

CHAPTER 7

ESTABLISHING PARENTHOOD AND THE STATUS OF CHILDREN

7.1 Introduction

In order to allocate parental rights and responsibilities, it is necessary to determine parentage. In this Chapter we will therefore consider aspects such as legitimacy, proof of parentage, artificial insemination, and surrogacy.

7.2 Legitimacy of children

A legitimate¹ child is one whose parents were married to each other at the time of his or her conception or at the time of his or her birth, or at any time in between these dates.² Where the parents' marriage, though invalid, fulfils the requirements of a putative marriage, children born of the union are legitimate for all purposes, and will on application be declared so by the court.³

1 Objections have been raised to the use of the terms 'legitimate' and 'illegitimate' on the grounds that especially the latter term stigmatises the child concerned and may be offensive: see South African Law Commission **Report on the Investigation into the Legal Position of Illegitimate Children** (October 1985), para 6.25.-6.26. The Commission therefore suggested the use of the term 'extra-marital' instead of 'illegitimate' in legislation.

2 See also Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 327, footnote 3 on the marriage requirement.

3 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 328. See also the South African Law Commission's investigations into the Review of the Marriage Act 25 of 1961 (Project 109) and Domestic Partnerships (Project 118).

At common law, annulment of a voidable marriage rendered children born or conceived of the union retrospectively extra-marital. In modern South African law, however, the status of children born or conceived of a voidable marriage which is subsequently set aside by the court is regulated by the Children's Status Act 82 of 1987.⁴ In terms of this Act, the annulment of the marriage has no effect on the status of children born or conceived of it;⁵ such children retain their legitimate status and, if minor or dependent at the time of the annulment, are treated as if the marriage had been terminated by a decree of divorce.⁶

Adoption, which is not confined to extra-marital children, is discussed fully in another chapter.⁷ It is, however, important to point out that in terms of section 20(2) of the Child Care Act, 1983, an adopted child 'shall for all purposes whatever be deemed in law to be the legitimate child of the adoptive parent, as if he was born of that parent during the existence of a lawful marriage'.

In the past considerable disadvantages attached to being an adulterine child, and the penalties for the fruit of incest were even greater.⁸ Today the notion that it is proper to visit the sins of the parents upon their innocent children has happily passed away, and it makes little difference into what class of illegitimacy a person falls.⁹

Since the legitimacy of a child depends on the status of his or her parents at the relevant time, it is necessary to determine who those parents are. Rapid advances in medical science over the past few decades have made such determination very problematic in certain cases, notably in cases involving so-called 'artificial fertilization'¹⁰ techniques. These particularly tricky cases will be dealt

4 In its **Report on the Investigation into the Legal Position of Illegitimate Children**, the Commission proposed legislation to place children born or conceived of a voidable marriage which is subsequently annulled in the same position as children born or conceived of a valid marriage which is subsequently dissolved by divorce. The Children's Status Act 82 of 1987 arose from the recommendations made by the Commission in this regard.

5 Section 6.

6 Section 7.

7 See Chapter 18 below.

8 The distinctions between the different categories of illegitimate children were relevant particularly in regard to succession rights and to legitimisation by subsequent marriage (for details see Hahlo and Kahn **The Union of South Africa: The Development of its Laws and Constitution** Cape Town: Stevens 1960 356.)

9 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 332.

10 The term 'artificial fertilization' is used by the Commission in its **Report on Surrogate Motherhood** (1993) to refer to inter alia the procedures of artificial insemination and *in vitro* fertilisation. See also the Commission's **Report on the Investigation into the Legal Position of Illegitimate Children** (October 1985). For a criticism

with first, followed by a discussion of the proof of paternity in other situations.

7.3 **Artificial insemination**

of the word 'artificial' in this context, see Graig Lind 'Sexual orientation, family law and the transitional Constitution' (1995) 112 **SALJ** 481 at 490, footnote 48.

It appears to be uncontroversial that a child born as a result of the artificial insemination of a married woman with the semen of her husband¹¹ is a legitimate child, whether or not the husband in fact consented to this means of conception.¹² Under the common law, a child born as a result of the artificial insemination of an unmarried woman or as a result of the artificial insemination of a married woman with the semen of a man other than her husband¹³ was ordinarily extra-marital even if, in the latter case, the husband was a consenting party.¹⁴

Section 5 of the Children's Status Act 82 of 1987 brought about far-reaching changes to the common law in this regard. In terms of section 5(1)(a), whenever the gamete or gametes of any person other than a married woman or her husband have been used for the artificial insemination of that woman with the consent of both spouses, any child born as a result of such artificial insemination is deemed for all purposes to be the legitimate child of the spouses. There is a rebuttable presumption that both spouses have in fact granted their consent in this regard.¹⁵

11 The so-called 'homologous' artificial insemination or AIH.

12 **V v R** 1979 (3) SA 1006 (T) at 1008. See also Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 334, footnote 19 for further references.

13 The so-called 'heterologous' artificial insemination or AID / DI.

14 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 334.

15 Section 5(1)(b) of the Children's Status Act 82 of 1987.

The fact that section 5(1) of the Children's Status Act 82 of 1987 appears to require nothing more than *informal* consent creates numerous problems.¹⁶ After analysing these problems, Van der Walt suggests,¹⁷ *inter alia*, that formal written consent is essential for the proper application of the statutory provisions and that the legislation should be amended in this regard. Although there is merit in this suggestion, the Commission is of the opinion that the presumption created in section 5(1)(b) of the Act adequately covers the concern and that the consent in most instances will be in writing anyway. It is also worth noting that in terms of Regulation 9(e), a medical practitioner intending to effect the artificial insemination of a recipient shall 'make sure that (1) before any artificial insemination is effected on a recipient, the recipient *and her husband in the case of a married person*¹⁸ receive advice and information from appropriate experts concerning - (aa) the possibilities, if any, of the recipient's being able to conceive in a natural manner; (bb) all the implications of artificial insemination including ... the consequences to the marriage in the case of a married person, and the ethical, psycho-social and educational implications of artificial insemination ... and legal advice which may be obtained with regard to artificial insemination'.¹⁹ Regulation 5(d) provides further that the 'written permission' from the donor's spouse in the case of a married person be obtained and that such permission be filed in the donor's file.

Until fairly recently, the regulations²⁰ issued in terms of the Human Tissue Act 65 of 1983 provided that the artificial insemination could be carried out only on a married woman and then only if both spouses had consented to this in writing.²¹ This restriction on the availability of artificial

16 See, for instance, Lirieka van der Walt 'Toestemming en die vestiging van ouerskap oor die kunsmatig verwekte kind' (1987) 8 **Obiter** 1 and F F W van Oosten 'Die leerstuk van ingeligte toestemming in surrogaatmoederskapsgevalle' (1990) 23 **De Jure** 340.

17 With reference to the then clause 5 of the Children's Status Bill 30 of 1987. See (1987) 8 **Obiter** 11.

18 Our emphasis.

19 Of the Regulations regarding the Artificial Insemination of Persons, and Related Matters (GN R 1182 GG 10283 of 20 June 1986 (as amended by GN R 1354 GG 18362 of 17 October 1997). See also Regulation 9(e)(v)(aa).

