

**THE FEASIBILITY OF COMPENSATED SURROGACY IN
SOUTH AFRICA: A COMPARATIVE LEGAL STUDY**

by

LOUIS MARÉ (LL.B)

**THE FEASIBILITY OF COMPENSATED SURROGACY IN SOUTH AFRICA: A
COMPARATIVE LEGAL STUDY**

by

LOUIS MARÉ

submitted in partial fulfilment of the requirements for the degree of

MASTER OF LAWS WITH SPECIALISATION IN PRIVATE LAW

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROF JM KRUGER

DATE: 27 JANUARY 2016

The following is a study and comparison of the various types of surrogacy currently being implemented locally and internationally and the laws surrounding it. I discuss the current South African legal framework on surrogacy and summarise the relevant legislative provisions whilst also further discussing the provisions prohibiting commercial surrogacy and the reasons behind them. Thereafter an investigation follows into other countries in respect of their individual laws regulating surrogacy and more specifically, commercial surrogacy. I discuss how these countries attempted to regulate commercial surrogacy and which regulations were a success and which weren't. The various international laws and regulations surrounding surrogacy as well as commercial surrogacy is then compared and discussed in a South African context. A discussion on the intertwined constitutional rights of the surrogate mother, commissioning parents and child follows and in conclusion I offer some recommendations on how to go about legalising commercial surrogacy safely and successfully implementing it free from exploitation.

Acknowledgment

I would like to express a great appreciation to Prof. JM Kruger, without whom I would have never graduated. You were there every step of the way and your timely and meticulous advice as well as your scholarly guidance were indispensable during my candidature. Furthermore, I would like to thank the University of South Africa for allowing me to pursue this qualification.

To my parents, Frik and Elmarie Maré, thank you for the never-ending love and support... and funding! Without your push, this would not have been accomplished. Always there in my hour... And every minute of need!! Your teachings and advice will remain with me always. *Lief vir julle twee!*

To my pillar of strength, Lara Jane Maré, thank you for all the long nights of brainstorming my theories and ideas during the research and writing hereof. I thank you for all the times you had to talk me off the edge as well as your never-ending support, patience and encouragement. Your genuine interest and insights assisted with the shaping of this dissertation. For the always putting my needs first, I cannot thank you enough. You truly are the amazing wife behind a very mediocre man. Love you wife.

KEY TERMS

Surrogacy; Commercial surrogacy; Compensated surrogacy; Rights of the surrogate mother; Rights of the commissioning parents; Surrogacy regulations

CONTENTS	PAGE
CHAPTER 1 – INTRODUCTION	1
1.1 PROBLEM STATEMENT	1
1.2 PURPOSE OF STUDY	4
1.3 RESEARCH METHODOLOGY	5
1.4 OVERVIEW OF DISSERTATION	5
CHAPTER 2 – SURROGACY IN SOUTH AFRICA	7
2.1 INTRODUCTION TO SURROGACY	7
2.2 SURROGACY IN SOUTH AFRICA	9
2.2.1 Introduction	9
2.2.2 The relevant provisions of the Children’s Act 38 of 2005	10
2.3 CONCLUSION	15
CHAPTER 3 – COMPARATIVE STUDY	16
3.1 INTRODUCTION	16
3.2 INDIA	18
3.2.1 Introduction	18
3.2.2 Introduction of the new Bill	18
3.2.3 The <i>Baby Manji</i> case	19
3.2.4 Conclusion	19
3.3 THAILAND	20
3.3.1 Prior to February 2015	20
3.3.2 Ensuing problems	21
3.3.3 Thailand’s solution	23
3.3.4 Conclusion	23
3.4 RUSSIA	25
3.4.1 Introduction	25

3.4.2	The Russian way	25
3.4.3	The new proposed draft Bill	26
3.4.4	Conclusion	27
3.5	THE UNITED STATES OF AMERICA (USA)	27
3.5.1	Introduction	27
3.5.2	California	29
3.5.3	Florida	30
3.5.4	Illinois	31
3.5.5	Conclusion	31
3.6	COLLECTIVE CONCLUSION	32
 CHAPTER 4 – THE INTERTWINED HUMAN RIGHTS OF THE SURROGATE MOTHER, COMMISSIONING PARENTS AND THE CHILD		 34
4.1	INTRODUCTION	34
4.2	THE SURROGATE MOTHER	34
4.3	THE COMMISSIONING PARENTS	38
4.4	THE CHILDREN	40
4.5	LIMITATIONS	42
4.6	CONCLUSION	43
 CHAPTER 5 – FINAL CONCLUSION AND RECOMMENDATIONS		 45
5.1	INTRODUCTION	45
5.2	THE PARTIES	45
5.3	THE SURROGACY AGENCY	49
5.4	THE SURROGACY AGREEMENT	50
5.5	CONCLUSION	51
 BIBLIOGRAPHY		 53

CHAPTER 1

INTRODUCTION

1.1 PROBLEM STATEMENT

According to a study published in 2012, it is estimated that more than 48 million couples worldwide suffer from infertility.¹ These couples are desirous of having children of their own but are for some or other medical reason unable to conceive naturally. They are faced with a limited choice on how to proceed. On the one hand they have the option of adoption, but some feel that they want their own flesh and blood and that adoption will not satisfy this desire. This is a problem shared by homosexual couples, although of course not for medical reasons. In cases of infertility due to some medical conditions artificial insemination is an option worth trying. If that fails, however, there are even fewer options available to the wanting couple. In most cases their last resort is to attempt surrogacy.

In South Africa surrogacy is governed by Chapter 19 of the Children's Act 38 of 2005 (hereinafter referred to as "the Children's Act"). It stipulates that a surrogacy agreement is an absolute necessity and furthermore governs the requirements necessary to validate such an agreement. Furthermore it provides for when doctors will be allowed to effect the actual insemination. Finally, the chapter deals with the rights of the surrogate mother and commissioning parents specifically regarding termination of the surrogacy agreement, the effects of such a termination, the termination of the pregnancy and the prohibition of compensation. It is currently illegal in South Africa to directly or indirectly compensate the surrogate mother, apart from the expenses incurred as a direct result of the pregnancy (for example

¹ Mascarenhas M *et al* "National, Regional, and Global Trends in Infertility Prevalence Since 1990: A Systematic Analysis of 277 Health Surveys" (2012) *PLoS Med* 1.

doctors' appointments, pre-natal vitamins, loss of income and insurance for anything that might lead to death or disability as a result of the pregnancy).²

Finding a suitable surrogate mother willing to participate for free is not an easy task.³ The main reason for this is simply that only a very small minority of people in the world are prepared to subject their bodies to the tolls and dangers related to a pregnancy purely for the benefit of someone else. This effectively means that couples requiring the services of a surrogate mother are dependent on the goodwill of another person without whom they will be unable to have a child that is biologically their own. Commercial surrogacy solves the problem of a scarcity of surrogate mothers. There are numerous countries around the world where commercial surrogacy is legal.⁴ This means that surrogate mothers are readily available in those countries to offer their services for a specified fee.⁵

Apart from solving the problem of a scarcity of surrogate mothers, commercial surrogacy has numerous other advantages for both the country and the surrogate mother concerned. It can be linked to the growth of those countries' economies but also to the surrogate mother's personal circumstances. For example, the Confederation of Indian Industry estimates that in India alone, the fertility tourism industry is generating around \$2.3 billion a year.⁶ This money is not only used to better their medical facilities, but also the lives of the women that sign up to be surrogates. It is no secret that the majority of the women that agree to be surrogate mothers hail from well under the poverty line. These women have little to no money to support themselves and their families. In addition, general health care is severely

² In terms of s 301(2) of the Children's Act 38 of 2005 ("the Children's Act").

³ Watson "Growing a baby for sale or merely renting a womb: Should surrogate mothers be compensated for their services?" 2007 *Whittier Journal of Child and Family Advocacy* 530-531.

⁴ India, Russia, the Ukraine, Thailand and some states in the United State of America.

⁵ Points "Commercial surrogacy and fertility tourism in India – The case of baby Manji" 2009 *The Kenan Institute for Ethics at Duke University* 3.

⁶ Kambli 2013-11-08 *Indian Express* "Surrogacy in India: Shedding its secrecy" <http://healthcare.financialexpress.com/market-section/2139-surrogacy-in-india-shedding-its-secrecy> (Date of use: 27 August 2015).

lacking. These women are unable to access health care due to, among other things, their social and economic status.⁷ They are left to fend for themselves. The compensation they receive from being a surrogate mother drastically improves their circumstances. In some cases the surrogates use the money to pay for their children's education, buy a house, start or expand a business.⁸ Furthermore, they receive excellent private health care during their pregnancies. India is not the only country to legalise compensated surrogacy. It is also legal in countries such as Russia, the Ukraine, Thailand and even some states in the United States of America.⁹

Commercial surrogacy may also be regarded as a constitutional imperative. Choosing one's occupation is a constitutional right.¹⁰ Feminists, although divided on this specific topic, have been fighting for equality for women and for women to be allowed to use their bodies, more specifically their reproductive systems, as they please.¹¹ If they choose, free from any duress, to have someone else's baby for an agreed upon fee, it should be respected.

Commercial surrogacy is not without disadvantages. It opens the door for exploitation and human rights violations. However, these can be avoided if surrogacy is properly regulated by legislation. Currently in South Africa there are numerous laws and procedures in place to protect the interests of both the surrogate mother and the resulting child. For example, doctors are only allowed to start the surrogacy process once the surrogacy agreement has been validated by

⁷ Deogaonkar "Socio-economic inequality and its effect on healthcare delivery in India: Inequality and healthcare" 2004 *Electronic Journal of Sociology* <http://sociology.org/content/vol8.1/deogaonkar.html#27> (Date of use: 27 August 2015).

⁸ Rathee "Surrogacy offers opportunities for upward mobility to many needy families" (2014) <http://www.indiamedicaltimes.com/2014/02/25/surrogacy-a-blessing-for-many-impoverished-families/> (Date of use: 8 May 2014).

⁹ Henaghan "International surrogacy trends: How family law is coping" 2013 *Australian Journal of Adoption* 2.

¹⁰ Constitution of the Republic of South Africa, 1996 s 22 ("the Constitution").

¹¹ Lieber "Selling the womb: Can the feminist critique of surrogacy be answered?" 1992 *Indiana Law Journal* 205.

the court.¹² Consequently the surrogacy agreement is thoroughly scrutinised by the High Court and only once the court is satisfied will it grant the order. Therefore there are already safeguards in place in South Africa. It will be fairly simple to amend these laws and procedures to accommodate commercial surrogacy and provide proper protection for the mother and child.

This dissertation will examine the feasibility of commercial surrogacy in the South African context. It will consider the various relevant constitutional provisions and international law provisions, and reach a conclusion on whether the limitation of the surrogate mother's constitutional rights brought about by the ban on commercial surrogacy is justified. It will also examine the legislative measures that have been implemented in countries where commercial surrogacy is legal, and the outcomes of those measures. If the conclusion is reached that commercial surrogacy is feasible in the South African context, recommendations will be made for the amendment of South Africa's legislative measures to govern the whole process effectively.

1.2 PURPOSE OF STUDY

The purpose of this study is to compare the laws of the various foreign jurisdictions where commercial surrogacy is legal, with the current South African laws. The further purpose is to determine the feasibility of commercial surrogacy in South Africa, with reference to the Constitution of the Republic of South Africa, 1996 and the relevant international law provisions, and to make recommendations on how to regulate the process effectively. Should these suggestions be implemented, the process of commercial surrogacy will be made a well-regulated and a mutually beneficial agreement which is free from exploitation and other abuse. This will mean that women who wish to offer their services as surrogates will be fairly compensated for their services. Regulations governing the surrogacy agreement,

¹² In terms of s 296(1) of the Children's Act.

the selection process, the medical clearance, and the surrogacy agencies, which must first be complied with, will all make a huge contribution towards a system free from abuse. The same applies to the implementation of stricter prerequisite criteria for potential surrogate mothers.

1.3 RESEARCH METHODOLOGY

The research methodology that will be used in this dissertation is a literature study. Local and international books, journals, articles, legislation and case law will be consulted.

The envisaged research is a comparative legal study of the feasibility of compensation for surrogate mothers. The main comparison will focus on South Africa, India and some states in the United States of America. India is well-known as the world leader in commercial surrogacy as well as fertility tourism.¹³ The United States of America is very interesting and rich for discussion and comparison mainly due to the laws surrounding surrogacy differing in each state. This in turn leads to voluminous discussions on the topic, some of which could be utilised for comparisons with the South African laws.

