in South Africa, where she is permanently employed. The surrogate mother, also a Lesotho national and a sister of Mr A, has accompanied Mr and Mrs A to Dr X's consulting rooms. Dr X is uncertain whether he is permitted in terms of South African law to assist the infertile couple and artificially inseminate Miss B with Mr A's sperm. Mr and Mrs A also enquire whether Miss B has the right to terminate the surrogate motherhood agreement, should Dr X be able to assist them, and what their rights in respect of a valid surrogate motherhood agreement are. This is the first time a patient has brought her own surrogate mother to Dr X, as he normally uses surrogate mothers who are recruited by an agency through web advertising.

The above scenario is certainly not an extraordinary one, but poses very specific and often intricate legal questions with which professionals specialising in artificial insemination are frequently confronted.

Surrogate motherhood is currently comprehensively regulated in South African law following the promulgation of chapter 19 of the Children's Act on 1 April 2010.¹ Prior to this, altruistic surrogacy arrangements were subject to contract law and legislation and regulations pertaining to artificial insemination,² with the status of the child born as a result of such an arrangement determined by the now repealed Children's Status Act.³ One very important consequence of the new statutory position is that the Children's Act

limits surrogacy to persons who are domiciled in South Africa, with a limited exception, as will be discussed below, making South Africa a less attractive 'reproductive tourism' destination.⁴ A second is that any commercial surrogacy agreement is considered invalid and unenforceable, as well as a crime.⁵

This article briefly discusses the relevant legal requirements that relate to the conclusion of surrogate agreements generally, including reference to recent case law in this regard, followed by a discussion of the legal requirements that relate to the surrogate mother specifically, including the issue whether the surrogate mother has the right to terminate the surrogate motherhood agreement. Next considered is the artificial insemination of the surrogate mother, which must comply with provisions from both the Children's Act and relevant health legislation and regulations. In the final instance, the article investigates the kind of payments that may be made to surrogate mothers, based on recent case law, as well as the question whether agencies may advertise for the services of surrogate mothers. From this discussion, a few ethical concerns emerge, which are briefly referred to.

Legal requirements relating specifically to the surrogate motherhood agreement

The Children's Act contains specific requirements relating to the contents of surrogate motherhood agreements. These agreements must be in writing and confirmed by the High Court.⁶ This specific requirement makes it clear that a written contract between a surrogate mother and commissioning parents will be invalid if not confirmed by the High Court. In addition, a surrogate motherhood agreement will also be invalid unless:

- the agreement is signed by all the parties thereto (including the partner or spouse of the surrogate mother, if applicable)⁷
- the agreement is concluded in South Africa⁸
- at least one of the commissioning parents, or in the case of only one commissioning parent, this person, is domiciled in South Africa at the time that the agreement is entered into⁹

- the surrogate mother (and her husband or partner, if relevant) are domiciled in South Africa at the time of entering into the contract¹⁰
- the agreement is confirmed by the High Court within whose jurisdiction the commissioning parent(s) are domiciled or habitually resident.¹¹

If good cause is shown, the court may dispense with the requirement that the surrogate mother and her spouse, civil union partner or permanent partner must be domiciled in South Africa.¹² Louw¹³ argues that if the commissioning parents have a foreign relative who is willing to act as altruistic surrogate mother, the court may be willing to dispense with the domicile requirement in respect of the surrogate mother.

No agreement will be confirmed by the High Court if the partner or spouse of the surrogate mother, as well as the partner or spouse of the commissioning parent, is not a party to the agreement and has not provided his/her consent to the arrangement in writing.¹⁴ The court may confirm the agreement if a spouse or partner of the surrogate mother (who is not genetically related to the child to be born) unreasonably withholds the relevant consent.¹⁵

A surrogate agreement must be confirmed by the court before the surrogate mother is artificially inseminated.¹⁶ Artificial insemination may also not be performed on the surrogate mother after the lapse of 18 months after the confirmation of the agreement by the court.¹⁷ The surrogate motherhood agreement may also not be terminated after the artificial insemination of the surrogate mother.¹⁸ The artificial insemination of the surrogate mother must also be specifically authorised by the court which validates or confirms the surrogate motherhood agreement.¹⁹ There are additional legal requirements regarding the artificial insemination process, not referred to in the Children's Act. These will be discussed below.