20 *Ibid.*

21 The regulations of June 1986 are for the most part not applicable to 'homologous' artificial insemination (AIH). Chapter 2 of the Regulations, which carries the heading "Donors, Donations and Related Matters", is also not applicable to cases of in vitro fertilisation (IVF) in which the gametes of a husband and his wife are united in vitro and the resultant embryo implanted in the wife's uterus. See Louise Tager 'Surrogate motherhood, legal dilemma' 1986 (103) **SALJ** 381 - 382; R Pretorius 'Surrogaat-moederskap: Implikasies in die Suid-Afrikaanse Regstelsel' 1987 **De Rebus** 270; S A Law Commission **Report on the Investigation into the Legal Position of Illegitimate Children**, par 10.12; M Schutte 'Artificial insemination and in vitro fertilisation' 1985 **De Rebus** 347 at 348 and 349.

insemination to married women was, however, the subject of severe criticism²² and the regulations were subsequently amended so as to make it possible for unmarried woman legally to access donor sperm and to undergo artificial insemination procedures.²³

Despite these developments, the provisions of section 5 of the Children's Status Act 82 of 1987 remain unchanged. As Van Heerden et al point out,²⁴ the common law therefore still applies to cases where an unmarried woman has been artificially inseminated or a married woman has been artificially inseminated with donor semen without her consent or the consent of her husband, with the result that the child in question will be considered extra-marital.

22 See Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 336, footnote 30 for references.

23 See GN R1354 GG 18362 of 17 October 1997, deleting regulation 8(1) and amending regulations 5(d) and 9(e).

24 **Boberg's Law of Persons and the Family** (2nd edition) 336.

AH van Wyk²⁵ points out that section 5(1) of the Children's Status Act 82 of 1987 applies only to in cases of *artificial* insemination. Therefore, if a child is born as a result of sexual intercourse between its mother and a man other than her husband, the child is extra-marital (subject, of course, to the presumption *pater es quam nuptiae demonstrant*), even if the mother's husband consented to this manner of conception. Van Wyk also points out that, because of the way in which 'artificial insemination' and 'artificial fertilisation' are defined in the relevant Acts, the 'pure' donation of an ovum,²⁶ as also a 'pure' embryo donation,²⁷ fall (for present purposes) completely outside the ambit of both the Children's Status Act 82 of 1987 and the Human Tissue Act 65 of 1983.²⁸ If either of these two procedures is utilised, the legal status of the child born as a result will have to be determined in accordance with the common law.

As regards the legal position of the donor of male or female gametes used in a process of artificial

25 *'Mater hodie semper incerta est? : 'n Evaluasie van artikel 5 van die Wet op die Status van Kinders van 1987'* 1988 **TSAR** 465 at 469.

26 I.e. the extraction of ripe *ova* from the ovaries of one woman using a laparoscopy procedure and the transfer of these *ova* into the uterus of another woman, followed by fertilisation of the *ova* through 'natural' sexual intercourse.

27 I.e. the flushing (lavage) and transfer of an embryo which has been created by natural means through fertilisation *in utero / vivo*.

28 See also Lirieke van der Walt 'Toestemming en die vestiging van ouerskap oor die kunsmatig verwekte kind' 1987 (8) **Obiter** 1 at 4; see further on these procedures M L Lupton 'The right to be born: Surrogacy and the legal control of human fertility' 1988 (21) **De Jure** 36 at 37.

insemination, section 5(2) of the Children's Status Act 82 of 1987 provides that there will be no legal ties between a child born as a result of the artificial insemination of a woman and the donor of the male or female gametes used for this procedure unless (a) the donor of the female gametes is the woman who gave birth to the child, or (b) the donor of the male gametes is married to such woman at the time of the artificial insemination.²⁹ This provision is very widely phrased and applies whether or not the woman giving birth to the child is married and whether or not the consent of either the woman or of her husband to the artificial insemination has been obtained.³⁰

29 However, in surrogacy cases it is tried to achieve the opposite effect: i.e. the intention is that the commissioning parents acquire all the rights and responsibilities while the role of the surrogate mother is for all practical purposes equated to that of a donor in artificial insemination cases.

30 S A Law Commission **Report on the Investigation into the Legal Position of Illegitimate Children**, par 10.34. Here too, it should be pointed out that section 5(2) applies only in cases of 'artificial insemination' as defined in section 1, with the result that, in circumstances falling outside the ambit of this definition, the question as to whether there are any legal ties between the child and the donor of the male or female gametes utilised in the process of his or her conception will have to be answered with reference to the common law.

The Human Tissues Act 65 of 1983 and the regulations issued under it also contain provisions to ensure that the donors of gametes used in an artificial insemination procedure remains anonymous.³¹ Thus, in terms of section 33(1)(c) of the Act,³² no person may publish 'to any other person' any fact by which the identity of a living person from whose body any gamete has been removed for the purposes of artificial fertilization of another person may possibly be established, unless the donor concerned has consented in writing to such publication. Apart from these provisions, a donor's file may not be made available to any other person for inspection 'unless any law otherwise provides or any court so orders'.³³ Several writers, both in South Africa³⁴ and abroad,³⁵ have argued that these kinds of restrictions contravene the fundamental right of children born as a result of artificial insemination procedures to know about their biological origins and thus to have access to biological information concerning their genetic parents. In view of these

31 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 338.

32 Read together with section 19(c) of the Human Tissues Act 65 of 1983.

33 Regulation 6(2)(e).

34 See M L Lupton 'The status of children born by artificial insemination in South African law' 1985 **TSAR** 277, 'Artificial insemination in South Africa in the light of the Human Tissue Act 65 of 1983' (1985) 48 **THRHR** 210 at 217 'The right to be born: Surrogacy and the legal control of human fertility' (1988) 21 **De Jure** 36 at 37, 'Human fertilization outside the womb - Law and policy' 1997 **TSAR** 746 at 758-9; J M T Labuschagne 'Die reg op afkomskenis as mensereg' (1996) 7 **Stell LR** 307 at 311-12.

35 See, eg, Michael Freeman 'The new birth right? Identity and the child of the reproductive revolution' (1996) 4 **International J of Children's Rights** 273 and authorities there cited. See also Sarah Wilson 'Identity, geneology and the social family: The case of donor insemination' (1997) 11 **International J of Law, Policy and the Family** 270; Katherine O'Donovan 'A right to know one's parentage' (1998) 2 **International J of Law and the Family** 27; Danny Sandor 'Federal IVF law would harm not help children's rights', press release by Defence for Children International - Australia, 20 August 2000.

arguments and of the fact that adopted children in South Africa are entitled to have access to their adoption records once they reach the age of 21 years, the 'confidentiality provisions' of the Human Tissue Act and regulations may need amendment.³⁶

7.4 Evaluation and recommendations

36 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 340.

As pointed out by Van Heerden et al³⁷ section 5 of the Children's Status Act 82 of 1997 does not apply to cases where an unmarried woman has been artificially inseminated or a married woman has been artificially inseminated with donor sperm without her consent or the consent of her husband, with the result that the child in question will be considered extra-marital. Section 5 of the Children's Status Act 82 of 1987 also does not apply to an arrangement involving a 'pure' ovum donation or a 'pure' embryo donation. After considering the issue, **the Commission recommends that section 5 of the Children's Status Act 82 of 1987 be amended to also cover these three instances.** Consequently, a similar amendment of the definition of "artificial fertilisation" in the Human Tissue Act 65 of 1983 might be opportune. These recommendations will be incorporated in the reformulation of the present section 5 of the Children's Status Act 82 of 1987. However, **the Commission does not consider it appropriate to extend the operation of section 5 of the Children's Status Act 82 of 1987 to instances where a woman (whether married or not) has been artificially inseminated with donor sperm without her consent, or in the case of a married woman, also without the consent of her husband. The Commission also refrains from covering the situation where a child is born as a result of sexual intercourse between the child's mother and a man other than the mother's husband.** In the latter instance, we specifically see a continued role for the common law.³⁸

The Commission recommends that the provisions of the Children's Status Act 82 of 1987, as to be amended, be incorporated in the new children's statute. The Children's Status Act 82 of 1987 can then be repealed.