1.4 OVERVIEW OF DISSERTATION

What is to follow is a brief introduction, in chapter 2, to the surrogacy process in South Africa, which will entail a discussion and comparison of the various types of surrogacy currently being implemented in medical practice. This will be followed by a detailed look at the current South African legal framework on surrogacy. The relevant legislative provisions will be summarised whilst further discussing the provisions prohibiting commercial surrogacy and the reasons therefore. After the current South African legal perspective on surrogacy, and more specifically its view

¹³ Witzleb “Surrogacy in India: Strong demand, weak laws” in Gerber & O’Byrne K (eds) *Surrogacy, Law and Human Rights* (2016) 168.

on commercial surrogacy, has been thoroughly discussed, an investigation will be launched in chapter 3, into commercial surrogacy in other countries around the world. The main countries to be discussed will be India, Russia, Thailand and some states in the United States of America (notably California, Illinois and Florida). The motivation in those countries that led to the implementation of commercial surrogacy contra the international public norm will be examined, as well as the positive and negative aspects resultant from the implementation of commercial surrogacy as evidenced by those countries. The positive and negative aspects that will be highlighted from the study on the laws of foreign jurisdictions allowing for commercial surrogacy will be compared and discussed in a South African context. The intertwined constitutional rights of the surrogate mother commissioning parents and child will be the focus of the discussion in chapter 4. Finally, in chapter 5, this study will draw to a conclusion by summarising the most important points and by offering some recommendations on how to go about legalising commercial surrogacy or at least offer some suggestions on how to safely and successfully implement it free from exploitation.

CHAPTER 2

SURROGACY IN SOUTH AFRICA

2.1 INTRODUCTION TO SURROGACY

The legal definition of surrogacy is “[a]n arrangement in which a woman (‘the carrying mother’) agrees to bear a child and to hand over that child, on birth, to another person or persons (‘the commissioning parents’)”.¹⁴ There are two basic types of surrogacy and they are referred to as “gestational surrogacy” and “traditional/partial surrogacy”. Both entail the use of the commissioning father’s or a donor’s sperm, but only the former entails the use the commissioning mother’s egg. Accordingly, only gestational surrogacy allows for the possibility of commissioning parents to conceive a child which is 100% genetically their own. Partial or traditional surrogacy only makes use of the commissioning father’s or donor sperm and will therefore require the use of a donor egg to produce a fertilised embryo which can be sourced from the surrogate herself.¹⁵

Gestational surrogacy relies on a method called “in vitro fertilisation (IVF)” to create the embryo which is to be implanted into the surrogate mother’s womb. This method entails using the harvested eggs of the commissioning mother or a donor and the semen of the commissioning father or that of a donor. This method is commonly referred to as the “Test-Tube Baby Method”.¹⁶ The egg is harvested from either the commissioning mother or a donor. Thereafter the egg is placed in a laboratory dish together with the sperm of the commissioning father or a donor, commencing the fertilisation stage. If fertilisation is successful, the resulting embryo is inserted into the surrogate mother’s womb, where it will grow and develop into

¹⁴ Oxford *Dictionary of Law* 6 ed (2006) 524.

¹⁵ Brinsden “Gestational surrogacy” 2003 *Human Reproduction Update* 483.

¹⁶ Gupta “Women’s bodies: The site for the ongoing conquest by reproductive technologies” 1991 *Issues in Reproductive and Genetic Engineering* 93-107.

the commissioning parents' baby. The surrogate mother will carry the commissioning parents' baby to term and after giving birth, hand the baby over to the commissioning parents.

It goes without saying that the resulting baby will only be 100% genetically related to the commissioning parents if their own gametes are used during the fertilisation stage. However, in some cases one of the commissioning parents might be infertile, necessitating the use of a donor egg or sperm. In that case the resulting baby will be genetically related to only one of the commissioning parents.¹⁷

In instances where the surrogate mother is used as a donor, she is simply artificially inseminated with the sperm of the commissioning father instead of harvesting an egg from her and artificially fertilising it. Again, this will only result in one of the commissioning parents, namely the father, being genetically related to the resulting baby. In this scenario the surrogate mother will be genetically related to the resulting baby. She will be the baby's mother in every way, except legally, due to the surrogacy agreement. This method is called traditional/partial surrogacy.¹⁸

Of course, in the event of the commissioning parents both being infertile to such an extent that neither of their gametes will successfully effect fertilisation, they will have to make use of an egg and sperm donor or better put, an embryo donor.¹⁹ Therefore the resulting baby will be completely unrelated to the commissioning parents and the surrogate mother, not dissimilar from the position created by the adoption of a child. A baby born as a result of this method could theoretically have five different parents.²⁰ However, for the purposes of this study I will only look into

¹⁷ Lieber 1992 *Indiana Law Journal* 207.

¹⁸ *Ibid.*

¹⁹ American Society for Reproductive Medicine *Third-party Reproduction: Sperm, Egg, and Embryo Donation and Surrogacy* (2012) 12.

²⁰ The sperm donor, the egg donor, the commissioning father, the commissioning mother, and the surrogate mother.

the problems, and the possible solutions to these problems, created by gestational surrogacy.

2.2 SURROGACY IN SOUTH AFRICA

2.2.1 Introduction

As stated above,²¹ surrogacy is governed by Chapter 19 of the Children's Act. The legal position prior to the Children's Act was not very clearly defined. In fact, three different pieces of legislation were used to indirectly govern the process.²² These were the Children's Status Act,²³ the Human Tissue Act,²⁴ and the Child Care Act.²⁵ The main section of the Children's Status Act that regulated artificial insemination read as follows:

- “5(1)(a) Whenever the gamete or gametes of any person other than a married woman or her husband have been used with the consent of both that woman and her husband for the artificial insemination of that woman, any child born of that woman as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of that woman and her husband as if the gamete or gametes of that woman or her husband were used for such artificial insemination.
- (b) For the purposes of paragraph (a) it shall be presumed, until the contrary is proved, that both the married woman and her husband have granted the relevant consent.”

This consequently meant that the surrogate mother and her husband would be considered to be the natural parents of the child. This is obviously not what any of the parties involved desired. The surrogate mother suddenly legally became a

²¹ See par 1.1 above.

²² Nicholson “Surrogate motherhood agreements and their confirmation: A new challenge for practitioners?” 2013 *De Jure* 513.

²³ 82 of 1987.

²⁴ 65 of 1983.

²⁵ 74 of 1983.

parent to a child which in some cases was not even genetically related to her. The only way to legally remedy this problem was to follow the adoption route.²⁶ Section 5(1)(a) was found to be unconstitutional by the Constitutional Court in the *J*²⁷ case due to unfair discrimination against unmarried same-sex partners. However, this did not change much in terms of surrogacy agreements. The commissioning parents would still have to follow the adoption process to be awarded parental rights over their own child, especially considering the fact that in a scenario where donated sperm is used, the donor renounced any and all rights he might otherwise have had over the donated sperm in terms section 36 of the Human Tissue Act.²⁸ This inevitably meant that the father/donor would no longer be legally recognised as the child's father. Therefore, adoption was the only way for these families to acquire parental responsibilities and rights over the child.

This state of affairs led to the South African Law Commission (as it was then known) Project 65 *Report on Surrogate Motherhood* (1993) as well as a draft Bill, which was later followed by the South African Law Commission *Report on the Review of the Child Care Act* Project 110 (2002).²⁹ All of these developments contributed to the eventual promulgation of the Children's Act. The Children's Act was a piece of legislation desperately needed to catch up with the ever-changing medical technologies and the laws governing those technologies, as well as to adapt those laws so as to be in line with the underlying principles of the Constitution of South Africa.

2.2.2 The relevant provisions of the Children's Act 38 of 2005

Chapter 19 of the Children's Act is dedicated to surrogate motherhood. It provides strict provisions which need to be adhered to before the surrogacy process can be

²⁶ Nicholson 2013 *De Jure* 513.

²⁷ *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC).

²⁸ Nicholson 2013 *De Jure* 513.

²⁹ Bonthuys "Guidelines for the approval of surrogate motherhood agreements: *Ex parte WH*" 2013 *SALJ* 130

initiated. It starts with section 292, which is entitled “Surrogate motherhood agreement must be in writing and confirmed by High Court”. It further provides for the requirements for a valid surrogate motherhood agreement, which are the following:

- The agreement must be in writing and signed by all the parties.
- The agreement must be entered into in the Republic of South Africa.
- At least one of the commissioning parents, at the time of signing the agreement, must be domiciled in South Africa. If the commissioning parent is a single person, that person must be domiciled in South Africa at the time of signing the agreement.
- The surrogate mother and her husband or partner, if any, must also be domiciled in South Africa.
- The agreement must be confirmed by the High Court within whose jurisdiction the commissioning parent(s) are domiciled or habitually resident.

It is however worth noting that in a recent case³⁰ the North Gauteng High Court retrospectively confirmed a surrogacy agreement which was concluded after the artificial insemination of the surrogate mother, finding that this would be in the best interests of the unborn child.

The legal status of children born as a result of surrogacy is defined in section 297. As long as the surrogacy agreement is legal and confirmed by the High Court the child will for all intents and purposes be the child of the commissioning parent or parents from the moment of birth.³¹ The surrogate mother will not have any rights of parenthood or care of the child,³² or contact with the child and neither will her husband, partner or relatives.³³ The surrogacy agreement also severs the child's right to claim maintenance from the surrogate mother or her husband, partner or

³⁰ *Ex parte MS* 2014 (3) SA 415 (GP).

³¹ Section 297(1)(a) of the Children's Act.

³² Section 297(1)(c) of the Children's Act

³³ Section 297(1)(d) of the Children's Act, unless stated otherwise in the surrogate agreement.

relatives. Of course this section places the commissioning parents into the position of parents of the child, thereby assuring that the child will have all the rights afforded to other children who weren't born via surrogacy.

Section 293(1) states that in the event that the commissioning parent is married or involved in a permanent relationship, the court must have the written consent of such a spouse or partner before confirming the agreement. Furthermore, such a spouse or partner must also be joined as a party to the agreement. The same provisions apply for the surrogate mother and her relationships.³⁴ In section 294 the Children's Act specifies the rules regarding the genetic origins of the child. It states that the gametes of both the commissioning parents must be used, unless this is biologically, medically or for any other valid reason impossible. In that event at least one commissioning parents' gametes must be used. This effectively means that the child cannot be completely unrelated to the commissioning parents. The child must be directly related to either one or both of the commissioning parents.³⁵

Section 295 offers some guidelines to assist the High Court with the confirmation of the surrogate motherhood agreement as required by section 292(1)(e). It states as follows:

"A court may not confirm a surrogate motherhood agreement unless—

- (a) the commissioning parent or parents are not able to give birth to a child and that the condition is permanent and irreversible [*sic*];
- (b) the commissioning parent or parents—
 - (i) are in terms of this Act competent to enter into the agreement;
 - (ii) are in all respects suitable persons to accept the parenthood of the child that is to be conceived; and

³⁴ In terms of s 293(2) of the Children's Act.

³⁵ However, in the *Ex parte WH* 2011 (6) SA 514 (GNP) case, brought by a male same-sex couple, the court seemingly did not properly note the origin of the gametes. Although it was noted that the surrogate mother's eggs would not be used (para [22]), the judgment failed to mention anything about the origins of the sperm donor.

- (iii) understand and accept the legal consequences of the agreement and this Act and their rights and obligations in terms thereof;
- (c) the surrogate mother–
 - (i) is in terms of this Act competent to enter into the agreement;
 - (ii) is in all respects a suitable person to act as surrogate mother;
 - (iii) understands and accepts the legal consequences of the agreement and this Act and her rights and obligations in terms thereof;
 - (iv) is not using surrogacy as a source of income;
 - (v) has entered into the agreement for altruistic reasons and not for commercial purposes;
 - (vi) has a documented history of at least one pregnancy and viable delivery; and
 - (vii) has a living child of her own;
- (d) the agreement includes adequate provisions for the contact, care, upbringing and general welfare of the child that is to be born in a stable home environment, including the child’s position in the event of the death of the commissioning parents or one of them, or their divorce or separation before the birth of the child; and
- (e) in general, having regard to the personal circumstances and family situations of all the parties concerned, but above all the interests of the child that is to be born, the agreement should be confirmed.”