A court may also not confirm the agreement if the agreement does not make adequate provision for the contact, care, upbringing and general welfare of the child, who is entitled to be born in a stable environment. The child's position in the event of the death of one or both of the commissioning parents, or their divorce or separation before the birth of the child must be considered.²⁰ The interests of the child to be born as a result of an agreement are of paramount importance, and regard must be taken of the personal circumstances and family situations of all the relevant parties.²¹

In addition to the domicile requirement relating to the commissioning parent referred to above, a court will not confirm a surrogate motherhood agreement unless the commissioning parent or parents are unable to give birth to a child and this condition must be permanent and irreversible.²²

Recent case law relating to the contents of surrogate motherhood agreements

Recent judgments clearly illustrate that the requirements relating to surrogate motherhood agreements are far from clear. There are

presently no regulations promulgated in terms of the Children's Act relating to surrogacy. In view of this shortcoming, the Deputy Judge President of the South Gauteng High Court has issued a practice directive dealing with these applications.²³

The first unreported judgment from the South Gauteng High Court, *Ex Parte Applications for the Confirmation of three Surrogate Motherhood Agreements (GSJ)*,²⁴ underlines some of the practical problems relating to surrogacy arrangements.²⁵ In this case Judge Wepener, with Judge Victor concurring, 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. This judgment emphasises that court confirmation of the agreement is not a mere 'rubber stamp' and that the court, in considering all the facts on which the application is based, will regard the interests of the child to be born of paramount importance.²⁶ Expert reports need to be very detailed and comprehensive and to provide enough factual exposition to support an expert's recommendation.²⁷ In this case, a psychologist's on-line evaluation of one of the commissioning fathers²⁸ was found to be unacceptable, as it reinforced an impression of 'babies for sale on order'.²⁹

A more recent judgment of the North Gauteng High Court³⁰ in October 2011 provides more clear instruction regarding the contents of these agreements.³¹ In this judgment, Justices Tolmay and Kollapen stated that specific expenses in respect of the surrogate mother should be motivated in the agreement, as a danger exists that 'generic payments for expenditure without specificity may well run the risk of disguising the payment of compensation'.³² Full details regarding the agency that facilitates the surrogate motherhood agreement should be disclosed.³³ In addition, full details regarding the surrogate mother's financial background and position should be investigated and explained, as should a comprehensive psychological report regarding the suitability of the surrogate mother. The last-mentioned must include details regarding how handing the baby over to the commissioning parents will affect her; as well as a full medical profile detailing the possible dangers that the pregnancy may hold for her or the intended child.³⁴ Any disease that may be transmitted from mother to child, such as HIV, should also be disclosed.³⁵ The court ruled that the origin of the gametes (not mentioning the identity of the gamete donor) must also be stated.

The determination of the suitability or not of the commissioning parents or the surrogate mother is one that may be subjective. Quite rightly, the court cautioned that courts should ensure that when exercising their discretion in this regard, personal perceptions not influence any decision on the suitability of a person to either accept parenthood or act as a surrogate mother.³⁶ However, previous criminal convictions, particularly relating to violent crimes or crimes of a sexual nature, must be disclosed, including the circumstances surrounding these.³⁷ The judgment also provides a list of issues that the affidavit should contain. Some of these are:³⁸

- proof that all the requirements set out in the Children's Act are satisfied, with documentary proof where relevant
- details of any previous applications for surrogacy; the division in which the application was brought, whether this was granted

and/or refused, and if refused, the reasons for the refusal should be stated

- a clinical psychologist's report in respect of the commissioning parents and a separate report relating to the surrogate and her partner
- a medical report regarding the surrogate mother, which must include the details referred to above
- details, and proof of payment of any compensation for services rendered, either to the surrogate herself or to the intermediary, the donor, the clinic or any third party involved in the process
- all agreements between the surrogate and any intermediary or any other person involved in the process
- full particulars, if any agency was involved, of any payment to such agency
- details, if any, if the commissioning parents have been charged with or convicted of a violent crime or a crime of sexual nature.