The Commission would also like to reiterate its position that all legal ties between a child and a donor of gametes with which the child was conceived be severed.³⁹

37 **Boberg's Law of Persons and the Family** (2nd edition) 336.

38 For a comparative perspective, see Samson O Koyonda 'Assisted reproductive technologies in Nigeria: Placing the law above medical technology' (2001) XXXIV **CILSA** 258.

39 S A Law Commission **Report on the Investigation into the Legal Position of Illegitimate Children**, par 10.38.

Some respondents feel strongly that, while the child (and indeed the parents or the recipient husband, if applicable) should have access to the **medical and other information** set out in Regulations 6(1)(a)(ii),⁴⁰ 6(1)(a)(iii) and 6(1)(b),⁴¹ information regarding the **donor's identity** should not be available to the recipient or the child. It would also appear that many medical practitioners performing artificial insemination procedures feel that disclosure (or potential disclosure) of donor identifying information will 'put off' most donors.⁴² **The Commission accordingly recommends that neither the recipient nor the child should have access to the information regarding the donor's identity.**⁴³ However, the Commission is convinced that children born as a result of artificial insemination procedures have the right to know about their biological origins and to have access to the biological and medical information concerning their genetic parents. **The Commission therefore recommends that the confidentiality provisions in the Human Tissue Act 65 of 1983 be amended to allow children born of artificial insemination access to biological and medical records, but not to information identifying the donor, when such child reaches the age of 18 years, similar to the case of adopted children.**⁴⁴ We would like to stress that we see this as the right of the **child**, and not that of the donor or recipient of the gametes.⁴⁵

Accordingly we recommend the incorporation in the new children's statute of the following provisions:

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Presumption of paternity in respect of child born out of wedlock

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- 40 Presently available to the recipient - see Regulation 4(d)(iii).
- 41 Presently available to the medical practitioner performing the AI, **not** the recipient - see Regulation 4(d)(iv).
- 42 Personal communication between Judge Belinda van Heerden and Dr Dalmeyer, President of the South African Society for Reproductive Science and Surgery.
- 43 See the minutes of the 20th meeting of the Project Committee held on 11 - 12 August 2001.
- 44 See also Regulation 28 of the regulations under the Child Care Act, 1983.
- 45 Obviously the recipient of the gametes (and her husband, if she is married) is entitled to numerous details in respect of the donor. However, this does not include information relating to the **identity** of the donor. See regulation 6(2)(b), read together with regulation 6(1)(a) (ii); regulation 6(2)(c), read together with regulation 4(a) and with regulations 6(1)(a)(ii) -(v), (b) and (c) issued in terms of the Human Tissue Act 65 of 1983.

1. If in any legal proceedings at which it has been placed in issue whether any particular person is the father of a child born out of marriage it is proved by judicial admission or otherwise that he had sexual intercourse with the mother of the child at any time when that child could have been conceived, it shall, in the absence of evidence to the contrary, be presumed that he is the father of that child.

Presumption on refusal to submit to taking of blood samples

2. (1) If in any legal proceedings at which the paternity of any child has been placed in issue it is adduced in evidence or otherwise that any party to those proceedings, after he or she has been requested thereto by the other party to those proceedings, refuses to submit himself or herself or, if he or she has parental responsibility for the child to cause that child to be submitted to the taking of a blood sample in order to carry out scientific tests relating to the paternity of that child, it shall be presumed, until the contrary is proved, that any such refusal is aimed at concealing the truth concerning the paternity of that child.

(2) The Court may order that a blood sample be taken and the scientific tests relating to the paternity of a child be conducted, where appropriate, at state expense.

Legitimation of children by subsequent marriage

3. Any child born of parents who marry each other at any time after his or her birth shall, even though his or her parents could not have legally married each other at the time of his or her conception or birth, as from the date of the marriage be in all respects the legitimate child of his or her parents.

Effects of artificial insemination

4. (1)(a) Subject to the provisions of section xx,⁴⁶ whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both spouses for the artificial insemination of one spouse, any child born of that

46 Qualification re surrogacy arrangements.

spouse as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of those spouses as if the gamete or gametes of those spouses were used for such artificial insemination.

(b) For purpose of paragraph (a) it shall be presumed, until the contrary is proved, that both spouses have granted the relevant consent.

(2) Whenever the gamete or gametes of any person have been used for the artificial insemination of a woman with her written consent, any child born of that woman as a result of such artificial insemination shall for all purposes in law be deemed to be the child of that woman.

(3) No right, duty or obligation shall arise between any child born as a result of artificial insemination of a woman and any person whose gamete or gametes have been used for such artificial insemination and the blood relations of that person , except where -

(a) that person is the woman who gave birth to that child ; or

(b) that person is the husband of such woman at the time of such artificial insemination.

(4) For purposes of this section -

“artificial insemination”,⁴⁷ in relation to a woman -

(a) means the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of that woman; or

(b) means the extraction of female gametes from one woman and the transfer of these gametes into the uterus of another woman, followed by fertilization of

⁴⁷ This expanded definition will also have to replace the current definition of 'artificial fertilization' in section 1 of the Human Tissue Act 65 of 1983.

these gametes [in utero / vivo] through natural means; or

- (c) means the placing of the product of a union of a male and a female gamete or gametes which have been brought together outside the human body, in the womb of that woman, or
- (d) means the flushing and transfer of the product of a union of a male and female gamete or gametes which has been created by natural means [through fertilisation in utero / vivo] from one woman to the uterus of another woman,

for the purpose of human reproduction;

“**gamete**” means either of the two generative cells essential for human reproduction.

Access to biographical information concerning genetic parents

5. A child born as a result of artificial insemination shall have access to the biographical and medical information concerning his or her genetic parents from the date on which the child reaches the age of 18 years.

Status of children of voidable marriage

6. (1) The status of any child conceived or born of a voidable marriage shall not be affected by the annulment of that marriage by a competent court.

(2) No voidable marriage shall be annulled until the court concerned has enquired into and considered the safeguarding of the interests of any minor or dependent child of that marriage, and the provisions of section 6 of the Divorce Act, 1979 (Act No. 70 of 1979), and of section 4 of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), shall, with the necessary changes, apply in respect of any such child as if the proceedings in

question were proceedings in a divorce action and the annulment of the marriage were the granting of a decree of divorce.

(3) The provisions of section 8(1) and (2) of the Divorce Act, 1979, shall, with the necessary changes, apply to rescission or variation of a maintenance order or an order relating to the custody or guardianship of, or access to, a child, or the suspension of a maintenance order or an order relating to access to a child, made by virtue of the provisions of subsection (2).

(4) A reference in any law -

- (a) to a maintenance order or an order relating to custody or guardianship or access to a child under the Divorce Act, 1979, shall be construed as a reference also to a maintenance order or an order relating to the custody or guardianship of, or access to, a child under the said Act as applied by subsection (2);
- (b) to the rescission, suspension or variation of such an order under the Divorce Act, 1979, shall be construed as a reference also to the rescission, suspension or variation of such an order under the said Act as applied by subsection (3).