Some of these provisions, particularly section 295(c)(iv) and (v), prohibit commercial surrogacy. However, section 301 of the Children’s Act addresses the issue of compensation head-on. It attempts to provide a list of things which may be paid for by the commissioning parents, whilst declaring that all other payments are not allowed. It states:

- “(1) Subject to subsection (2) and (3) no person may in connection with a surrogate motherhood agreement give or promise to give to any person, or receive from any person, a reward or compensation in cash or in kind.
- (2) No promise or agreement for the payment of any compensation to a surrogate mother or any other person in connection with a surrogate

motherhood agreement or the execution of such an agreement is enforceable, except a claim for–

- (a) compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the 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; or
- (c) insurance to cover the surrogate mother for anything that may lead to death or disability brought about by the pregnancy.”

These provisions read together with section 60(4)(a) of the National Health Act 61 of 2003, which states that it is an offence to receive any form of financial or other reward for donating gametes, renders commercial surrogacy impossible and wholly illegal.³⁶ In *Ex parte WH*,³⁷ concerning the confirmation of a surrogate motherhood agreement, the court allowed payment for “Surrogate’s various expenditures” in the amount of R20 000.00,³⁸ which technically does not entirely form part of the exceptions in section 301 above and should have been investigated more thoroughly. In spite of its warning 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”,³⁹ the High Court failed to query the expenses. The court did however state that in future a detailed list should be provided which clearly reflects proper descriptions and details of the proposed payments.⁴⁰

This judgment has been deemed inadequate by many due to the fact that one of the main objectives of this case was to clarify some of the tricky situations surrounding surrogacy agreements which is failed to do.⁴¹

³⁶ Bonthuys 2013 SALJ 130.

³⁷ 2011 (6) SA 514 (GNP).

³⁸ *Ex parte WH* 2011 (6) SA 514 (GNP) para [28].

³⁹ *Ex parte WH* 2011 (6) SA 514 (GNP) para [64].

⁴⁰ *Ex parte WH* 2011 (6) SA 514 (GNP) para [29].

⁴¹ Carnelley “*Ex parte WH* 2011 6 SA 514 (GNP)” 2012 *De Jure* 188.

2.3 CONCLUSION

The problem with payments that are made to the surrogate mother under the pretence of loss of income and other expenses related to the pregnancy is that it is not and cannot be monitored or controlled. In a country such as South Africa, riddled with socio-economic inequalities and coupled with the ever-present poverty factor, this could create opportunities for abuse and exploitation. Further, money can secretly be paid to the surrogate mother by means of a third party, for example, and the agency can take its commission for the introduction made.

The checks and balances are in place to prevent abuse and exploitation, but they are not efficient. Technically, the courts are tasked with monitoring compliance, as they may not confirm surrogacy agreements that allow for commercial surrogacy. However, if they do not fulfil this function properly, like what happened in the *WH* case,⁴² it becomes a problem. Further, section 305 of the Children's Act renders contravention of section 301 an offence. It may certainly be argued that these types of offences may be difficult to police, but with proper checks and balances forming part of a proper regulating system, these offences will be easier to discover. A proper regulating system will also ensure that the appropriate punishment is administered for a contravention. However, should South Africa simply allow for compensated surrogacy this could all be rendered unnecessary.

⁴² The court in *Ex parte WH* 2011 (6) SA 514 (GNP) failed to scrutinise a list of vague expenditures listed in the surrogacy agreement.

CHAPTER 3

COMPARATIVE STUDY

3.1 INTRODUCTION

The legal status of surrogacy agreements differs substantially from country to country. For example, surrogacy is completely banned in some countries yet allowed in others. In the countries that allow for surrogacy there is a further division between the ones who allow surrogacy entirely, meaning allowing for commercial surrogacy, and those who merely allow for surrogacy with no financial gain (altruistic) for the surrogate mother. Each of these countries has their own statutory provisions regulating the surrogacy process. In some countries surrogacy arrangements continue to take place due to the simple fact that there is a lack of proper regulation of the surrogacy process in that particular country. This chapter is of paramount importance to this study as a result of section 39(1)(b) of the Constitution, which states that, "When interpreting the Bill of Rights, a court, tribunal or forum must consider international law." This study will be limited to the countries that have regulations in place that legalise commercial surrogacy and the ones who due to the lack of proper regulation also allow for commercial surrogacy.

Previously, it was inevitable for couples who lived in a country that banned any kind of surrogacy to seek greener pastures. Fertility tourism was thus born. Now couples simply travel to countries where surrogacy is legal, start the surrogacy process and once complete pick the baby up and go home. As can be expected, this process is riddled with legal problems and procedural red tape. For example, there are many cases in various different countries that dealt specifically with the problem created where the commissioning parents' home countries refused to recognise them as the

legal parents of the baby born via a surrogate in another country.⁴³ Some of these cases will be briefly discussed below. Another common problem that exists in countries where there is a lack of proper regulation is that the surrogate mother sometimes refuses to give the baby to the commissioning parents once born,⁴⁴ meaning the surrogate mother refuses to adhere to the surrogacy agreement. The baby will be 100% unrelated to the surrogate mother and in some cases 100% genetically related to the commissioning parents. However, as a result of some of the laws not having been amended to effectively regulate surrogacy agreements, the surrogate mother will in some cases be considered the mother of the baby, leaving the commissioning parents with no rights in respect of the child. Other times the situation is reversed and the commissioning parents disappear and leave the surrogate mother with their baby.⁴⁵ Some countries, such as New Zealand and the United Kingdom, allow for surrogacy agreements, but hold that they are unenforceable,⁴⁶ which does not help with the problem at hand.

The different regulations cause different results and outcomes. One should, theoretically, be able to identify the main problems in the regulations of all the countries, isolate the common problems and address them. One should also be able to see if the solution a country attempted for a particular problem was successful or not and thereafter be able to determine the implications it could have if we decide to make use of the same solution in South Africa. Of course, we could also learn lessons from other countries incorrectly addressing problems. One should be able to see which things worked and which didn't. In this way one should be able to recommend safe and fair regulations for all the parties involved in the surrogacy agreement.

⁴³ *Jan Balaz v Anand Municipality* LPA 2151/2009 (High Court of Gujarat, India); *Re: L (A Minor)* [2010] EWHC 3146 (Fam).

⁴⁴ *Johnson v Calvert* 851 P. 2d 776 Cal Supreme Court 1993.

⁴⁵ Howard "Taming the international commercial surrogacy industry" 2014 *The BMJ* 1. See paras 3.2.3 & 3.3.2 below in this regard.

⁴⁶ Henaghan 2013 *Australian Journal of Adoption* 14.

3.2 INDIA

3.2.1 Introduction

It is relatively well-known that India is currently the main hub of commercial surrogacy in the world.⁴⁷ With high quality health care, Western-trained doctors, low medical costs, no lack of willing surrogates, and absence of proper regulations governing the surrogacy process, it is no mystery why.⁴⁸ In fact, no laws regulate surrogacy in India, apart from the set of guidelines the Ministry of Health and Family Welfare established in 2005. These guidelines were drafted and published by a committee formed by the National Academy of Medical Sciences and Indian Council of Medical Research (ICMR). These guidelines are legally non-binding and are directed primarily towards promoting all the new technologies rather than regulating the said technologies.⁴⁹

3.2.2 Introduction of the new Bill

In 2014 the Indian government introduced into parliament the Assisted Reproductive Technologies Regulation (ART) Bill. The Bill addresses most of the issues that are currently unregulated, such as the age and background of the surrogate mother and limits to how many babies a surrogate mother can have. It further provides some procedures which foreign commissioning parents will have to adhere to.⁵⁰ When this Bill is enacted the laws surrounding surrogacy agreements will at long last become enforceable.⁵¹ Until then though, without any enforceable regulations, it is a free-for-all, and consequently the system is ripe for abuse. India has all the catalysts for exploitation, such as no enforceable regulations and an

⁴⁷ Witzleb in Gerber & O'Byrne (eds) 168.

⁴⁸ Rimm "Booming baby business: Regulating commercial surrogacy in India" 2009 *University of Pennsylvania Journal of International Law* 1430.

⁴⁹ Bailey "Reconceiving surrogacy: Toward a reproductive justice account of Indian surrogacy" 2011 *Hypatia* 736.

⁵⁰ Howard 2014 *The BMJ* 2.

⁵¹ Assisted Reproductive Technology (Regulation) Bill 2014 s 60(1).

abundance of potential surrogates living under the poverty line willing to do anything to survive.⁵² As a result of surrogacy being outlawed in most other countries potential surrogates have their pick of wealthy desperate individuals wishing to become parents at any cost.

It is interesting to note that the guidelines ban partial (traditional) surrogacy.⁵³ Thus a surrogate mother cannot donate her own egg for the surrogacy process.⁵⁴ Consequently, the surrogate mother can never be related to the baby. I assume that this is most probably a method utilised to prevent the surrogate mother from terminating the surrogacy agreement and keeping the resultant baby for herself.

3.2.3 The *Baby Manji* case

In the *Baby Manji* case⁵⁵ a surrogate mother in India was carrying a baby for commissioning parents from Japan.⁵⁶ The agreement was a simple one. The surrogate mother would carry the baby to term and after the birth relinquish the baby to the Japanese couple. However, the Japanese couple divorced one month before the birth. Even though the father still wanted the baby, it nevertheless caused a legal nightmare. Japan refused to issue a passport as they required the child to be born in Japan, and India did not recognise a single male as an adoptive parent. He eventually succeeded but only after lengthy court applications.

3.2.4 Conclusion

India, currently being the main surrogacy destination, is hard at work at attempting to regulate surrogacy. The main genetic link requirement, as will be discussed later,

⁵² Panitch "Global surrogacy: Exploitation to empowerment" 2013 *Journal of Global Ethics* 323.

⁵³ Assisted Reproductive Technology (Regulation) Bill 2014 s 60(17)(a).

⁵⁴ Rimm 2009 *University of Pennsylvania Journal of International Law* 1438.

⁵⁵ *Baby Manji Yamada v Union of India & ANR*. [2008] INSC 1656 (29 September 2008).

⁵⁶ Mohapatra "Stateless babies and adoption scams: A Bioethical analysis of international commercial surrogacy" 2012 *Berkeley Journal of International Law* 3.

is quite an effective method of dealing with this issue. However, one should further note that the effectiveness is directly related to the support received from surrounding legislation. For example, in Thailand the woman who gives birth is automatically accepted as the mother of the child, regardless of any genetic link.⁵⁷ This is an obvious result of outdated legislation which has failed to adapt to a quick and ever-changing world. Nevertheless, it is my opinion that if properly regulated this guideline could serve to make the surrogacy process a little safer for the commissioning parents. We will, however, only see what India has managed to achieve after the enactment of the proposed Bill. Almost excessively strict regulations will be needed to combat the exploitation of the poor. Furthermore, the enactment of strict regulations is not where the issue ends. These regulations need to be aggressively enforced, at least initially, to terminate the syndicates that are already in place. For now though we can only wait and see as to its effectiveness.

3.3 THAILAND

3.3.1 Prior to February 2015

Thailand used to be a big surrogacy destination for many fertility tourists. A lack of surrogacy regulations, much the same as in India, made it a hotspot for foreigners with dreams of surrogacy. The legal issues which occur as a result of Thailand's failure to properly regulate the process are dealt with under the Thai Civil and Commercial Code.⁵⁸ Where a baby is born during wedlock, the automatic assumption that the husband is the father of the child will apply.⁵⁹ The code further states that "[a] child born of any woman who is not married to a man is deemed to be the legitimate child of such woman."⁶⁰ Therefore the surrogate mother automatically becomes the legal mother of the child. What's more is the fact that should the surrogate mother be married, her husband will be assumed to be the

⁵⁷ Howard 2014 *The BMJ* 1

⁵⁸ Thailand Civil and Commercial Code Book 5.

⁵⁹ Thailand Civil and Commercial Code Book 5 s 1536.

⁶⁰ Thailand Civil and Commercial Code Book 5 s 1546.

father. Section 1548 affords the biological father the right to apply to court to have himself registered as the legitimate father of the child, with the mother's consent. This will leave the commissioning mother in a difficult situation, should the surrogate mother refuse to hand over the baby to the commissioning parents. The father will also have legal problems, as the Thai Civil and Commercial Code only provides for the father to apply to be registered as the father with the consent of the mother. Therefore, should the surrogate refuse outright, the commissioning parents will have no option but to leave the child with the surrogate mother. This is merely the result of a lack of regulation and can easily be remedied. Obviously Thailand would not be such a pull factor for international commissioning parents if this was the result of every surrogacy agreement. However, clearly the risk is very real and should not be hurriedly overlooked.