Specific legal requirements relating to the surrogate mother

Apart from the surrogate mother's consent to the agreement, her husband or partner (including a same-sex partner),³⁹ in instances where the surrogate mother is not the genetic parent of the child, e.g. in cases of full surrogacy,⁴⁰ must also consent to the surrogate agreement and must become a party to the agreement.¹⁵ If this husband or partner unreasonably withholds his or her consent, the court may confirm the surrogate motherhood agreement without consent.¹⁵

The Children's Act lists a number of legal requirements specifically relating to the surrogate mother, who:

- must be legally competent to enter into a surrogate motherhood agreement⁴¹
- must, in all respects, be a suitable person to act as surrogate mother⁴²
- must understand and accept the legal consequences of the surrogate motherhood agreement and the relevant provisions of the Children's Act, including her rights and obligations in terms of the agreement and the provisions of the Act⁴³
- must not be using surrogacy as a source of income⁴⁴
- must have entered into the surrogate motherhood agreement for altruistic and not for commercial reasons⁴⁵
- must have a documented history of at least one pregnancy and viable delivery⁴⁶
- must have a living child of her own⁴⁷
- is obliged to hand over the child that is born as a result of the agreement, as soon as reasonably possible after the birth of the child to the commissioning parent(s).⁴⁸

Does the surrogate mother have the right to terminate the agreement?

A surrogate mother, if the genetic parent of the child (in other words, in cases of partial surrogacy),⁴⁹ has the right to terminate the surrogate motherhood agreement at any time prior to the lapse of 60 days after the birth of the child by filing notice to the court to this effect.⁵⁰ A court will only terminate the confirmation of the agreement between the surrogate mother and the commission-

ing parents if convinced that the surrogate mother's decision is a voluntary one and that she understands the consequences of the termination, and may issue any other order that it deems fit in the best interests of the child. The surrogate mother will incur no liability if she exercises this right, except to compensate the commissioning parents for the expenses they incurred in terms of the agreement, as provided for in the Act.⁵¹

These provisions clearly distinguish between full and partial surrogacy in the context of acquiring parental rights. In the case of full surrogacy, the surrogate motherhood agreement will confer full parental rights to the commissioning parents from the moment of the child's birth, whereas in the case of partial surrogacy, these are technically suspended for a 'cooling-off' period of 60 days following the birth of the child, during which period the surrogate mother has the right to terminate the contract and keep the child.

Some have argued that forcing the surrogate mother to hand over the child against her will amounts to 'sacrificing a woman's reproductive autonomy to the principle *pacta servanda sunt*',⁵² even in cases of full surrogacy. The specific enforcement of a surrogate motherhood agreement against the will of the surrogate mother may also violate her rights to dignity, privacy and bodily autonomy, including the child's right to dignity.⁵³

The surrogate mother, or her partner, spouse or relatives, have no right of parenthood or care of the child born as a result of such agreement.⁵⁴ The surrogate mother, or her partner, spouse or relatives, also has no right of contact with the child so born, unless so indicated in the surrogate motherhood agreement.⁵⁵

Legal requirements relating to the artificial insemination of the surrogate mother

The artificial fertilisation of the surrogate mother must also comply with the relevant regulations published in terms of the National Health, which came into operation on 2 March 2012.⁵⁶ Prior to the promulgation of these regulations, guidance had to be sought from draft regulations.⁵⁷ Similar to the 2012 regulations relating to artificial fertilisation, the 1986 regulations relating to artificial fertilisation were not intended to include surrogacy within their ambit, but did not preclude the practice either.⁵⁸ Specific regulations relating to surrogate motherhood, issued in terms of the Children's Act, are desperately needed, as those relating to artificial fertilisation only regulate the artificial fertilisation process itself.