7.5 **Surrogate motherhood**

As it is first and foremost the parents of a child who have parental responsibilities and parental rights in respect of that child, it is important to be able to determine who those parents are. Rapid advances in medical technology over the past few decades have made this determination very problematic in certain circumstances, notably in cases of so-called 'artificial fertilization' (perhaps less

objectionably sometimes referred to as 'alternative' or 'assisted' fertilization)⁴⁸ and particularly in the context of 'surrogate motherhood'.⁴⁹

⁴⁸ See Craig Lind 'Sexual Orientation, Family Law and the Transitional Constitution' (1995) 112 **SALJ** 481 at 490 n48. It is worth noting that surrogacy can be effected through natural means - it need not be effected by means of 'artificial fertilization'.

⁴⁹ On surrogate motherhood in general, see Tager (1986) 103 **SALJ** 381; M L Lupton 'Surrogate parenting: The advantages and disadvantages' (1986) 11 **TRW** 148, 'The right to be born. Surrogacy and the legal control of human fertility' (1988) 21 **De Jure** 36; Pretorius 1987 **De Rebus** 270, 'A comparative overview and analysis of a proposed surrogate mother agreement model' (1987) 20 **CILSA** 275, 'Practical aspects of surrogate motherhood' (1991) 24 **De Jure** 52; 'Surrogate motherhood: A detailed commentary on the draft bill' 1996 **De Rebus** 114; Clark (1993) 110 **SALJ** 769; P L Volpe 'My mother, my sister' 1989 **De Rebus** 369. For an Israeli perspective, see Carmel Shalev 'Halakha and patriarchal motherhood - An anatomy of the new Israeli surrogacy law' at http://mishpatim.msc.huji.ac.il/ilr/ilr32_1c.htm .

A surrogate mother is a woman who (usually before becoming pregnant) agrees (for financial or compassionate reasons)⁵⁰ to bear a child for another person or for a couple (the 'commissioning' person or couple), with the explicit intention of handing over the child to the commissioning person or couple after the birth.⁵¹ It is further intended by the parties to this agreement that the child should become, for all legal purposes, the child of the commissioning person or couple and that neither the surrogate mother (nor her husband, if she is married) should have any parental rights or

50 Surrogacy arrangements are sometimes referred to as 'altruistic' where the surrogate mother is motivated to enter into the arrangement not by the prospect of financial gain, but by the altruistic desire to assist another person or couple to have a child. In many of these cases, the surrogate mother is a friend or relative of the commissioning person or couple. By contrast, 'commercial' or 'paid' surrogacy is undertaken in exchange for payment, viz the commissioning person or couple undertake to pay the surrogate mother a fee which is greater than the costs incurred (and income lost) in conceiving and bearing the child. See SA Law Commission **Report on Surrogate Motherhood**, par. 2.1.6; Strauss **Doctor, Patient and the Law** 188; Tager (1986) 103 **SALJ** 381 at 391 - 2; Pretorius 1987 **De Rebus** 270; Van Wyk 1988 **TSAR** 465 at 473; Brigitte Clark 'Surrogate motherhood: Comment on the South African Law Commission's Report on Surrogate Motherhood (Project 65)' (1993) 110 **SALJ** 769 at 780.

51 Van Heerden et al **Boberg's Law of Persons and the Family** (2 nd edition) 340.

responsibilities in respect of the child.⁵²

52 SA Law Commission **Report on Surrogate Motherhood**, par 2.1.1.

A distinction is usually drawn between *partial surrogacy* and *full surrogacy*. Where the pregnancy of the surrogate mother is achieved through the implantation into her uterus of an embryo which has been 'created'⁵³ using the gametes of the commissioning person or couple or of donors (or of a combination of these persons), the process is referred to as 'full' surrogacy or 'gestational' surrogacy.

In such cases, the surrogate mother carries and gives birth to a child to whom she is not genetically related.⁵⁴ If, on the other hand, the surrogate mother's own *ovum* is fertilised (either naturally or through 'artificial' fertilization) using the semen of the commissioning man or of a donor, or where the surrogate mother's *ovum* is extracted, fertilised *in vitro* using the semen of the commissioning man or of a donor and the resultant embryo replaced in her womb, the process is known as 'partial' surrogacy. In such cases, the surrogate mother is both the genetic and the gestational mother of the child. Thus, depending on the technique utilized, a child born as a result of a surrogacy agreement could have as many as six different 'potential' parents: the genetic 'parents' (the donors of the semen and *ovum*), the commissioning 'parents', the surrogate mother who carries the baby to term and, if she is married, the surrogate's husband.⁵⁵

Although the concept and practice of surrogate motherhood raises a host of difficult legal, moral, religious and philosophical questions, the most important issue for the purposes of this investigation is the effect of a surrogacy arrangement as regards the parental rights and responsibilities of the parties involved. Other important questions relate to whether and under what circumstances a surrogacy agreement should be recognized by South African courts as a valid agreement and be enforceable, including the qualifications required for a surrogate mother and for a commissioning

⁵³ Either naturally, through sexual intercourse, or *in vitro*, by combining semen and *ova* in a glass container under laboratory conditions.

⁵⁴ The case studies discussed by Pretorius 'Practical aspects of surrogate motherhood' (1991) **De Jure** 52 at 56ff provide interesting examples of different full surrogacy situations.

⁵⁵ Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 341, footnote 51.

person or couple.

There is as yet no legislation in South Africa dealing specifically with surrogacy arrangements.⁵⁶ The 1986 Regulations Regarding the Artificial Insemination of Persons, and Related Matters, issued in terms of the Human Tissue Act 65 of 1983,⁵⁷ were apparently not intended to include surrogacy within their ambit, but nevertheless do not preclude it.⁵⁸ Similarly, although the Children's Status Act 82 of 1987 (and more specifically section 5 thereof) was apparently also not intended to address the issue of surrogacy, this Act nevertheless has far-reaching implications for many cases of surrogate motherhood. The definition of 'artificial insemination' in section 5(3) of the Act⁵⁹ is wide enough to cover many of the procedures utilized to give effect to surrogacy agreements. Thus, in those situations of surrogacy to which the Act applies, the effect of section 5(1)(a) is that the child will be deemed for all purposes to be the legitimate child of the married gestational mother (the surrogate mother) and her husband, provided that both spouses consented to the 'artificial' insemination process.⁶⁰ In terms of section 5(2), the persons whose semen and/or *ova* were used in the conception process, except in circumstances which are of no relevance here, have no rights, obligations or duties towards the child. This would be so even in a case of full surrogacy where the gametes of both the commissioning 'parents' have been used so that they are the genetic parents of the child. If, on the other hand, the legal requirements set out in section 5(1)(a) are not complied with, ie the surrogate mother is unmarried or, if she is married, the 'artificial' insemination process

56 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 341.

57 And amended in 1997 so as to make it legally possible for unmarried women to undergo 'artificial' fertilization procedures and hence to access donor semen: see Government Notice R1354 in Government Gazette 18362 of 17 October 1997. Prior to these amendments, 'artificial' insemination could legally only be carried out on a married woman and then only with the written consent of her husband.

58 SA Law Commission **Report on Surrogate Motherhood**, par. 4.2.1. See also M Schutte 'Artificial insemination and in vitro fertilisation' 1985 **De Rebus** 347; Clark (1993) 110 **SALJ** 769 at 770; Lupton (1986) 11 **TRW** 148 at 149; Pretorius (1987) 20 **CILSA** 275 at 284 and 291, footnote 85.