3.3.2 Ensuing problems

In 2011, the police rescued 14 Vietnamese women of various ages from a “baby-breeding ring” in Thailand.⁶¹ Some of the women agreed to be part of the surrogacy program for a promised fee and the others were deceived into it and soon after their passports were confiscated and they were forced to be surrogates. Not long after the initial discovery the police found a further 15 victims.⁶²

In the case of baby Gammy, the commissioning parents from West Australia entered into a commercial surrogacy agreement with a surrogate mother through a surrogacy agency.⁶³ The surrogacy procedure was a success and the surrogate was pregnant with twins. Soon thereafter it was determined that one of the babies, baby Gammy, had Down's syndrome. The surrogate mother was requested to undergo an abortion, which she refused. Once the twins were born, the commissioning parents only took baby Gammy's twin sister, and left for Australia,

⁶¹ Shanks 2011-03-02 *Biopolitical Times* “Criminal Surrogacy Ring Exposed in Thailand” <http://www.biopoliticaltimes.org/article.php?id=5612> (Date of use: 27 August 2015).

⁶² *Ibid.*

⁶³ *Farnell & Arnell & Anor and Chanbua* [2016] FCWA 17 para [7].

thus leaving the surrogate mother to care for baby Gammy. This led to massive worldwide interest.⁶⁴ The commissioning parents immediately responded that they never abandoned baby Gammy and that it was the surrogate mother who refused to release the baby to them.⁶⁵ Once under the microscope, further problems and horrors came to the surface. Not only did the commissioning parents allegedly abandon one of their children, but the commissioning father also had 22 prior convictions for child sexual abuse.⁶⁶

Later in 2014 the police once again performed a raid, only this time on a house owned by a Japanese businessman in Thailand.⁶⁷ What they uncovered was 9 babies apparently fathered through surrogacy by the said Japanese businessman. With each baby having his or her own personal nanny, the babies were very well looked after. However, the alarm bells were ringing. It was later discovered that the businessman had 7 more, bringing his total to 16 children.⁶⁸ His real motives remain unclear; his defence however is that he merely wants a big family. The Japanese businessman claimed that he wanted 10 to 15 children per year. He has not been charged with any crimes, as nothing he did was illegal. He is currently still fighting for the return of his children.⁶⁹

⁶⁴ Blyth "Baby Gammy: The responsibilities of ART professionals in international surrogacy" 2014 *BioNews* 767.

⁶⁵ Withnall 2014-08-10 *The Independent* "Baby Gammy: Australian parents deny abandoning Down's syndrome boy" <http://www.independent.co.uk/news/world/asia/baby-gammy-australian-parents-deny-abandoning-downs-syndrome-son-9660056.html> (Date of use: 27 August 2015).

⁶⁶ Kagi "Baby Gammy case: Father David Farnell reported to child protection authorities by niece, Colin Barnett reveals" (2014) <http://www.abc.net.au/news/2014-09-24/calls-for-child-protection-minister-to-quit-over-baby-gammy-case/5764950> (Date of use: 27 August 2015).

⁶⁷ Ludwig 2014-08-22 *The Wire* "Interpol is not a fan of Japanese businessman who funded Thai 'baby factory'" <http://www.thewire.com/global/2014/08/interpol-is-not-a-fan-of-japanese-businessman-who-wanted-15-babies-a-year/378997/> (Date of use: 20 March 2015).

⁶⁸ Rawlinson 2014-08-23 *The Guardian* "Interpol investigates 'baby factory' as man fathers 16 surrogate children" <http://www.theguardian.com/lifeandstyle/2014/aug/23/interpol-japanese-baby-factory-man-fathered-16-children> (Date of use: 20 March 2015).

⁶⁹ The Associated Press "Extreme surrogacy: Man with 16 infants wants 10-15 more per year" (2014) <http://www.npr.org/2014/08/22/342583654/extreme-surrogacy-man-with-16-infants-wants-10-15-more-per-year> (Date of use: 20 March 2015).

3.3.3 Thailand's solution

In light of the above and most likely as a direct result of the above, the Draft Surrogacy Bill⁷⁰ was passed by the National Legislative Assembly (NLA) on 19 February 2015.⁷¹ This Bill amongst other things specifically outlaws commercial surrogacy.⁷² It furthermore prohibits foreign commissioning parents from entering into any surrogacy agreements. The only persons allowed to enter into any form of non-commercial surrogacy agreements are Thai national couples or a couple consisting of one Thai national and a foreign national who have been married for a period of three or more years, with the added limitation that the surrogate mother must be 25 years or older and has to have had a baby of her own.⁷³ This has completely eliminated Thailand as a surrogacy destination for foreigners.

3.3.4 Conclusion

This legislation does not, however, solve the underlying problem. It once again seems that one of the leading countries for fertility tourism has completely missed the golden opportunity to lay down a set of precise legislative provisions governing all aspects of surrogacy, whether for compensation or not. The baby Gammy case made it significantly clear that commercial surrogacy is in dire need of proper regulation. Checks and balances need to be in place. The whole situation with baby Gammy could have been avoided had a simple background check been done on the commissioning parents. There are obvious issues surrounding such a simple task, especially considering the international factor, but in today's day and age that

⁷⁰ Protection of Children Born from Assisted Reproductive Technologies Act B.E.
⁷¹ Osathanon 2015-02-21 *The Nation* "NLA votes to plug surrogacy loophole"
<http://www.nationmultimedia.com/national/NLA-votes-to-plug-surrogacy-loophole-30254587.html> (Date of use: 27 August 2015).
⁷² Protection of Children Born from Assisted Reproductive Technologies Act B.E. s 23.
⁷³ Umeda "Thailand: New surrogacy law" (2015)
http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404368_text (Date of use: 27 August 2015)

should certainly not be an issue. The simple background check would purely have resulted in the commissioning father being considered unfit for the process and ended the whole process right then and there. A background check would however not have avoided the issues regarding the alleged abandonment or refusal to take the one baby, even in the event of the background check coming back clear of any criminal charges. That is where an enforceable surrogacy agreement will benefit both parties. Furthermore mere limit to the amount of times you can be a party to a surrogacy agreement could help avoid situations like in the case of the Japanese businessman.

Surrogacy in Thailand has effectively now been limited to Thai national heterosexual couples of a specific age, a decision which has led to some people criticising the legislation.⁷⁴ This criticism is especially true if one considers the effect it has on homosexual couples, and this during a time that the Thai Constitution is in the process of being amended by the Thailand Constitution Drafting Committee to afford homosexual couples equal rights!⁷⁵ The enactment of the legislation comes across as being slightly rushed, which can be understood as the Thai interim parliament was clearly put under severe pressure as a result of all the surrogacy scandals as of late. Critics agree that this piece of rushed legislation will merely succeed in running the now illegal commercial surrogacy market underground.⁷⁶ This is a cause for great concern. However, the main point to take from this is that Thailand was in the perfect position, not at all dissimilar from a position India earlier found itself in, but similar to India failed to enact proper and effective regulations regulating surrogacy.

⁷⁴ “Surrogacy laws will fail” 2015 *Bangkok Post*
<http://www.bangkokpost.com/opinion/opinion/481066/surrogacy-law-will-fail> (Date of use: 27 August 2015).

⁷⁵ *Ibid.*

⁷⁶ Niyomyat “Thailand bans surrogacy for foreigners in bid to end ‘rent-a-womb’ tourism” (2015)
<http://www.reuters.com/article/2015/02/20/us-thailand-surrogacy-idUSKBN0LO07820150220>
(Date of use: 21 March 2015).

3.4 RUSSIA

3.4.1 Introduction

Surrogacy in Russia is currently regulated by legislation of the Russian Federation, which was enacted on 15 November 1997.⁷⁷ It states that the commissioning parents must be married to each other and both must consent to the IVF procedure. Furthermore, similar to the positions in South Africa, Florida and Illinois,⁷⁸ either of the parties must suffer from some medical condition relating to reproduction before they will be eligible for the procedure.⁷⁹ Russia also prescribes no age limit for the surrogate mother, its laws merely state that the woman should be a major (18 years old or older) and consenting.⁸⁰

3.4.2 The Russian way

Once the baby is born in Russia following surrogacy, Russian law allows for the surrogate mother to there and then decide whether or not she wishes to keep the child, not dissimilar from the regulations in Thailand.⁸¹ If she consents to the handing over of the baby to the commissioning parents, she will irrevocably be giving up her rights towards the baby.⁸² If she refuses to hand the baby over to the commissioning parents, the commissioning parents will have no legal remedies available to them. Once the surrogate mother gives the required consent, the commissioning parents' names are immediately recorded on the birth registration without the need for any lengthy court applications or even any adoption

⁷⁷ Clause 4, art 51 & cl 3, art 52 of the Russian Federation's Family Code and cl 5, art 16 of the Federal Law on Civil Status Records, No. 143-FZ. Also see Svitnev "Legal control of surrogacy – international perspectives" 2011 *Ethical Dilemmas in Assisted Reproductive Technologies* 155.

⁷⁸ See para 2.2.2 above & paras 3.5.3 & 3.5.4 below.

⁷⁹ Svitnev "New Russian Legislation on Assisted Reproduction" 2012 *Open Access Scientific Reports* 2.

⁸⁰ Svitnev 2012 *Open Access Scientific Reports* 2.

⁸¹ See para 3.3.1 above.

⁸² Family Code of the Russian Federation No. 223-FZ 1995 a 51(4).

procedures.⁸³ This makes the process extremely quick and effortless, if you are willing to overlook the potential chaos the requirement of the surrogate mother's consent brings to the table.

The surrogacy agreement is not regulated and does not require any permission from any regulatory body.⁸⁴ No actual surrogacy contract is required between the parties, as a result of the power the surrogate mother has over who gets the baby at the end, which means the agreement will be unenforceable anyway. It is however still advisable to enter into such an agreement for the benefit of the financial aspect of the agreement, in other words the commercial side of the surrogacy agreement, which is not prohibited in Russia.⁸⁵ It is further interesting that, unlike the requirements in South Africa,⁸⁶ there is no requirement for the child to be genetically related to the commissioning parents.⁸⁷ This is strange because to have one's own flesh and blood offspring is normally the main motivation for resorting to surrogacy agreements and the surrogacy procedure. If not, why not simply use the adoption channels?

3.4.3 The new proposed draft Bill

On 1 November 2011 Russia's State Duma (the lower chamber of the parliament of the Russian Federation) approved a new draft Bill which when enacted will result in some minor changes to the surrogacy process.⁸⁸ The new proposed Bill puts an end to traditional surrogacy by banning it outright, not dissimilar from the new proposed Bill of India.⁸⁹ The issue regarding the resultant child being related to at least one of the commissioning parents was addressed by making that one of the

⁸³ Svitnev 2011 *Ethical Dilemmas in Assisted Reproductive Technologies* 156.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ See para 2.2.2 above

⁸⁷ Svitnev 2012 *Open Access Scientific Reports Center 2.*

⁸⁸ *On the Basis of Health Care Protection of the Citizens of the Russian Federation* Draft Bill No 534829-5.

⁸⁹ See para 3.2.2 above.

requirements for the surrogacy procedure. This requirement is quite easily sidestepped with Russia's laws on purchasing gametes from clinics, because once purchased the gametes become "theirs" and can be used for the surrogacy procedure.⁹⁰ It goes on to state that a prospective surrogate mother should be at least 20 years old but no older than 35 years, and she should have at least one healthy child of her own.⁹¹

3.4.4 Conclusion

It is clear that Russia's legislature has realised that the surrogacy process needs to be regulated properly to avoid problems and abuse of the system. They have taken the first step in regulating it, although this is not a massive step forward. New draft Bills are in the works which target surrogacy agreements as there are no regulations protecting the resultant child. This is a major cause for concern as many babies are simply abandoned by both the surrogate mother and the commissioning parents.⁹² The new regulations seek to remedy this. Consequently, Russia is one of the easiest places to enter into a surrogacy agreement, although Russian law affords parents with little to no remedies in the event of breach.