It is necessary to briefly note the difference between the concepts 'artificial insemination' and 'artificial fertilisation', as the different sets of regulations refer to both terms. Although the 1986 regulations referred to 'artificial insemination' in the description of the title of the regulations, the Human Tissue Act referred to the 'artificial fertilisation of a person'.⁵⁹ The 2012 regulations, similar to the draft regulations of 2011, define 'artificial fertilisation' as 'the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of a female person for the purpose of human reproduction and includes artificial

insemination, *in vitro* fertilisation, gamete intrafallopian tube transfer, embryo intrafallopian transfer or intracytoplasmic sperm injection'. The same regulations, similar to the 2011 regulations, refer to 'artificial insemination' as the 'placing of male gametes (sperm) into the female reproductive tract by means other than copulation'. Artificial insemination is thus more limited than the wide term of artificial fertilisation and one specific assisted reproductive technique or method.

In terms of the 1986 regulations, artificial fertilisation could only be performed by a medical doctor or a person acting under his supervision,⁶⁰ with the written consent of the woman and her husband or partner,⁶¹ after having complied with prescribed formalities relating to patient and donor files, tests, examinations, enquiries, consents, information, and so forth.⁶² Prior to the promulgation of the 2012 regulations, and in view of the limitations of the 1986 regulations, reproductive specialists followed the draft 2007 and 2011 regulations relating to the artificial fertilisation of persons, which mirrored international practice standards and requirements.⁵⁷ The 2012 regulations, almost identical to the 2011 regulations, stipulate that only three zygotes or embryos (or less) may be transferred to the recipient (e.g. surrogate mother) during an embryo transfer procedure, unless a medical reason requires otherwise.⁶³ If the surrogate mother provides her own ova for the creation of the embryo, she must comply with specific requirements (e.g. relating to age, medical, genetic and psychological history) regarding gamete donors.⁶⁴ The regulations stipulate that ova taken from a woman younger than 18 years may not be used in artificial insemination,⁶⁵ whereas the 2008 Practice Guidelines issued by the Southern African Society of Reproductive Medicine and Endoscopic Surgery (SASREG) regarding Gamete Donation,⁶⁶ state that donors younger than 21 years should first be evaluated by a psychologist. The preferable age of female donors is between 21 and 34 years. The same guidelines caution that oocyte donation treatment performed on postmenopausal women, e.g. women older than 50 years, be considered with caution. This means that if a surrogate mother provides her own eggs (e.g. partial surrogacy), she should not be younger than 18 years old, but preferably between 21 and 34 years. If she only carries the child for the commissioning parents (full surrogacy), she should preferably not be older than 50 years. The Tzaneen grandmother Pat Anthony, who made history in 1987 when she gave birth to her own grandchild, was the exception and it is unlikely that a similar situation will arise in South Africa in future.

What kind of payments may be made to the surrogate mother?

The statutory provisions relating to surrogacy are clear on payments in respect of surrogacy. The type of expenses that are recognised clearly point to a prohibition of commercial surrogacy. Apart from the fact that no person in relation to a surrogate motherhood agreement may promise or give to another person, or receive from another person, any compensation, money or reward of any kind,⁶⁷ no promise or agreement for the payment of any compensation to the surrogate mother or any other person, including for the execution of such an agreement will be enforceable,⁶⁸ except in the case of a claim for:

- compensation for expenses directly related to the artificial fertilisation of the surrogate mother, the resulting pregnancy, the birth of the child, and the confirmation of the surrogate motherhood agreement by the High Court⁶⁹
- loss of earnings incurred by the surrogate mother as a result of the surrogate motherhood agreement,⁷⁰ or
- insurance to indemnify the surrogate mother for death or disability that may result from the pregnancy and the birth of the child she agreed to carry.⁷¹