59 In terms of section 5(3), 'artificial insemination' is defined in relation to a woman, as '(a) the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of that woman; or (b) the placing of the product of a union of a male and female gamete or gametes which have been brought together outside the human body in the womb of that woman' (ie *in vitro* fertilization or IVF). This definition is virtually identical to the definition of the 'artificial fertilization of a person' in terms of section 1 of the Human Tissue Act 65 of 1983. See the proposed amendment to this definition set out in section 7.4 above.

60 There is a rebuttable presumption that both spouses have in fact granted their consent in this regard: section 5(1)(b).

has taken place without her husband's consent, then the common law will apply and the child will be considered to be the extra-marital child of the surrogate mother.⁶¹ In all these situations, the resultant legal status of the child is entirely contrary to the objective of the parties to the surrogacy agreement, namely that the child should be for all legal purposes the child of the commissioning person or couple.⁶²

61 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 342.

62 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 342.

Under the current South African law, the only way in which the commissioning person or couple can become the *legal* parents of the child is by adopting him or her,⁶³ even if the surrogate mother (and her husband, if she is married) are prepared to give effect to the surrogacy agreement and hand over the child to the commissioning person or couple. In terms of the Child Care Act 74 of 1983, the surrogate mother (and, if she is married, her husband) must consent to the adoption of the child, unless the children's court is prepared to dispense with such consent on one of the grounds set out in section 19. Adoption could give rise to problems in a situation of commercial surrogacy, since section 24 of the Child Care Act criminalises the payment or receipt of remuneration in respect of the adoption of a child, except as prescribed under the Social Work Act 110 of 1978 (which exception is not relevant in the present context).⁶⁴ From Regulation 21(1)(b)(iii) of the Regulations issued under the Child Care Act (as inserted by the 1998 Amendments), it would appear that it is permissible for the adoptive parents to compensate the natural mother for her actual expenses incurred without falling foul of section 24. In a surrogacy situation, this would probably include expenses relating to the fertilization, pregnancy and birth of the child (possibly including loss of earnings by the surrogate mother).

Under the present South African law, if the surrogate mother breaches the agreement and refuses to hand over the child to the commissioning person or couple, it seems likely that the South African courts will regard the agreement as *contra bonos mores* and hence unenforceable, perhaps on the grounds that it 'constitutes a possible devaluation or distortion of the concept of the family and the marriage relationship' by the introduction of a third party (the surrogate).⁶⁵ Thus, apart from an application for the adoption of the child (which is unlikely to succeed given the surrogate mother's refusal to give up the child)⁶⁶ and the possibility of an application to the High Court for guardianship

63 Section 17(a) of the Child Care Act, 1983 makes it possible for a commissioning couple to adopt a child born of surrogacy jointly even if both of them are the genetic parents of the child.

64 See, however Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 343, footnote 64 and the authority quoted.

65 SA Law Commission **Report on Surrogate Motherhood**, par 2.9; Tager (1986) 103 **SALJ** 381 at 385, 389-90, and 395 -7; Pretorius 1987 **De Rebus** 270 at 274, (1987) 20 **CILSA** 276 at 282; Lupton (1988) 21 **De Jure** 36 at 55-6; Brigitte Clark (1993) 110 **SALJ** 769 at 770, 'Gender Issues' in Schäfer **Family Law Service** para L 15.

66 A children's court is unlikely to regard the refusal by the surrogate mother to consent to the adoption of her child by the commissioning person or couple as 'unreasonable' in terms of s 19(b)(vi) of the Child Care Act.

or custody of or access to the child, the commissioning person or couple are left without any real remedy. It must be stressed, however, that although surrogacy is a very complicated and technical issue to legislate, in practice very few problems are encountered. Data reflect an absence of significant adverse effect of surrogacy on all participants.⁶⁷ The fact that a surrogate mother could wilfully surrender 'her' child for altruistic reasons and that it may be in the child's best interests for

67 JJ Weltmann 'Points to consider on the subject of surrogacy' The American Surrogacy Centre Inc (TASC) 1997 says there has been 5000 surrogacy contracts in 15 years of which 12 resulted in litigation and 2 resulted in partial custody being awarded to the gestational mother. D E Lascarides 'A plea for the enforceability of gestational surrogacy contracts' www.hofstra.edu/law/lawrev/lascar.html states that only one percent of surrogates change their minds and seek custody of the child. According to the Brazier Review (Surrogacy review for Health Ministers of current arrangements for payment and regulation) Secretary of State for Health (Cmnd 4668, October 1998), p. 26, in Britain evidence seems to suggest that only in a handful of cases (perhaps 4-5% of surrogacy arrangements) does the surrogate mother refuse to hand over the child. These statistics may explain the few court decisions on surrogacy contracts. In fact, there are far more law review articles on the topic of surrogacy than court decisions.

her to do so has become an acceptable idea.⁶⁸

68 Where the surrogate mother refuses to hand over the child, the international practice has been not to uphold the surrogacy contract, but to place the child with the commissioning parents on the basis of family law principles. See further **In re Baby M** 109 NJ 396 A2d 1227 (1988) where the court held that the surrogacy contract was invalid and unenforceable, but that it was in the best interest of the child to stay with the commissioning parents; the surrogate mother was granted visitation rights only. See also **In re Mathew B** Cal. Rptr 18 (Ct App) (1991).

The unsatisfactory legal state of affairs sketched above - and, in particular, the historic conception and birth of surrogate triplets carried by their 48-year-old married grandmother for her own daughter and son-in-law who were the genetic parents of the children - gave rise to an investigation by the South African Law Commission into the legal and other implications of surrogate motherhood. Following the circulation of a Questionnaire on Surrogate Motherhood in November 1989, the Commission published (in 1991) a Working Paper on the topic, incorporating a draft bill.⁶⁹ This was in turn followed by the publication in 1993 of a **Report on Surrogate Motherhood**, containing final recommendations and a further draft bill.⁷⁰ Matters did not, however, end here.

The Commission's Report was referred by Parliament to an Ad Hoc Select Committee for investigation and report. The Draft Bill contained in Schedule A to the Commission's Report was published on 14 June 1995, members of the public being requested to make written representations on the Bill to the Committee by 30 July 1995. The Ad Hoc Committee also conducted public hearings, called for written submissions through advertisements, conducted study tours in the North-West, Northern Province, Eastern Cape and KwaZulu-Natal and visited the United States of America and the United Kingdom to investigate how surrogate motherhood is dealt with in other jurisdictions.

The Ad Hoc Committee completed its final report in February 1999. This report was tabled in Parliament on 19 March 1999 and was referred to the Minister of Justice for further action. Draft legislation is pending.

The Commission took the view that surrogacy should not be banned or criminalized in South Africa, but should rather be recognized and regulated by legislation. This view is shared by the Ad Hoc Committee. However, on many other aspects, the approaches of the Commission and the Ad Hoc

⁶⁹ **Working Paper 38: Surrogate Motherhood** (Project 65) (April 1991).

⁷⁰ **Report on Surrogate Motherhood** (Project 65) (1993).

Committee differ quite widely, particularly as regards the issues identified above as being most important for the purposes of this investigation.