3.5 THE UNITED STATES OF AMERICA (USA)

3.5.1 Introduction

In the USA each state has its own views and legislation on surrogacy and commercial surrogacy agreements and for most the legal position is unclear.⁹³ The

⁹⁰ *Ibid.*

⁹¹ Cook "Deputy blasts Russia's commercial surrogacy industry" (2014) http://www.bioedge.org/bioethics/deputy_blasts_russias_commercial_surrogacy_industry/10939.

⁹² Novosti & Zarembo "Draft Russian law restricts surrogacy for single people" (2014) <http://rt.com/politics/154496-russia-surrogacy-single-bill/> (Date of use: 27 August 2015)

⁹³ Hofman "'Mama's baby, daddy's maybe': A state-by-state survey of surrogacy laws and their disparate gender impact" 2009 *William Mitchell Law Review* 454.

USA's federal government has not regulated surrogacy yet.⁹⁴ This results in all the states deciding for themselves on how to deal with surrogacy. Some states, such as Washington, allow for gestational uncompensated surrogacy but completely bans commercial surrogacy.⁹⁵ States such as Michigan⁹⁶ and District of Colombia⁹⁷ strictly ban any form of surrogacy agreements and even impose a fine or alternative imprisonment. Others allow for both forms of surrogacy, as will be discussed below. In states where surrogacy is not strictly prohibited, a further question comes up of whether or not the commercial surrogacy agreement is enforceable. Some states further require the commissioning parents to be married to each other.⁹⁸

States have different ways of viewing and weighing up of the surrogacy agreement as well.⁹⁹ For example, and very similar to South Africa,¹⁰⁰ some states look at what is in the best interests of the child;¹⁰¹ others would have the surrogate mother and her husband (if any) be declared the parents of the child as they don't acknowledge the surrogacy agreement at all.¹⁰² This means that they will suddenly be the parents of a child who is completely unrelated to them and not to mention most probably completely unwanted. It gets worse; in Nebraska the sperm donor will be considered the legal father of the child.¹⁰³ However, in states where the surrogacy agreement is allowed, the commissioning parents will be the legal parents of the child.¹⁰⁴ These will be further discussed.

⁹⁴ Smerdon "Crossing bodies, crossing borders: International surrogacy between the United States and India" 2008 *Cumberland Law Review* 25

⁹⁵ Hofman 2009 *William Mitchell Law Review* 460.

⁹⁶ The Surrogate Parenting Act 199 of 1988 s 5.

⁹⁷ District of Colombia Code s 16-402 (2007).

⁹⁸ Arons *Future Choices: Assisted Reproductive Technologies and the Law* (2007) 26.

⁹⁹ Khar "Surrogacy contracts" (2008)

http://web.stanford.edu/group/womenscourage/Surrogacy/surrogacy_contracts.html (Date of use; 27 August 2015).

¹⁰⁰ See para 4.4 below.

¹⁰¹ In Michigan the Surrogate Parenting Act 199 of 1988 s 5 prescribes that the best interests of the child have to be considered when determining custody.

¹⁰² Arizona, Florida, North Dakota and Virginia (Khar "Surrogacy contracts" (2008)

http://web.stanford.edu/group/womenscourage/Surrogacy/surrogacy_contracts.html (Date of use: 27 August 2015).

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

3.5.2 California

Commercial surrogacy is allowed and surrogacy agreements are enforced in the state of California.¹⁰⁵ California procedure relies on case law and accordingly is relatively flexible around surrogacy agreements.¹⁰⁶ For the commissioning parents to be listed on the birth certificate one needs only apply to a Superior Court to acknowledge the surrogacy agreement and this will suffice in getting the intended parents listed as the natural parents.¹⁰⁷ Unlike the situation is South Africa where the surrogacy agreement must first be confirmed by the High Court,¹⁰⁸ in California it is done after the birth.

There have been a couple of court cases which determined the legal position of surrogacy agreements in California. The first one was the *Johnson v Calvert* case.¹⁰⁹ The facts were as follows: The commissioning parents entered into a surrogacy agreement with the surrogate mother. The relationship soured and the surrogate mother wanted to keep the baby. The court stated that both mothers had maternal rights towards the baby, one as birth mother and the other as genetic mother. The court stated that the commissioning mother was the one who had the initial intent of procreating and raising a baby and would for all intents and purposes be the natural mother of the child under Californian law. Thus the “intent” test was born.¹¹⁰ In all further cases involving surrogacy, the surrogacy agreement was looked at to see who had the initial intent to have the baby where the surrogate

¹⁰⁵ Hartocollis 2014-02-19 *New York Times* “And surrogacy makes 3: In New York, a push for compensated surrogacy”
http://www.nytimes.com/2014/02/20/fashion/In-New-York-Some-Couples-Push-for-Legalization-of-Compensated-Surrogacy.html?_r=0 (Date of use: 19 May 2015).

¹⁰⁶ Hofman 2009 *William Mitchell Law Review* 461.

¹⁰⁷ Hofman 2009 *William Mitchell Law Review* 461.

¹⁰⁸ See para 2.2.2 above.

¹⁰⁹ 851 P.2d 776 (Cal. 1993).

¹¹⁰ Arons 28.

mother and commissioning mother are two different people.¹¹¹ In a later case, *In re Marriage of Buzzanca*¹¹² the parties entered into a surrogacy agreement, after which the commissioning parents divorced. They accordingly did not want the baby anymore. The surrogate mother took them to court and the court held that it was the commissioning parents' initial intent to have a baby, and even though the man had no genetic link to the child (which was the defence he was relying on), he and his ex-wife were named the parents.¹¹³ Therefore it is clear that the "intent" test is in line with following and enforcing the surrogacy agreement in the event of a dispute arising between the parties.

3.5.3 Florida

In Florida, not dissimilar from California, commercial surrogacy is not banned and surrogacy agreements are not only enforced but are a strict requirement for the surrogacy process.¹¹⁴ Florida law requires, for gestational surrogacy, the surrogate agreement to contain specific things, such as a medical and mental evaluation of the surrogate mother, a clause in terms of which the surrogate mother agrees to give up the baby to the commissioning parents once born and the commissioning parents undertake to accept the child regardless of any impairment the child might suffer from.¹¹⁵ A further requirement is for the commissioning mother to show that she is incapable of having babies or that there will be a health risk to either her or the baby should she carry the baby herself. Florida requires the commissioning parents to bring an urgent court application within 3 days of the baby's birth to record them as the parents.¹¹⁶

¹¹¹ *Ibid.* When a surrogate uses her own eggs, she will be considered the natural, legal mother regardless of the intent of the parties.

¹¹² 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

¹¹³ Arons 28.

¹¹⁴ Luckey "Commercial surrogacy: Is regulations necessary to manage the industry?" 2011 *Wisconsin Journal of Law, Gender & Society* 231.

¹¹⁵ Florida Fla. Stat. c. 742.15 (1997). See also Arons 37.

¹¹⁶ Hofman 2009 *William Mitchell Law Review* 462.

3.5.4 Illinois

In Illinois a very similar position surrounding commercial surrogacy exists in California and Florida. Commercial surrogacy is not prohibited and surrogacy agreements are enforced, although only under strict conditions.¹¹⁷ The surrogacy process is regulated by the Illinois Parentage Act of 1984¹¹⁸ and the Gestational Surrogacy Act.¹¹⁹ The surrogate may not supply her own egg (traditional surrogacy) and at least one of the commissioning parents is required to be related to the child.¹²⁰ Further requirements are needed, such as that the commissioning parents must have a medical reason as to why they can't have the baby themselves and a medical and mental evaluation of the surrogate mother.¹²¹ Once all the requirements have been met for an enforceable surrogacy agreement, the commissioning parents become the legal parents immediately upon birth,¹²² similar to the laws in South Africa as discussed in paragraph 2.2.2 above.

3.5.5 Conclusion

Currently in some states in the USA commercial surrogacy is on-going without proper regulation. Authorities are turning a blind eye so to speak. They effectively leave the parties, in the event of a dispute arising, to fight the matter out between themselves.¹²³ Each state is currently doing what it thinks best to regulate the industry within its state lines. However, each and every one of them leaves much to be desired in terms of regulations protecting all of the parties involved. What is required is unified regulations between all the states, or at least between the ones who do not prohibit commercial surrogacy. At the moment most states are sitting on

¹¹⁷ Luckey 2012 *Wisconsin Journal of Law, Gender & Society* 231.

¹¹⁸ 750 ILL. Comp. Stat. 45/6.

¹¹⁹ 750 ILL. Comp. Stat. 47.

¹²⁰ Arons 38.

¹²¹ Hofman 2009 *William Mitchell Law Review* 463.

¹²² Arons 38.

¹²³ Arons 25.

the fence: No regulations prohibiting commercial surrogacy or even surrogacy for that matter, but also no regulations allowing for it. It leaves a state of confusion and leads to situations and a mentality of “let’s do it and see what happens”.

3.6 COLLECTIVE CONCLUSION

It is relatively clear from the above that there is no clear, detailed and precise set of regulations in existence at this point. It is further evident that not one of the abovementioned countries are content with their regulations regarding commercial surrogacy. In fact most of them are currently amending these exact regulations. From the collection of laws and regulations governing commercial surrogacy it should be easy enough to create a unified collection of regulations aimed at commercial surrogacy. A first suggestion would be to make a surrogacy agreement compulsory, simply for the protection of all the parties involved, especially the baby. The surrogacy agreement should make provision for medical aid to be taken out as well as a clause stating that the surrogate mother will give up the baby and that the commissioning parents will accept the baby regardless of any defects, as in Florida. To further make the process safer the commissioning parents must become the legal parents of the baby upon birth, as in Illinois. The surrogate mother should not be given a choice as to whether or not she wants keep the baby, as in Russia. Banning traditional surrogacy, as in India and Illinois, will make the surrogacy process safer for the commissioning parents and, one would think, slightly easier on the surrogate mother with regard to giving up the baby as she will not be related to the baby whatsoever. As a result the surrogate mother will have no claim to the baby either. With regard to the commissioning parents, at least one of them should be related to the baby, unless this is impossible due to medical reasons, a regulation envisioned by the Russians which is unfortunately not effectively enforced. A medical reason as to why the commissioning parents are resorting to surrogacy should also be a requirement as in Florida and Illinois. Both the commissioning parents and the surrogate mother should undergo thorough mental

evaluations as well to ensure their suitability as done in Florida. Further one should allow for regulated commercial surrogacy and not simply ban it as they have in Thailand and thereby forcing the industry underground and to operate completely unregulated. These are merely a few ideas from the laws already in place internationally. A more in-depth proposed list of regulations follows in the final chapter. Rules and regulations are however not the only elements attached to surrogacy, and more specifically commercial surrogacy. A brief discussion on the surrogate mother's as well as the commissioning parents' and child's rights is also required for this study to be thorough and complete. This will inevitably lead to a discussion on whether or not the banning of commercial surrogacy is unconstitutional and a violation of international human rights.

CHAPTER 4

THE INTERTWINED HUMAN RIGHTS OF THE SURROGATE MOTHER, COMMISSIONING PARENTS AND THE CHILD

4.1 INTRODUCTION

The laws governing surrogacy in foreign jurisdictions as well as in South Africa are not the only authority worth taking a look at. As stated above, legislation governing surrogacy always needs to be in line with the Constitution.¹²⁴ The rights of the surrogate mother, the commissioning parents and any children concerned require a mention. The Bill of Rights contained in the Constitution affords every citizen with rights which require protection. This study requires an enquiry into whether or not the right to receive compensation for surrogacy is a right protected by the Constitution. If so, one needs to determine whether the limitation placed on that right by the ban on commercial surrogacy is justified. The best interests of the child born as a result of a surrogacy agreement,¹²⁵ and the rights of any siblings have to be carefully balanced with the rights of the commissioning parents and surrogate mother. What follows is a brief study of the rights of the surrogate mother, the commissioning parents and the child.

4.2 THE SURROGATE MOTHER

The Constitution does not specifically afford the right to bear children or procreate to its citizens. This right is, however, enshrined within a collection of other rights.¹²⁶ For example, a collection of rights such as the right to equality,¹²⁷ privacy,¹²⁸ and religion, belief and opinion¹²⁹ can be interpreted to afford and protect the right to

¹²⁴ See para 2.2.1 above.

¹²⁵ Protected by s 295(e) of the Children's Act.

¹²⁶ Nicholson "When moral outrage determines a legal response: Surrogacy as labour" 2013 *SAJHR* 502.