Medical or legal professionals providing a *bona fide* professional service relating to the surrogate motherhood agreement (e.g. drawing up of the contract) and its execution (e.g. the artificial insemination of the surrogate mother), are entitled to reasonable compensation for their services.⁷²

Despite these provisions, a commissioning couple launched a court application in January 2011 in the Durban High Court to compel the surrogate mother carrying their child to keep her part of the agreement, as it had transpired that this woman had made a 'wish list', which included a Volkswagen Polo motor vehicle and an amount of R100 000. The surrogate mother, in an agreement following the application, agreed to surrender her rights to the child and to receive R10 000 a month for the period of her pregnancy, as well as R70 000 for her loss of income. The commissioning parents would cover the medical expenses relating to the pregnancy and birth for a period up to 3 months after the birth.⁷³

May agencies advertise for the services of surrogate mothers?

The advertising (for profit or with the view to compensation) of a woman's desire to enter into a surrogate motherhood agreement is specifically prohibited.⁷⁴ This means that it is illegal to broker surrogacy arrangements on a commercial basis. However, a woman is free to offer her services to enter into a surrogate motherhood agreement that complies with the provisions of the Act and in terms of which she will only be compensated for reasonable expenses provided for in the Act. Advertisements for egg donors in South Africa are common and offer to pay between R5 000 and R6 000 per donation.⁷⁵ The same agencies recruiting egg donors normally also advertise for surrogate mothers,⁷⁶ but refer the process to the relevant artificial insemination clinics and lawyers specialising in surrogacy arrangements.⁷⁷

A few ethical concerns

With the artificial insemination of the surrogate mother in cases of full surrogacy, more than one embryo (but not more than three) may be transferred to the surrogate mother's uterus, which may result in the birth of more than one surrogate child. Whether the birth of surrogate twins or triplets is desirable or in the best interests of these children, is a separate question that must be carefully considered.

The surrogacy provisions clearly require that a child contemplated in terms of a valid surrogate motherhood agreement will need to be genetically related to both the commissioning parents, or if

this is impossible as a result of medical or biological or other valid reasons, related to at least one of the commissioning parents.⁷⁸ This provision is deemed harsh and discriminatory by practising reproductive specialists, as it is possible that both the commissioning parents may suffer from (male or female) infertility. Some legal scholars, however, argue that to allow surrogacy where the commissioning parent is or both are infertile would amount to a 'commissioned adoption' and would hence be unacceptable.⁷⁹ It would also prevent the practice of commissioning parents 'shopping around' with the intention to create children with specific characteristics. An ordinary adoption for these persons is not always possible, as Pretorius⁸⁰ points out. There may be long waiting lists for new-born white babies or the person or couple may be too old to qualify as an adoptive parent(s). Such a provision may also infringe an infertile person's right to make decisions regarding reproduction, entrenched in section 12(2)(a) of the South African Constitution, including his or her rights to dignity and privacy.⁸¹

It is also likely that some surrogate mothers, despite the Act limiting payment to reasonable expenses only, may be desperate enough to enter into these contracts for the limited financial benefit that they may receive. This concern has also been expressed in the recent judgment in the North Gauteng High Court. The court mentioned the deep socio-economic disparities and the prevalence of poverty as factors that may increase the possibility of abuse of underprivileged women who enter into these agreements solely for the financial benefit,³⁰ however limited this may be. The cost of full surrogacy is high (currently estimated around R200 000),⁸² which makes this clearly an option for the affluent only. This illustrates how difficult it is to achieve a nuanced balancing of the rights and interests of all the parties to a surrogate arrangement. The best interests of the child, of course, are of paramount importance.⁸³

Conclusion

The clarity that chapter 19 of the Children's Act has brought in respect of the regulation of surrogate motherhood is welcomed. However, as the discussion above has shown, there are still some practical legal and ethical issues that remain, despite the guidance found in recent judgments.