According to the Commission, surrogate motherhood should be restricted as an option to commissioning parents who are lawfully married to each other and who act jointly as a couple. This recommendation was criticized on the ground that a refusal to allow a single person or an unmarried couple (whether heterosexual or of the same sex) to enter into a surrogacy agreement should be based on established empirical evidence that such persons are less capable parents and that it is not in the best interests of the child. However, research has indicated that there is no evidence of increased likelihood of psychiatric, gender-identity or other disorders in children raised by single persons or unmarried couples (even same-sex couples).⁷¹ It could also be argued that restricting the category of 'acceptable' commissioning persons in this way is unconstitutional: not only does it discriminate unjustifiably against persons on the grounds of their marital status or sexual orientation,⁷² but it may also be regarded as impairing or limiting the right of certain persons 'to make decisions concerning reproduction'.⁷³ Insofar as the provision effectively denies to certain persons the opportunity to become parents, it also appears to violate their rights to dignity and privacy.⁷⁴ While the best interests of the child or the potential of harm to the commissioning parent or parents might in principle justify this restriction, it is difficult to see how either of these considerations could arise from the *mere* fact that the commissioning parent is a single person or that the commissioning couple happens to be unmarried (whether heterosexual or same-sex).⁷⁵

⁷¹ See Brigitte Clark 'Surrogate Motherhood: Comment on the South African Law Commission's **Report on Surrogate Motherhood** (Project 65) (1993) 110 **SALJ** 769 at 772. See also Craig Lind (1995) 112 **SALJ** 481 at 496 ff; Elsje Bonthuys 'Awarding Access and Custody to Homosexual Parents of Minor Children: A Discussion of *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W)' (1994) 5 **Stell LR** 298 at 310 ff; Frans Viljoen 'Signs of the Times: Changing Attitudes Under the New Constitution' (1995) 6 **Stell LR** 232 at 234 ff; Divya Singh 'Discrimination against Lesbians in Family Law' (1995) 11 **SAJHR** 571 at 576-7.

⁷² Section 9(3) of the Constitution.

⁷³ Section 12(2)(a) of the Constitution.

⁷⁴ Sections 10 and 14 of the Constitution.

⁷⁵ See Alfred Cockrell 'The Law of Persons and the Bill of Rights' in **Bill of Rights Compendium** para 3E28.

It would appear that some of these arguments influenced the Ad Hoc Committee in coming to the conclusion that, subject to the other qualifications required for commissioning parents, a single person (whether married or unmarried), an unmarried couple (whether of the same sex or heterosexual) and a married couple (whether married in terms of the common law or customary law or by religious rites) should be eligible to enter into a surrogacy agreement as a commissioning person or couple. The Ad Hoc Committee emphasised, however, that legislation should in all respects protect the best interests of children, especially as regards providing a child born in the context of a surrogacy agreement with a stable home. The Ad Hoc Committee was of the view that persons who are not able to provide a stable home for the child or who are physically, psychologically or otherwise unfit or unsuitable to be commissioning parents should be eliminated through the compulsory screening process recommended.

As regards the qualifications for a surrogate mother, the Commission recommended that only a woman who has already given birth to at least one child and who is married, divorced or a widow should be allowed to become a surrogate mother. This provision also appears to discriminate unfairly against persons who have never been married, as also against childless persons. According to the Commission, a surrogate who is married with children of her own 'will have experienced the physical and emotional consequences of bearing a child and should be better able to judge whether she can cope with the physical and psychological consequences of a surrogate pregnancy'.⁷⁶ Much the same sort of thinking appears to have led the Ad Hoc Committee to its conclusion that, subject to the other qualifications required for a surrogate mother, a woman should be allowed to act as a surrogate mother irrespective of her marital status (including whether she is or has ever been married), or of her sexual orientation, but that a surrogate mother must have at least one child of her own. Here too, there may be potential problems. It could be argued that, as recommended by both the Commission and the Ad Hoc Committee, careful screening of a potential surrogate mother to establish her physical and psychological suitability to act as such should be an essential prerequisite for a surrogacy arrangement. If a childless woman (whether married or not) 'passes' this screening process successfully, then it is arguable that preventing her from being a surrogate mother

⁷⁶ **Report** para 8.2.3.

unjustifiably limits her constitutional rights (to equality, privacy, dignity and reproductive freedom).⁷⁷

The Ad Hoc Committee agreed with the Commission recommendation that surrogacy agreements should only be available as a 'last resort'. Because the Commission Report restricted surrogacy as an option to a lawfully married commissioning couple, its 'last resort' recommendation was to the effect that surrogacy would only be available if the commissioning wife was for medical reasons incapable of giving birth to a child and this condition was permanent and irreversible. In line with the more liberal view of the Ad Hoc Committee as regards eligibility to be a commissioning parent, the Ad Hoc Committee's 'last resort' recommendation requires that the commissioning person or couple must, owing to biological or medical factors (or both), be unable to give birth to a child and that this condition must be permanent and irreversible. After all, if the commissioning person is a single man or the commissioning couple is a same-sex couple, then such persons are indeed permanently and irreversibly incapable of giving birth to a child - not for medical reasons, but because of biological realities!

⁷⁷ Sections 9, 10, 12 (2)(a) and 14 of the Constitution.

The Ad Hoc Committee also accepted the view of the Law Commission that the use of donor gametes should not be permitted where it is possible to use the gametes of the commissioning parents. Thus, in the case of a commissioning couple, surrogate motherhood should only be permitted if the gametes of both commissioning parents or, where this is not possible, of at least one of the commissioning parents is used: in other words, the child must be genetically related to at least one if not both of the commissioning parents. As regards a single commissioning person, the Committee recommended that he or she should only be eligible to enter into a surrogacy agreement if his or her gametes (semen or *ova*, as the case may be) are used in the conception of the child, viz that a single commissioning parent should be genetically related to the child. If the commissioning person is or both of the commissioning couple are infertile, then the Ad Hoc Committee was of the view that allowing surrogacy would amount to what Professor Meyerson calls a 'commissioned adoption'⁷⁸ and that this is not acceptable. As the child will in such cases not be genetically related to the commissioning person or to either of the commissioning couple, the approach of the Ad Hoc Committee is that 'ordinary' adoption will in such cases adequately serve the needs of the person or couple concerned. It must, however, be remembered that adoption will *not* always be possible in such cases: there is a lengthy waiting list for adoption (particularly for new born 'white' babies), the person or couple might be too old to qualify as an adoptive parent or parents, potential problems arise in the case of trans-racial or transcultural adoptions even where these are possible, etc.⁷⁹ Although it could be argued that this provision (that the commissioning person or at least one of the commissioning couple must be genetically related to the child) is aimed at restricting 'undesirable

⁷⁸ Denise Meyerson 'Surrogacy Arrangements' in Christina Murray (ed) **Gender and the New South African Legal Order** (1994) 121 at 123.

⁷⁹ See Rika Pretorius 'Practical Aspects of Surrogate Motherhood' (1991) 24 **De Jure** 52 at 59-61 and 'Surrogate Motherhood: A Detailed Commentary on the Draft Bill' 1996 **De Rebus** 114 at 117-119.

practices such as shopping around with a view to creating children with particular characteristics',⁸⁰ there is the counter-argument that, if subjected to constitutional scrutiny, this provision may be regarded as violating the right of an infertile person to 'make decisions concerning reproduction',⁸¹ as well as such person's rights to dignity and privacy.

⁸⁰ See **Report on Surrogate Motherhood** par 8.2.

⁸¹ Section 12(2)(a) of the Constitution.