¹²⁷ Constitution s 9

¹²⁸ Constitution s 14.

¹²⁹ Constitution s 15.

bear children.¹³⁰ At section 12(2)(a) provision is made for decisions regarding reproduction. It *inter alia* states that “[e]veryone has the right to bodily and psychological integrity, which includes the right ... to make decisions concerning reproduction”, and further, “to security in and control of their body...”.¹³¹

According to the Report of the International Conference on Population and Development, by the United Nations, couples and individuals have the “basic right ... to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard to sexual and reproductive health”, in addition to the human rights that are already provided for in the Constitution and in other international human rights documents.¹³² It goes on to state, similar to the Constitution, that this includes the protection of their right to make decisions concerning reproduction. It, however, adds that the decision should be free of discrimination, coercion and violence.¹³³

In terms of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa states parties shall ensure that the right to health of women, including sexual and reproductive health, is respected and promoted.¹³⁴ It further defines this right to include the right of women to control their own fertility.¹³⁵

Coupling the Constitution with the international human rights laws mentioned above effectively affords all women the right to have children. One then has to give effect to the entire equality section¹³⁶ of the Constitution which results in protecting everyone’s right to have children, a list which includes homosexuals, single men

¹³⁰ Nicholson 2013 *SAJHR* 502.

¹³¹ Constitution s 12(2)(a) and (b).

¹³² The Report of International Conference on Population and Development 1994 *United Nations Publication* 40.

¹³³ *Ibid.*

¹³⁴ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa 2003 a 14(1).

¹³⁵ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa 2003 a 14(1)(a).

¹³⁶ Constitution s 9.

and infertile couples. This section clearly states that everyone is equal before the law and therefore also has the right to equal protection and benefit of the law.¹³⁷ The next subsection goes on to state that equality includes the full and equal enjoyment of all rights and freedoms, and further to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.¹³⁸ In subsection 3 it states that “the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”¹³⁹

When looked at from a surrogacy perspective, one could argue that it is clearly the surrogate mother’s choice whether or not to bear children for someone else. From a commercial surrogacy perspective, however, it could be argued that the surrogate mother has the right to choose regarding reproduction but not to make a profit from it. This argument can be countered by section 22 of the Constitution, which states that “[e]very citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law”.¹⁴⁰ Accordingly, the surrogate mother has the right to procreate as well as the right to choose her trade, occupation or profession. It can be argued that a ban on commercial surrogacy infringes these rights. Other rights that the ban may also infringe upon are the rights of the surrogate mother to an improved life and the freeing of her potential,¹⁴¹ as well as her right to control of her own body.¹⁴² Therefore the protection of these rights certainly suggests that commercial

137 Constitution s 9(1).
138 Constitution s 9(2)
139 Constitution s 9(3)
140 Constitution s 22.
141 Constitution preamble.
142 Constitution 12(2)(b).

surrogacy should be permitted,¹⁴³ as it is in India, Russia, California, Florida and Illinois.¹⁴⁴

¹⁴³ Nicholson 2013 *SAJHR* 503.

¹⁴⁴ See ch 3 above

4.3 THE COMMISSIONING PARENTS

Section 294 of the Children’s Act was recently held to be inconsistent with the Constitution.¹⁴⁵ A divorced female approached the court after having failed to fall pregnant using the IVF procedure after multiple attempts.¹⁴⁶ She was single and infertile to such an extent that resorting to surrogacy would mean that she would have to make use of donor gametes, which is illegal according to section 294 of the Act as it requires a genetic link to the commissioning parent.¹⁴⁷ The court found that this provision infringes on, amongst other things, human dignity, reproductive autonomy and the right to privacy.¹⁴⁸ The genetic link requirement, for example, was enacted in order to promote the bond between the child and the commissioning parents, as it would be in the best interests of such a child.¹⁴⁹ This is similar to the laws in Russia and Illinois.¹⁵⁰ It restricts undesirable practices such as shopping around with a view to creating children with particular characteristics.¹⁵¹

However, the judge stated that the genetic link requirement clearly constitutes discrimination if regard is had particularly to the impact on the sub-class.¹⁵² It is directly excluding certain members of the sub-class from being able to utilise surrogacy. The judge went on to state that “excluding members of the sub-class from accessing surrogate motherhood undoubtedly encroaches upon their human dignity not only in that it prohibits a member of the sub-class from exercising their right to autonomy but also in light of the fact that the exclusion reinforces the profound negative psychological effects that infertility often has on a person.”¹⁵³ The argument against the claim of discrimination was that the genetic link requirement

¹⁴⁵ *AB v Minister of Social Development as Amicus Curiae: Centre for Child Law* (40658/13) [2015] ZAGPPHC 580 (12 August 2015) (hereinafter referred to as “the AB case”).

¹⁴⁶ *Ibid* 16

¹⁴⁷ *Ibid* 8

¹⁴⁸ *Ibid* 87, 89, 96

¹⁴⁹ *Ibid* 62(i)

¹⁵⁰ See paras 3.4.2 & 3.5.4 above.

¹⁵¹ *Ibid* 62(iv)

¹⁵² *Ibid* 76

¹⁵³ *Ibid* 76

causes differentiation, and it was submitted that the differentiation is rational. The judge accepted that factually such differentiation existed, but this factual differentiation was not enough to justify a legal differentiation.¹⁵⁴ The judge then moved on to the human dignity aspect and stated as follows:

“I am in agreement with this submission that given the fact that a genetic link requirement infringes on autonomy – which is a vital part of human dignity – this requirement infringes on human dignity.”¹⁵⁵

The judge further stated that the decision to use gametes falls within the realm of privacy and should accordingly be protected.¹⁵⁶ Subsequently the genetic link requirement was found to infringe on the constitutional right to privacy.¹⁵⁷

The intended effect of the genetic link requirement is that direct parentage will be established for children born via the surrogacy procedure as envisioned by the South African Law Commission.¹⁵⁸ Therefore the basic reasoning behind this provision is that the resultant child will always be related to either the commissioning parent or the surrogate mother.

It is my opinion that the surrogate mother should never be genetically linked to the child – my reasons for this view follow in the final chapter hereof.¹⁵⁹ Although the High Court decided in the *AB* case that this limitation is not in line with the Constitution, it is my further opinion that the commissioning parent in that instance had adoption as an alternative option. The resultant child would not be any closer related to a commissioning parent than an adopted child would be. In a country with so many orphaned children I do not see the need for surrogacy in circumstances such as these. If the child can be related to the commissioning parent, their own

¹⁵⁴ *AB* case para [77].

¹⁵⁵ Para [89].

¹⁵⁶ Para [95].

¹⁵⁷ Para [96].

¹⁵⁸ Project 110 *Report on the Review of the Child Care Act* (2002).

¹⁵⁹ See para 5.2 below.

flesh and blood, then by all means surrogacy is the route to take. In a scenario where both parents are infertile to such an extent that neither of their gametes can be used, maybe the option of using gametes from direct family members should be allowed, thus still extending their family genes into the future, yet still avoiding the “shopping around” mentioned above. For example, a father could supply his gametes to his infertile son, which can then be used together with a donor’s gamete to create a fertilised embryo. In this way the child will still be closely related to one of the commissioning parents and the family lineage will remain intact. This will also bring the process more in line with the Constitution as nobody will be unfairly denied the surrogacy avenue.

As mentioned above section 12(2)(a) of the Constitution also provides the commissioning parents with the right to make decisions regarding reproduction. Surely that entails the right to utilise any available options such as surrogacy? That coupled with the right to have access to reproductive health care¹⁶⁰ and the right to reproduce which is enshrined in article 25(2) of the 1948 Universal Declaration of Human Rights, as well as the Report of the International Conference on Population and Development, by the United Nations, and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, as discussed above, affords all with the right to procreate.¹⁶¹

4.4 THE CHILDREN

The rights of all children involved in the surrogacy process have to be carefully balanced with the rights of the commissioning parents and surrogate mother. Section 28(2) of the Constitution states that the best interests of the child are of paramount importance in all matters concerning such a child. Even though the

¹⁶⁰ Constitution s 27(1).

¹⁶¹ Van Bogaert “The right to procreate – freedom and necessity” 2005 *SAMJ* 2.

Constitution does not apply to unborn children,¹⁶² the Children's Act has opened the door to apply this paramountcy principle to all matters of surrogacy.¹⁶³ Therefore the High Court must consider the interests of the unborn child, and only after satisfying itself that it would be in the best interests of the resultant child may it grant the order. For example, the High Court cannot grant an order where the commissioning parents are abusive as this would be contrary to the child's best interests. The same can be said if the surrogate mother is for example a drug addict as the drugs could potentially harm the fetus.

This holds true not only for the resultant child of the surrogacy but also the children the parties already have. In terms of the Constitution, the best interests of these children are of paramount importance in every matter concerning them, including a sibling born as a result of surrogacy.¹⁶⁴ However, it should be kept in mind that section 28(2) is not an "overbearing and unrealistic trump"¹⁶⁵ that will automatically override other rights. The best interests of the child are paramount, not absolute. As section 28(2) is a constitutional right in a non-hierarchical system of rights, it can be limited.¹⁶⁶ Section 28(1)(b) of the Constitution further provides every child with the right to family or parental care, or to appropriate alternative care. The scope of care encompasses basic nutrition, shelter, basic health care services and social services.¹⁶⁷ The obligation to provide care rests primarily on parents, and only shifts to the state if a child is no longer in the care of his or her parents.¹⁶⁸

An argument can be made that it will be, by virtue of the above, unconstitutional not to allow for compensated surrogacy in a hypothetical situation where the surrogate

¹⁶² *Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 1113 (T) 1121G.

¹⁶³ In terms of s 295(e) of the Children's Act.

¹⁶⁴ Constitution s 28(2)

¹⁶⁵ In the words of Sachs J in *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para [26].

¹⁶⁶ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para [26].

¹⁶⁷ Constitution s 28(1)(c). See also *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para [76].

¹⁶⁸ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para [77].

mother is struggling financially and is unable to afford her child's tuition, as compensated surrogacy will clearly be in her child's best interests.

4.5 LIMITATIONS

The Constitution protects numerous fundamental rights, but it also provides for the limitation of these rights.¹⁶⁹ It states the following:

"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose."

The prohibition of commercial surrogacy is in my view not justified in terms of this section. Considering the first of the factors above, the nature of the rights being limited is a woman's rights over her own reproductive system and what she chooses to do with it. Non-compensated surrogacy is legal, so by that notion she is allowed to use her reproductive system as she pleases – she is merely not allowed to charge for her services. So the right being limited is the surrogate mother's right to charge a fee for her services. The next factor in the list is the importance of the purpose of the limitation. The purpose of the limitation is most likely to avoid abuse and exploitation. However, that in its own cannot serve as the main reason as almost all things left unchecked and unregulated can be abused and exploited. As stated in the *AB* judgment, for a limitation to be constitutional there should be a rational connection between the scheme it adopts and the achievement of a

¹⁶⁹ Constitution s 36.

legitimate governmental purpose.¹⁷⁰ Therefore, in my opinion, the relationship between the limitation and its purpose is not on a level field if one considers that merely properly regulating the system will in most likelihood circumvent the abuse and exploitation and thereby eliminate the purpose of the limitation outright. Another reason for the limitation is that some feel that the process is against public policy.¹⁷¹ Public policy changes with time. Consider the fact that homosexuality was illegal in South Africa slightly over a decade ago, and in this day and age those same homosexuals now have the same rights as every other South African, which includes the right to marry.¹⁷² While some definitely feel strongly against it there are others who feel strongly for it.¹⁷³ Others again feel strongly against it but further believe that women should have the right to choose.¹⁷⁴ It should be noted that as the norms change, so too must public policy. The last factor is whether or not there is a less restrictive means of achieving the purpose. Clearly a less restrictive means would be to have proper regulations in place which will be able to carefully regulate the process.

4.6 CONCLUSION

Parties should be allowed to exercise their rights to equality, privacy, and religion, belief and opinion, to control their own fertility and to choose their trade but only when it is safe for everyone involved. They should be allowed to use their bodies as they see fit and at the same time be allowed to choose their trade. Surely it is the women's right to decide whether or not she wants to participate in a surrogacy agreement, which is echoed by the current laws in South Africa if one considers the fact that uncompensated surrogacy is legal. The only issue lies with whether or not surrogate mothers have the right to be compensated for the surrogacy. They should

¹⁷⁰ *AB* case para [61].