To return to the scenario described at the outset of this article:

The domiciliary requirement relating to the commissioning couple discussed in this article makes it clear that as neither Mr A nor Mrs A is domiciled in the Republic, Dr X will be unable to artificially inseminate Miss B, who is also a foreign national and not domiciled in the Republic. The High Court will not confirm any surrogate motherhood agreement concluded between Mr and Mrs A and Miss B, which means that the agreement will be unenforceable and invalid. As a consequence, the surrogate mother (Miss B) will be the legal parent of the child that will be born, even if Mr A donates the sperm for the artificial insemination of Miss B. Dr X also needs to ensure that the agency that recruits the surrogate mother complies with the legal requirements discussed above.

References

1. Children's Act No. 38 of 2005. Chapter 19 came into effect on 1 April 2010.
2. The regulations regarding the artificial insemination of persons and related matters, issued in terms of the Human Tissue Act o. 65 of 1983. These regulations were published under General Notice R1182 in Government Gazette 10283 of 1986-06-20 and amended by General Notice R1354 in Government Gazette 18362 of 1997-10-17.
3. Children's Status Act 82 of 1987.
4. Heaton J. International surrogacy: South Africa (unpublished draft report submitted to the Family Law Committee of the International Law Association). August 2011:1. The author is grateful to Professor Heaton for making this report available for the purpose of this article.
5. Children's Act, sections 292(1), 295(c)(iv), 295(c)(v), 297(2), 301(1) and 303(2).
6. Children's Act, section 292.
7. Children's Act, section 292(1)(a).
8. Children's Act, section 292(1)(b).
9. Children's Act, section 292(1)(c).
10. Children's Act, section 292(d).
11. Children's Act, section 292(e).
12. Children's Act, section 292(2).
13. Louw A. Surrogate motherhood. In: Davel CJ, Skelton AM, eds. Commentary on the Children's Act. Cape Town:: Juta, 2007:19-8 (loose-leaf).
14. Children's Act, sections 292(1) and 292(2).
15. Children's Act, sections 293(2) and 293(3).
16. Children's Act, section 296(1)(a).
17. Children's Act, section 296(1)(b).
18. Children's Act, section 297(1)(e), subject to sections 292 and 293.
19. Children's Act, section 303(1).
20. Children's Act, section 295(d).
21. Children's Act, section 295(e).
22. Children's Act, section 295(a). The reference to the permanent and irreversible condition causing the infertility must be distinguished from instances where single men or same-sex commissioning couples are unable to have children as a result of physical reality instead of medical indications. Commissioning parents may include a single person, spouses, same-sex or heterosexual civil union partners, as well as same-sex or heterosexual life/permanent partners, provided that he/she/they are permanently and irreversibly unable to give birth. See the Children's Act, section 295(a), read with the definition of 'commissioning parent' in section 1(1) of the Act, sections 292(1)(c), 293(1) and 294 of the Act, and also section 13 of the Civil Union Act 17 of 2006.
23. Practice Directive 5 of 2011.
24. Unreported case no 2011/153, 2011/154, 2011/679, 2011/1314, 2011/1315, 2011/1316, 1-3-2011.
25. Carnelley M, Soni S. Surrogate motherhood agreements. *Speculum Juris* 2008;2:36.
26. Ex Parte Applications for the Confirmation of three Surrogate Motherhood Agreements (GSJ), par 12.
27. Ex Parte Applications for the Confirmation of three Surrogate Motherhood Agreements (GSJ), par 12.
28. Ex Parte Applications for the Confirmation of three Surrogate Motherhood Agreements (GSJ), par 21.
29. Ex Parte Applications for the Confirmation of three Surrogate Motherhood Agreements (GSJ), par 21.
30. Case number 29936/11, in the ex parte matter between WH, UVS, LG, and BJS, delivered early in October 2011 (still unreported). In this case, the first and second applicants, the commissioning parents, are two married males, who are Dutch and Danish citizens respectively, and domiciled in South Africa. The author is grateful to Judge Tolmay of the North Gauteng High Court, for making the judgment available for the purpose of this article.
31. Ex parte matter between WH, UVS, LG and BJS (case number 29936/11), par 9. The Court invited the Bar, the Law Society and the Centre for Child Law to make submissions as amicus curiae to the court regarding the correct approach in surrogacy agreements, specifically where the genetic material used is not that of the parties; the approach, if any, if same-sex couples apply for a surrogate motherhood agreement to be made an order of court; and the appropriate steps that should be followed and factors that should be considered in the best interests of the child (par 10).
32. Ex parte matter between WH, UVS, LG and BJS (case number 29936/11), par 29.
33. Ex parte matter between WH, UVS, LG and BJS (case number 29936/11), par 66: 'An affidavit by the agency should also be filed containing the following: (a) the business of the agency, (b) whether any form of payment is paid to or by the agency in regard of any aspect of the surrogacy, (c) what exactly the agency's involvement was regarding the (i) introduction of the surrogate mother, (ii) how the information regarding the surrogate mother was obtained by the agency and (d) whether the surrogate mother received any compensation at all from the agency or the commissioning parents.'