As regards permissible types of surrogacy, the Commission took the view that partial surrogacy should not be permitted: the surrogate mother's own *ovum* should not be used in the conception of the child. Furthermore, if the surrogate mother is married, then the semen of her husband should also not be used. The reasoning underlying this prohibition on partial surrogacy is apparently that it would be unconscionable to force a mother to part with her natural child and that a surrogate mother who is not genetically related to the child will be able to relinquish him or her more easily. But this reasoning has been convincingly criticized - not only does it suggest (without any real substantiation) that it is genes rather than gestation which create a bond between mother and child, but it also fails to take account of the fact that full surrogacy 'may be potentially more exploitative of poorer women than partial surrogacy and at the same time more attractive to the wealthier couple who can obtain a child who is genetically their own'.⁸² Furthermore, because full surrogacy entails complex and very expensive medical and surgical procedures with a relative low success rate (particularly in cases where the commissioning woman is infertile and a donated *ovum* has to be used),⁸³ partial surrogacy will in many cases be the only practically and financially feasible option open to the commissioning person or couple.

Despite these considerations, the Ad Hoc Committee also regarded full surrogacy as the 'preferred option' and is only prepared to allow partial surrogacy in circumstances in which, for biological or medical reasons, it is not possible to use the *ovum* of a commissioning parent in the conception process. Here too, the Ad Hoc Committee's recommendation may be problematic in certain cases,

⁸² Brigitte Clark (1993) 110 **SALJ** 769 at 773.

⁸³ *Ovum* donation requires risky hormone treatment and surgical extraction of the *ovum*. And even if the commissioning woman is fertile and merely needs the surrogate mother to carry the baby to term, the embryo ('created' either naturally or *in vitro*) will still have to be implanted in the surrogate mother after artificially manipulating her cycle. This operation is also 'prohibitively expensive, high-tech, and usually unsuccessful': Meyerson 'Surrogacy arrangements' in Murray **Gender and the New South African Legal Order** 138.

for example, those in which the commissioning person or couple simply cannot afford the procedures required for partial surrogacy, even though it is biologically and medically possible to use the *ovum* of a commissioning parent.

Most important for the purposes of this investigation are the approaches taken by the Commission and the Ad Hoc Committee as regards the effect of a surrogacy arrangement on the parental rights and responsibilities of the parties involved. The Commission's view was that a child born of a surrogate mother in terms of a surrogacy arrangement that satisfied the prescribed requirements⁸⁴ should, from the moment of birth, for all purposes be deemed to have the legal status of a legitimate child of the commissioning couple. The commissioning parents should therefore be regarded as the child's lawful parents and neither the surrogate mother nor her husband should have any rights or obligations towards the child. The surrogate mother should be required to hand over the child to the commissioning parents at his or her birth or as soon thereafter as is reasonably possible and can be forced to do so against her will. If, on the other hand, the surrogacy agreement fails to comply with the prescribed requirements, then it should be invalid and the child should for all purposes be deemed to be the child of the surrogate mother (subject to the provisions of section 5 of the Children's Status Act).

The Ad Hoc Committee recommended that, in cases of full surrogacy, there should be so-called 'direct parentage'. The child should be regarded from birth as the child of the commissioning person or couple and should be registered as such. So too, the surrogate mother should be obliged to hand over the child to the commissioning person or couple immediately after birth (or, in exceptional cases, within a reasonable period after birth) and, if she refuses to do so voluntarily, she should be forced to do so. Neither the surrogate mother nor any of her relatives should have any parental

⁸⁴ And that is confirmed by the court prior to the implementation of the agreement, ie prior to the 'artificial' fertilisation of the surrogate mother. In considering whether or not to confirm the agreement, the court's overriding consideration should be the best interests of the child that is to be born.

rights or responsibilities in respect of the child, although it should be possible for the parties to the surrogacy agreement to include in the agreement provisions regulating, inter alia, 'visitation rights' to the child.

In cases of partial surrogacy, the Ad Hoc Committee recommended the so-called 'transfer of parentage' or 'fast-track adoption' approach that is utilised in England in terms of section 30 of the Human Fertilisation and Embryology Act 1990. The child is, at birth, regarded as the child of the surrogate mother (and, if applicable, of her husband) and is registered accordingly. The commissioning person or couple will then have to apply to court for a change of parentage (parental) order, the effect of which will be to make them, in law, the parents of the child. Once the order is granted the child is issued with a new birth certificate reflecting the commissioning person or couple as the parent(s) of the child. Such an order must be applied for within 6 months of the child's birth and cannot be made unless the surrogate mother gives her unconditional consent. Because it is felt that she should not make a final decision as to whether or not to 'give up' the child during the first six weeks after birth, any consent which she purports to give during those six weeks is ineffective. The Ad Hoc Committee's idea was that, as in England, the child should be handed over to the commissioning person or couple immediately after birth (or, in exceptional cases, within a reasonable period after birth) and that, until the change of parentage order is made, a guardian *ad litem* should be appointed to protect the child's interests. Unlike its recommendation in cases of full surrogacy, the Ad Hoc Committee recommended that, in cases of partial surrogacy, the failure or refusal of the surrogate mother to give her unconditional consent to a change of parentage order should result in the retention of the status quo (ie the child should continue to be regarded in law as the child of the surrogate mother and, if applicable, of her husband).

As regards the Ad Hoc Committee's recommendation in respect of the use of the direct parentage model in cases of full surrogacy, it has been argued that to compel the surrogate mother to surrender the child amounts to 'sacrificing a woman's reproductive autonomy to the principle *pacta servanda sunt*',⁸⁵ and that the physiological and psychological changes experienced by the surrogate mother

⁸⁵ Clark (1993) 110 **SALJ** 769 at 777.

during pregnancy, coupled with her exposure to the physical risks of pregnancy and with the fact that it is her body which makes possible every aspect of the child's development, justify the law in refusing to force a surrogate mother (against her will) to relinquish a child she has carried, even in cases of full surrogacy (where she is not genetically related to the child).⁸⁶ It is also possible that specific enforcement of a surrogacy agreement against the surrogate mother would be unconstitutional, violating the surrogate's rights to dignity, privacy and bodily autonomy,⁸⁷ as well as the child's right to dignity.⁸⁸

⁸⁶ Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 351, footnote 90, with reference to Denise Meyerson 'Surrogacy agreements' in Murray **Gender and the new South African Legal Order** 139-40, 145.

⁸⁷ Sections 10, 14 and 12(2) of the Constitution.

⁸⁸ See Alfred Cockrell **Bill of Rights Compendium**, 3E28.

As regards the enforceability of the surrogacy agreement against the commissioning parents, it would appear that the prevailing view in South Africa is that the surrogate mother ought to be able to force the commissioning parents to take responsibility for the child, if necessary with the assistance of the court, in cases where the commissioning parents attempt to abdicate such responsibility for some or other reason.⁸⁹

In considering the effect of surrogacy on the status of the child, a slight shift in perspective may perhaps present a better rationale and assist future discussions of this issue. While reference is regularly made to the fact that the welfare of the **child** must be accorded the highest priority, all further reasoning is usually centred around the rights of the **adults** involved, and in particular the surrogate mother. While the Commission acknowledges the rights of parents, in its opinion the foremost consideration in this regard should indeed be the best interests of the child, as is mandated by section 28(2) of the Constitution. **The Commission would therefore recommend a more child-centred approach, accepting however that the child's best interests are closely linked to those of his or her parents and the interests of the family as a whole.**⁹⁰

From a child's vantage point, legal ties to parents confer status in society. That status carries rights of care, support, inheritance, etc. The child's identity is furthermore vested in the family unit, and birth into the unit endows the child with a heritage and a history.⁹¹

The effects of surrogacy on a child could perhaps better be illustrated by an example evaluating the position of a child, born as a result of *full* surrogacy,⁹² at the age of seventeen years. At the moment

89 Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 351, footnote 90.