¹⁷¹ Nicholson 2013 *SAJHR* 507

¹⁷² Constitution s 9. See also Ilyayambwa "Homosexual rights and the law: a South African constitutional metamorphosis" 2012 *IJHSS* 51.

¹⁷³ Meyerson "Surrogacy agreements" 1994 *Acta Juridica* 124-125.

¹⁷⁴ Meyerson 1994 *Acta Juridica* 125.

have the choice to decide whether or not they want to carry someone else's baby for compensation, compensation which could change their and their children's lives for the better. This is similar to how compensated surrogacy drastically changed the lives and circumstances of surrogate mothers in India.¹⁷⁵ Surely it should be their decision and theirs alone, as to whether the benefits of the compensated surrogacy outweigh the negatives?¹⁷⁶ They should be allowed to make an informed decision.

On face value, the limitations to the surrogate mother's constitutional rights in the context of commercial surrogacy appear to be justified, in view of the potential for exploitation. However, in my opinion, as stated above, proper regulation of the process will eliminate this potential.

¹⁷⁵ See para 1.1 above.

¹⁷⁶ Meyerson 1994 *Acta Juridica* 131.

CHAPTER 5

FINAL CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

In conclusion I would like to make some recommendations from my findings in the above study. It is my opinion that commercial surrogacy should be allowed in South Africa. However, before it can be legalised there should be proper regulations in place, specifically to limit possible abuse and exploitation and to avoid exactly what happened in Thailand.¹⁷⁷ A properly regulated system will allow for a system that is free from exploitation and provides for the safety of all parties involved, especially the child, thereby rendering the ban on commercial surrogacy redundant. I recommend that the process of commercial surrogacy be divided into three parts. The first part will be applicable to all the parties involved with specific regard to strict criteria, as well as prerequisites and obligations. The second part will be concerned with the surrogacy agency. The third part will deal with the surrogacy agreement, and its requirements for validity.

5.2 THE PARTIES

The parties include the surrogate mother and the commissioning parents. The general laws surrounding the surrogate mother in South Africa should be kept intact. For example, the following prerequisites should be retained:

- The *domicilium* requirement, stating that at least one of the commissioning parents, at the time of signing the agreement, must be domiciled in South Africa,¹⁷⁸ similar to the newly enacted laws in Thailand;¹⁷⁹

¹⁷⁷ See para 3.3.2 above.

¹⁷⁸ S 292(1)(c) of the Children's Act.

¹⁷⁹ See para 3.3.3 above.

- The surrogate mother and her husband or partner, if any, must also be domiciled in South Africa;¹⁸⁰
- The commissioning parents must have some sort of permanent medical condition rendering them unable to conceive naturally,¹⁸¹ similar to most of the regulations of the countries discussed;¹⁸²
- The surrogate mother must have at least one healthy baby of her own;¹⁸³
- The consent of the spouse or partner of either party is required before the surrogacy agreement will be made a court order.¹⁸⁴ another regulation shared by the bulk of the regulations discussed herein;
- At least one of the commissioning parents' gametes must be used for the procedure;¹⁸⁵ as is required in Russia and Illinois;¹⁸⁶ and
- The commissioning parents must in all respects be fit and suitable for becoming parents.¹⁸⁷

However, to provide for a safer environment in respect of a surrogacy agreement, I recommend that the following prerequisites should be implemented:

- A compulsory psychological evaluation must be done by qualified professionals on all of the parties involved, which include the commissioning parent's spouse or partner;
- A comprehensive physical evaluation by a trained medical professional must be performed on the surrogate mother, which must confirm her fitness for pregnancy, similar to, but slightly more invasive than the laws of Florida prescribe;¹⁸⁸

¹⁸⁰ S 292(1)(d) of the Children's Act.
¹⁸¹ S 295(a) of the Children's Act.
¹⁸² See paras 3.4.1, 3.5.3 & 3.5.4 above.
¹⁸³ S 295(c)(vii) of the Children's Act.
¹⁸⁴ S 293 of the Children's Act.
¹⁸⁵ S 294 of the Children's Act.
¹⁸⁶ See ch 3 above.
¹⁸⁷ S 295(b)(ii) of the Children's Act.
¹⁸⁸ See para 3.5.3 above.

- A six-month screening process for all parties must be made compulsory.¹⁸⁹ This is to ensure that the commissioning parents are financially stable and that none of the parties are rushing into it without any proper consideration. It needs to be in the resultant child's best interest as required by the Constitution;¹⁹⁰
- A further screening for HIV must also be done on the surrogate mother;¹⁹¹
- An addition to section 294 of the Act is recommended, which should not only include couples medically incapable of having children of their own, but it should also make provision for people who cannot have children as it would pose a serious health risk. The genetic link should remain the underlying requirement, however, only to be deviated from in certain specific circumstances to keep it in line with the Constitution.¹⁹² These specific circumstances should be where a direct family member of the infertile commissioning parent acts as the third party and donates gametes. If no genetic link, then there is no reason why they should not simply proceed with adoption;¹⁹³
- There should be a total ban on traditional surrogacy as this could lead to potential issues such as the surrogate mother refusing to hand the baby over to the commissioning parents.¹⁹⁴ As discussed above,¹⁹⁵ India, Russia and Thailand have taken the necessary first steps to amend their laws to ban traditional surrogacy.
- There should be a prescribed maximum number of times a surrogate mother can offer her services as a surrogate mother;
- There should be a prescribed minimum and maximum age limit for the surrogate mother;

¹⁸⁹ South African Law Commission *Report on Surrogate Motherhood* Project 65 (1993) 19.

¹⁹⁰ Constitution s 28(2).

¹⁹¹ Nicholson 2013 *De Jure* 530.

¹⁹² See para 4.2 above.

¹⁹³ See paras 2.1 & 3.4.2 above.

¹⁹⁴ As was the case in California – see para 3.5.2 above.

¹⁹⁵ See ch 3 above.

- A prescribed maximum fee chargeable by the surrogate mother should be set;
- There should be a ban on international travel by the surrogate mother up and until the baby is born. Her right to freedom of movement will be momentarily limited by the High Court, in case the surrogate mother decides not to honour the agreement and travel to a country where a surrogacy agreement is not enforced.
- A comprehensive background check should be done on all the parties involved, including their spouse or partner. This is simply to avoid situation similar to that of baby Gammy;¹⁹⁶ and
- The parties should be domiciled in South Africa at the time of entering into the agreement, but they should at least have been domiciled in South Africa for one year prior to entering into the agreement. The purpose of this requirement would merely be to limit international surrogacy initially. This can always be reassessed at a later stage once the regulations have been tried and tested.

A psychological evaluation as well as a thorough background check on the surrogate mother should provide a clear indication whether or not she is being forced into the agreement. This will reduce the chances of surrogate mothers being forced into service by a third party. The evaluation will further determine whether the surrogate mother is in the right frame of mind to proceed with the procedure. If she is being forced into it, it will in all likelihood be picked up by the professional during this stage. The evaluation will also determine if the surrogate mother is mentally ready for the procedure and whether or not she will mentally cope with giving the baby up after delivery. The physical evaluation will determine if the surrogate mother is in good health and whether or not her body is ready for the strains of pregnancy and child birth. Any dangers or risks to her or the baby must be taken into account. Her safety and the health of the baby must be of paramount

¹⁹⁶

See para 3.3.2 above.

importance. There should also be a maximum amount that the surrogate mother will be legally allowed to charge for her services. As a result, the surrogate mother will know exactly how much she will benefit from the agreement. This is sure to avoid many issues, especially with regard to competition. Lastly, a ban on traditional surrogacy is required simply for the reason that it could potentially create a legal headache. The surrogacy agreement will not have as much force when the surrogate mother is actually related to the baby. She will always have a right to claim her parental rights. This can simply not be left as is. By allowing traditional surrogacy we are allowing a backdoor to the surrogacy agreement to remain open. For this process to successfully thrive there can be no loopholes such as this.

5.3 THE SURROGACY AGENCY

A surrogacy agency should be part of every surrogacy agreement. Their main goal must be to assist all the parties in complying with the regulations. However, this is an area which will most likely be targeted for abuse and exploitation. The agency is supposed to be the “safe house” for the surrogate mothers, someone to look after the surrogate mother and her wellbeing. However, as was made evident by what happened in Thailand with regard to the baby breeding ring, it is not always a safe house.¹⁹⁷ It will be a nightmare if this is the place she comes for security and assistance and is instead trapped in a world full of abuse and exploitation. Therefore, strict requirements need to be laid down for surrogacy agencies. It might be a good idea to prohibit private surrogate agencies and only allow for government sanctioned ones, with a private sector watchdog, or *vice versa*. It might also be a good idea to require such agencies to have a permanent financial advisor on staff to advise the surrogate mothers as to what will be the smartest way to spend or invest their earned money. In addition to the financial advisor they should also be required to have a councillor on staff.

¹⁹⁷ See para 3.3.2 above.

Once the parties consult the agency, the rules and regulations should be properly and thoroughly explained to the parties. They must understand that once the baby is born the commissioning parents become the legal parents – no backing out. The surrogate must understand that the baby is completely unrelated to her and that she will have no right over that baby. The aforementioned regular counselling will make the process easier on the surrogate mother as well as properly prepare her. If all the parties know and understand their rights, duties and obligations from the start, it should help avoid any unpleasanties in the future. Furthermore, the surrogate mother should not be required to pay for membership or any of their services. Their expenses must be for the commissioning parents' account. The surrogate mother should be free to choose which medical or other professional she chooses to consult with and should not be forced to abide by the recommendation of the agency. As pointed out by Nicholson,¹⁹⁸ the agency's recommended professional might not be so recommended as a result of his or her skill; the recommendation could be financially driven. Complete transparency is required, especially with regard to payments. The agency's account should be audited annually to avoid any illegality or behind-the-scenes dealings. To avoid hundreds of these agencies springing up at once and causing chaos with all attempts to regulate them, only a few clinics should be allowed to operate in South Africa. These should have regular unscheduled inspections by an agency governing body. Severe penalties, such as imprisonment, should be imposed for any breach of any regulation by the agency or any other party. The threat of severe repercussions in the event of a contravention will supply a necessary deterrent factor.

5.4 THE SURROGACY AGREEMENT

The surrogacy agreement is the heart of a successful surrogacy arrangement and any attempt to regulate it.¹⁹⁹ The current requirements regarding the surrogacy agreement, mainly that it must be in writing and approved by the High Court, as well

¹⁹⁸ Nicholson 2013 *De Jure* 530.

¹⁹⁹ See para 2.2.2 above.

as the other normal contractual requirements such as capacity, must remain as is. A few clauses could be prescribed, for example a clause where the commissioning parents agree to accept the baby or babies unconditionally to avoid situations like the baby Gammy case.²⁰⁰ The surrogacy agreement is what provides the security for all the parties. The surrogate mother knows that she will not be the biological mother to the baby and that she has no rights towards that baby as a result. The commissioning parents know that they will be the legal parents of the baby no matter what and that they cannot refuse. The total payment will be declared within the agreement as well. The amount stated must be paid to the surrogate mother free from deductions or set-offs. The agency will have no claim to this money. Afterwards the governing body must ensure that the money was in fact paid to the correct persons as per the surrogacy agreement. Whether the surrogate mother is participating in the surrogacy for free or for compensation must be clearly indicated. Should she provide her service for free, a specific clause must be added where she renounces her right to claim compensation at a later stage.

5.5 CONCLUSION

Even though it is currently illegal to compensate a surrogate mother, this does not necessarily mean that it does not happen. In my view, it is better to have surrogacy properly regulated than have the potential likelihood of unregulated and under-the-table deals. Something that is most likely going to happen in Thailand when their new Bill is passed.²⁰¹ If South Africa does not allow for commercial surrogacy, these couples will find another country willing to provide the service. This opens the door to all sorts of inherent dangers which these desperate couples will potentially and unnecessarily face, not to mention the money that will be funnelled into another country's economy. This is money which could be used to provide a South African child with education, provide a family with shelter or start a small business. That money could change a whole family's economic position in a country where many

²⁰⁰ See para 3.3.2 above.