34. Ex parte matter between WH, UVS, LG and BJS (case number 29936/11), par 67.
35. Ex parte matter between WH, UVS, LG and BJS (case number 29936/11), par 67.
36. Ex parte matter between WH, UVS, LG and BJS (case number 29936/11), par 69.
37. Ex parte matter between WH, UVS, LG and BJS (case number 29936/11), par 69.
38. Ex parte matter between WH, UVS, LG and BJS (case number 29936/11), par 77.
39. Before the enactment of the Children's Act, the Constitutional Court held in *J v Director-General, Department of Home Affairs* 2003 (5) SA 621(CC), that if the ovum of one woman and a donor's sperm have been used for the artificial insemination of another woman, and the two women are living together in a permanent life partnership, a child born of such insemination is deemed for all purposes to be the legitimate child of the two women.
40. Full surrogacy takes place when an embryo is created using the gametes of one or both of the commissioning parents (or donors, or a combination of these persons). The surrogate mother is thus not genetically related to the child that she carries.
41. Children's Act, section 295(c)(i).
42. Children's Act, section 295(c)(ii).
43. Children's Act, section 295(c)(iii).
44. Children's Act, section 295(c)(iv).
45. Children's Act, section 295(c)(v).
46. Children's Act, section 295(c)(vi).
47. Children's Act, section 295(c)(vii).
48. Children's Act, section 297(1)(b).
49. Partial surrogacy applies in cases where the surrogate mother's ovum or ova is/are fertilised using the sperm of the commissioning man or male donor. The surrogate mother in this instance is both the genetic and gestational mother of the child.
50. Children's Act, section 298(1).
51. Children's Act, section 301.
52. Clarke B. Surrogate motherhood: Comment on the South African Law Reform Commission's Report on Surrogate Motherhood (Project 65). *South African Law Journal*, 1993;110:777.
53. Cockrell A. Bill of Rights Compendium. Butterworths, 1996: par 3E28 (updated loose-leaf).
54. Children's Act, section 297(1)(c).
55. Children's Act, section 297(1)(d).
56. See Regulations relating to artificial fertilisation of persons, published under Government Notice R175 in Government Gazette 35099 on 2 March 2012. Prior to the promulgation of these regulations, artificial fertilisation was regulated in terms of the Regulations regarding the artificial insemination of persons and related matters, published under Government Notice R1182 in Government Gazette 10283 of 20 June 1986, as amended by Government Notice R1354 in Government Gazette 18362 of 17 October 1997.
57. These draft regulations were first published on 5 January 2007 in Government Gazette 29527, General Notice R8. A series of draft regulations issued in terms of chapter 8 of the National Health Act, including those relating to artificial fertilisation, were again published for public comment on 1 April 2011 (Government Gazette 34159 General Notice R262). There are slight differences between the two draft sets of 2007 and 2011, and minor differences between the 2011 and 2012 regulations.
58. Clarke B. Surrogate motherhood: Comment on the South African Law Reform Commission's Report on Surrogate Motherhood (Project 65). *South African Law Journal* 1993;110:769.