²⁰¹ See para 3.3.4 above.

are living in poverty. This will inevitably lead to a chain reaction which, among other things, will lead to less crime due to the members of that family not being forced to resort to a life of crime. All that is required is a properly regulated system with numerous safeguards and checks and balances to ensure that none of these women's rights get violated and that they are protected from exploitation. Once we have the regulations in place, a trial period can be run to determine the effectiveness. Should the results be positive, a few tweaks can later be made to the *domicilium* requirements (and undoubtedly a few more regulations added, such as clauses confirming that the surrogacy will remain governed by the laws of South Africa),²⁰² and we could end up with an international commercial surrogacy market free from exploitation which could do wonders for the South African economy. We should, however, not be naïve. Once we take that step to the international stage there will be quite a number of pitfalls to deal with, as thoroughly discussed by Heaton.²⁰³ Therefore it is imperative that we first concentrate on regulating commercial surrogacy within our borders before taking the step towards international commercial surrogacy. The golden opportunity to be the first to lay down a proper set of regulations which effectively govern commercial surrogacy free from exploitation has now passed to South Africa. We have the opportunity, and with the recommendations above, all the tools to successfully implement it.

²⁰² Heaton "The pitfalls of international surrogacy: A South African family law perspective" 2015 *THRHR* 31.

²⁰³ Heaton 2015 *THRHR* 24-46.

BIBLIOGRAPHY

1 Books and chapters in books

American Society for Reproductive Medicine *Third-party Reproduction: Sperm, Egg, and Embryo Donation and Surrogacy* (American Society for Reproductive Medicine Washington DC 2012)

Arons J *Future Choices: Assisted Reproductive Technologies and the Law* (Centre for American Progress Washington DC 2007)

Law J *Dictionary of Law* 6 ed (Oxford University Press Oxford 2006)

South African Law Reform Commission *Report on the Review of the Child Care Act Project 110* (2002)

Svitnev K “Legal control of surrogacy – international perspectives” in Schenker JG *Ethical Dilemmas in Assisted Reproductive Technologies* (De Gruyter Berlin 2011)

Witzleb N “Surrogacy in India: Strong demand, weak laws” in Gerber P and O’Byrne K (eds) *Surrogacy, Law and Human Rights* (Routledge London 2016)

2 Journal Articles

- Bailey A "Reconceiving surrogacy: Toward a reproductive justice account of Indian surrogacy" 2011 (26) *Hypatia* 715-741
- Blyth E "Baby Gammy: The responsibilities of ART professionals in international surrogacy" 2014 (767) *BioNews*
- Bonthuys E and Broeders N "Guidelines for the approval of surrogate motherhood agreements: Ex parte WH" 2013 (130) *SALJ* 485-495
- Brinsden P "Gestational surrogacy" 2003 (9) *Human Reproduction Update* 483
- Carnelley M "Ex parte WH 2011 6 SA 514 (GNP)" 2012 (45) *De Jure* 179-188
- Deogaonkar M "Socio-economic inequality and its effect on healthcare delivery in India: Inequality and healthcare" 2004 (8) *Electronic Journal of Sociology*
- Gupta J "Women's bodies: The site for the ongoing conquest by reproductive technologies" 1991 (4) *Issues in Reproductive and Genetic Engineering* 93-107
- Henaghan M "International Surrogacy Trends: How Family Law is Coping" 2013 (7) *Australian Journal of Adoption* 1-24
- Heaton J "The pitfalls of international surrogacy: A South African family law perspective" 2015 (78) *THRHR* 24-46
- Hibino Y and Shimazono, Y "Becoming a surrogate online: 'Message board' surrogacy in Thailand" 2013 (5) *Asian Bioethics Review* 57-72
- Hofman D "'Mama's baby, Daddy's maybe': A state-by-state survey of surrogacy laws and their disparate gender impact" 2009 (35) *William Mitchell Law Review* 450-468
- Howard S "Taming the international commercial surrogacy industry" 2014 (349) *The BMJ* 1-3
- Ilyayambwa M "Homosexual Rights and the Law: A South African Constitutional Metamorphosis" 2012 (2) *International Journal of Humanities and Social Science* 50-54

- Lieber K "Selling the womb: Can the feminist critique of surrogacy be answered?" 1992 (68) *Indiana Law Journal* 205-232
- Luckey C "Commercial surrogacy: Is regulations necessary to manage the industry" 2011 (26) *Wisconsin Journal of Law, Gender & Society* 213-240
- Mascarenhas M *et al* "National, regional, and global trends in infertility prevalence since 1990: A systematic analysis of 277 health surveys" 2012 (9) *PLoS Med* 1-12
- Meyerson D "Surrogacy agreements" 1994 *Acta Juridica* 121-145
- Mohapatra S "Stateless babies & adoption scams: A bioethical analysis of international commercial surrogacy" 2012 (30) *Berkeley Journal of International Law* 412-449
- Nicholson C "When moral outrage determines a legal response: Surrogacy as labour" 2013 (29) *SAJHR* 496-514
- Nicholson C and Bauling A "Surrogate motherhood agreements and their confirmation: A new challenge for practitioners?" 2013 (2) *De Jure* 510-538
- Panitch V "Global surrogacy: exploitation to empowerment" 2013 (9) *Journal of Global Ethics* 329-343
- Points K "Commercial surrogacy and fertility tourism in India – The case of baby Manji", 2006 *The Kenan Institute for Ethics at Duke University* 1-5
- Rimm J "Booming Baby Business: Regulating Commercial Surrogacy in India" 2009 (30) *University of Pennsylvania Journal of International Law* 1429-1462
- Smerdon U "Crossing bodies, crossing borders: International surrogacy between the United States and India" 2008 (39) *Cumberland Law Review* 16-85
- Svitnev K "New Russian legislation on assisted reproduction" 2012 (207) *Open Access Scientific Reports* 1-3
- Van Bogaert "The right to procreate – freedom and necessity" 2005 (95) *SAMJ* 32-34
- Watson J "Growing a baby for sale or merely renting a womb: Should surrogate mothers be compensated for their services?" 2007 (6) *Whittier Journal of Child and Family Advocacy* 529-554

3 Internet sources

- Cook M “Deputy blasts Russia’s commercial surrogacy industry” (2014)
http://www.bioedge.org/bioethics/deputy_blasts_russias_commercial_surrogacy_industry/10939 (Date of use: 27 August 2015)
- “Extreme surrogacy: Man with 16 infants wants 10-15 more per year” (2014)
<http://www.npr.org/2014/08/22/342583654/extreme-surrogacy-man-with-16-infants-wants-10-15-more-per-year> (Date of use: 27 August 2015)
- Hartocollis A 2014-02-19 *New York Times* “And surrogacy makes 3: In New York, a push for compensated surrogacy”
http://www.nytimes.com/2014/02/20/fashion/In-New-York-Some-Couples-Push-for-Legalization-of-Compensated-Surrogacy.html?_r=1 (Date of use: 27 August 2015)
- Kagi J “Baby Gammy case: Father David Farnell reported to child protection authorities by niece, Colin Barnett reveals” (2014)
<http://www.abc.net.au/news/2014-09-24/calls-for-child-protection-minister-to-quit-over-baby-gammy-case/5764950> (Date of use: 27 August 2015)
- Kambl R 2013-11-08 *Indian Express* “Surrogacy in India: Shedding its secrecy”
<http://archivehealthcare.financialexpress.com/market-section/2139-surrogacy-in-india-shedding-its-secrecy> (Date of use: 27 August 2015)
- Khar D “Surrogacy contracts” (2008)
http://web.stanford.edu/group/womenscourage/Surrogacy/surrogacy_contracts.html (Date of use: 27 August 2015)
- Ludwig D 2014-08-22 *The Wire* “Interpol is not a fan of Japanese businessman who funded Thai ‘baby factory’”
<http://www.thewire.com/global/2014/08/interpol-is-not-a-fan-of-japanese-businessman-who-wanted-15-babies-a-year/378997/> (Date of use: 27 August 2015)
- Niyomyat A “Thailand bans surrogacy for foreigners in bid to end ‘rent-a-womb’ tourism” (2015)
<http://www.reuters.com/article/2015/02/20/us-thailand-surrogacy-idUSKBN0LO07820150220> (Date of use: 27 August 2015).
- Novosti R & Zarembo I “Draft Russian law restricts surrogacy for single people” (2015)
<http://www.rt.com/politics/154496-russia-surrogacy-single-bill/> (Date of use: 27 August 2015)

- Osathanon P 2015-02-21 *The Nation* "NLA votes to plug surrogacy loophole"
<http://www.nationmultimedia.com/national/NLA-votes-to-plug-surrogacy-loophole-30254587.html> (Date of use: 27 August 2015)
- Rathee V "Surrogacy offers opportunities for upward mobility to many needy families" (2014) <http://www.indiamedicaltimes.com/2014/02/25/surrogacy-a-blessing-for-many-impooverished-families/> (Date of use: 27 August 2015)
- Rawlinson K 2014-08-23 *The Guardian*: "Interpol investigates 'baby factory' as man fathers 16 surrogate children"
<http://www.theguardian.com/lifeandstyle/2014/aug/23/interpol-japanese-baby-factory-man-fathered-16-children> (Date of use: 27 August 2015)
- Shanks P 2011-03-02 *Biopolitical Times* "Criminal surrogacy ring exposed in Thailand" <http://www.biopoliticaltimes.org/article.php?id=5612> (Date of use: 27 August 2015)
- "Surrogacy laws will fail" 2015-02-23 Bangkok Post
<http://www.bangkokpost.com/opinion/opinion/481066/surrogacy-law-will-fail>
(Date of use: 27 August 2015)
- Umeda S "Thailand: New surrogacy law" (2015)
http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404368_text (Date of use: 27 August 2015)
- Withnall A 2014-08-10 *The Independent* "Baby Gammy: Australian parents deny abandoning Down's syndrome boy"
<http://www.independent.co.uk/news/world/asia/baby-gammy-australian-parents-deny-abandoning-downs-syndrome-son-9660056.html> (Date of use: 27 August 2015)

4 International instruments / documents.

African Union *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (2003) <http://www.refworld.org/docid/3f4b139d4.html> (Date of use: 6 October 2015)

International Conference on Population and Development (ICPD) *Report of the International Conference on Population and Development, Cairo, 5-13 September 1994* (1995) <http://www.refworld.org/docid/4a54bc080.html> (Date of use: 6 October 2015)

5 Table of cases

5.1 Australia

Farnell & Arnell & Anor and Chanbua [2016] FCWA 17

5.2 India

Baby Manji Yamada v. Union of India & ANR. [2008] INSC 1656 (Supreme Court of India)

Jan Balaz v Anand Municipality LPA 2151/2009 (High Court of Gujarat, India)

Re: L (A Minor) [2010] EWHC 3146 (Fam)

5.3 South Africa

AB v Minister of Social Development as Amicus Curiae: Centre for Child Law (40658/13) [2015] ZAGPPHC 580 (12 August 2015)

Christian Lawyers Association of South Africa v The Minister of Health 1998 (4) SA 1113 (T).

Ex parte MS 2014 (3) SA 415 (GP)

Ex parte WH 2011 (6) SA 514 (GNP)

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)

J v Director General, Department of Home Affairs [2003] ZACC 3; 2003 (5) BCLR 463; 2003 (5) SA 621 (CC) (28 March 2003)

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

5.4 USA

In re Marriage of Buzzanca 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998)

Johnson v Calvert 851 P. 2d 776 Cal Supreme Court 1993

6 Legislation

6.1 India

Assisted Reproductive Technology (Regulation) Bill 2014

6.2 Russia

Family Code of the Russian Federation No. 223-FZ 1995

On the Basis of Health Care Protection of the Citizens of the Russian Federation
Draft Bill No 534829-5

6.3 South Africa

Basic Conditions of Employment Act 75 of 1997

Child Care Act 74 of 1983

Children's Act 38 of 2005

Children's Status Act 82 of 1987

Constitution of the Republic of South Africa, 1996

National Health Act 61 of 2003

Human Tissue Act 65 of 1983

Unemployment Insurance Act 63 of 2001

6.4 Thailand

Protection of Children Born from Assisted Reproductive Technologies Act B.E

Thailand Civil and Commercial Code Book 5

6.5 USA

District of Columbia Code s16-402

Florida Statute Title XLIII Chapter 742.15 (1997)

Illinois Statutes Chapter 750 s45 (6) (Illinois Parentage Act of 1984)

Illinois Statutes Chapter 750 s47 (Gestational Surrogacy Act)

Surrogate Parenting Act 199 of 1988 772.855

Surrogate Parenting Act 199 of 1988 772.861