59. The 1986 regulations only defined 'in vitro fertilisation', and described this as 'the bringing together outside the human body of a male and a female gamete and the placing of the zygote in the womb of a female person'. The 2012 Regulations, however, define 'in vitro fertilisation' as 'the process of spontaneous fertilisation of an ovum with a male sperm outside the body in an authorised institution'.
60. Regulations 3 (a doctor must remove or withdraw the gametes) and 11(1), 12 and 13 (a doctor must effect the artificial fertilisation) of the 1986 Regulations, as amended in 1997. For more detail, see Slabbert MN. Medical law (South Africa). In: Blanpain, ed. *International Encyclopaedia of Laws* 2011: paragraphs 226-231.
61. Regulations 5(d) and 8(1) of the 1986 Regulations.
62. Regulations 4, 5, 6, 9 and 10 of the 1986 Regulations.
63. See regulation 12 of the 2012 Regulations. This resembles regulation 12 of the 2011 Regulations relating to artificial fertilisation of persons. Interestingly, one difference between the 2011 and 2012 Regulations is that the 2012 Regulations state that it should be ascertained, before ova is harvested, that no more than six children have been conceived through the artificial fertilisation of a person with the gametes of that specific donor (see regulations 6 and 7). The 2011 draft Regulations referred to five children (in regulations 6 and 7).
64. See regulation 7 of the 2012 Regulations. See also regulation 5 of the 1986 Regulations; regulation 7 of the 2011 Regulations.
65. Regulation 10(1)(c) of both the 2012 and 2011 Regulations.
66. Guidelines available at <http://www.fertilitysa.org.za/TreatmentGuidelines/ReproductiveMedicine.asp> (accessed 10 August 2011).
67. Children's Act, section 301(1).
68. Children's Act, section 301(2).
69. Children's Act, section 301(2)(a).
70. Children's Act, section 301(2)(b).
71. Children's Act, section 301(2)(c).
72. Children's Act, section 301(3).
73. Unreported case. See Broughton T. Unborn baby a hostage to greed. *The Mercury* 2011; 19 January.
74. Children's Act, section 303(2).
75. See, for example, <http://baby2mom.co.za/page/11597/Become-Egg-Donor-#%2FPage%2F11597%2FEgg-Donors> (accessed 2 August 2011).
76. See <http://www.surrogatemom.co.za/#%2FPage%2F11609%2FSurrogacy> (accessed 2 August 2011).
77. It is uncertain whether a referral fee applies in these instances.
78. Section 294. The provision refers to the use of the gametes of the commissioning parents(s).
79. See Meyerson D. Surrogacy arrangements. In: Murray C, ed. *Gender and the new South African constitutional order*. Cape Town: Juta, 1994:121-123.
80. Pretorius D. Practical aspects of surrogate motherhood. *De Jure* 1991;24:59-61; Pretorius D. Surrogate motherhood: A detailed commentary on the draft bill. *De Rebus* 1996;117-119.
81. Sections 10 and 14 of the Constitution.
82. According to Jenny Currie, founder of the Baby2mom Egg Donation and Surrogacy Programme. For more detail, see <http://baby2mom.co.za/page/11597/Become-Egg-Donor-#%2FPage%2F11597%2FEgg-Donors> (accessed 10 August 2011).
83. See *Jooste v Botha* 2000 (2) SA 199 (T), where the court states that this standard is a general guideline only, and not a rule of horizontal application. If it is interpreted to override all other legitimate interests of parents, siblings and other parties, this would prevent the imprisonment or dismissal of a parent where this is not in the child's best interests (at 210C-E).