90 Michael Freeman 'The new birth right? Identity and the child of the reproductive revolution' (1996) 4 **International J of Children's Rights** 273 at 286.

91 M L Lupton 'Artificial reproduction and the family of the future' (1998) 17 **Med Law** 93 at 95.

92 The position regarding partial surrogacy may present more of a problem as the child will be genetically related to the surrogate mother as well as the commissioning father. From the child's point of view, he or she will therefore only be living with one genetic parent irrespective of which party is chosen. The determining factor will once again be the family law principles as considered by the court before conception. Ananda Louw 'Reproductive rights and alternative methods of reproduction including surrogacy', paper presented at the Miller Du Toit Conference on Family Law in a Changing Society held in Cape Town on 1 and 2 February 2001 rightfully poses the question whether full and partial surrogacy should not therefore be treated in the same way.

of birth, the gestational mother, more than anyone else, is the person who has made the largest biological and psychological investment in the child. But, however primary this relationship is, it is readily supplemented and gradually replaced by other caring aspects of parental commitment in the social relationship.⁹³

If a child aged seventeen years, genetically linked to both parents, as well as to an extended family of grandparents, uncles, aunts, nephews, nieces and possibly siblings, and nurtured by them for seventeen years would look back at his or her birth, it would be difficult to imagine that the nine months before he or she was born, spent with the surrogate mother, would play a significant role in that child's future psychological health. The child's history would present a happy picture of parents who went to the ends of the earth in order to have him or her as miracle child and a special woman who made this possible. The child would also in many cases have known the surrogate mother throughout his or her life since chances are good that she would be a relative or good friend of the family.

Compare this to a child at the same age who was denied the opportunity to live with his or her genetic parents and family in order to live with the surrogate mother and her family to whom such child is not related at all. That child would, as is often the case in adoption cases, experience anguish about his or her origin and roots and would need to have questions answered as to his or her identity, personal history, medical background and the reasons why he or she was not allowed to grow up within his or her genetic family. That child's history could be one of disputed custody, bitterness and enforced separation from his or her genetic parents. Where all the arrangements went awry chances of amiable contact between the parties would furthermore be slim.

93 R Tong 'Feminist bioethics toward developing a "feminist" answer to the surrogate motherhood question' (1996) 6.1 **Kennedy Institute of Ethics** J 37.

It would be very difficult to argue that it would be in the best interests of a child who has the opportunity to grow up with his or her genetic parents who would at the same time also be his or her social parents (and which parents have been found by the court to be suitable parents for that child) to be compelled to live with the surrogate mother. In considering competing interests one should therefore not only weigh up the interests of the surrogate mother as against that of the commissioning parents, but also against the interests of the child.

7.6 Evaluation and recommendations

The Commission has taken note of the criticism raised in respect of its report on surrogacy, but for present purposes it is not necessary to deal with these, except as far as it relates to the status of children. The introduction of draft legislation on surrogacy in Parliament is pending, and it is therefore premature for the Commission to revisit its recommendations on surrogacy.

To give effect to the vision of a single comprehensive children's statute, **the Commission recommends that the provisions in the envisaged new Surrogacy Act on the status of children born of surrogacy be mirrored in the new children's statute. In this context, it is recommended that a distinction between full and partial surrogacy be maintained. In the case of *full* surrogacy, the Commission recommends the establishment of direct parentage between the child born of surrogacy and the commissioning parent(s) from the time of birth of that child. In this scenario, the commissioning parent(s) are entitled to immediately register the child as their child. In the case of *partial* surrogacy, the Commission recommends the use of a 'delayed direct parentage' model. In terms of this model, the commissioning parent(s) would automatically become entitled to register the child as their child after a short 'period of grace'⁹⁴ (say 60 days) has lapsed after the birth of the child.** The acquisition of parental rights and responsibilities by the commissioning parent(s) is therefore merely delayed by a 'cooling-off period' in which the surrogate mother has the right to change her mind and keep the child. Should the surrogate mother decide to keep the child, then the commissioning parents have no rights in

94 See further Clark (1993) 110 **SALJ** 769 at 777-8; Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 352, footnote 90.

respect of the child.⁹⁵

Our recommendation will have the effect that **direct** parentage will be established for children born of both partial and full surrogacy, with one difference, as explained above.

In the case of **full** surrogacy, if the child is with the commissioning parents, then the child will grow up with at least one genetic parent. If the child grows up with the surrogate mother, then the child will not be growing up with any genetic parent at all. In the case of **partial** surrogacy, the child will grow up with at least one genetic parent (either the surrogate mother or commissioning parent(s)).

95 In such a case, the commissioning parent(s) should be able to reclaim from the surrogate mother all money paid to her and expenses, etc incurred. It might even be possible to claim damages from the surrogate mother for her breach of contract.

Recent international developments have centred on the child's right to (genetic) identity.⁹⁶ In this context, identity has been described as an organising framework for holding together our past and present while providing some anticipated shape to future life.⁹⁷ Interest in genetic origins and the question as to whether identity should be based on genetic ties are being investigated and debated. This notion of identity should however not be seen to emphasise the importance of genetic parenthood over the commitment involved in bringing up a child as a social parent.⁹⁸ However, the Commission recognises the claim that there is a psychological need in all people to know their backgrounds, their genealogy and their personal history.⁹⁹

In line with our recommendation regarding the amendment of the confidentiality provisions in the Human Tissue Act 65 of 1983 in respect of artificial insemination above,¹⁰⁰ the Commission recommends that a child born as a result of a surrogacy arrangement should have access to the surrogate contract and all biographical and medical information concerning his or her generic parents from the date on which he or she reaches the age of 18 years.

Accordingly the Commission recommends that the following provisions be included in the new children's statute:

Effect of surrogate motherhood agreement

1. (1) The effect of a valid surrogate motherhood agreement will be that -
 - (a) a child or children born of a surrogate mother in accordance with the agreement is for

96 See, eg, Michael Freeman 'The new birth right? Identity and the child of the reproductive revolution' (1996) 4 **International J of Children's Rights** 273 and authorities there cited. See also Sarah Wilson 'Identity, genealogy and the social family: The case of donor insemination' (1997) 11 **International J of Law, Policy and the Family** 270; Katherine O'Donovan 'A right to know one's parentage' (1998) 2 **International J of Law and the Family** 27.

97 Freeman (1996) 4 **International J of Children's Rights** 290.

98 Wilson (1997) 11 **International J of Law, Policy and the Family** 270.

99 See also O'Donovan (1998) 2 **International J of Law and the Family** 30.

100 See 7.4 above.

all purposes the child of the commissioning parent or parents from the moment of the child's birth;

- (b) the surrogate mother will be obliged to hand the child over to the commissioning parent or parents as soon as is reasonably possible after the birth;
- (c) the surrogate mother or her husband, partner or relatives will have no rights of parenthood or custody of the child;
- (d) the surrogate mother or her husband, partner or relatives will have no right of access to the child unless provided for in the agreement between the parties;
- (e) subject to sections 2 and X,¹⁰¹ no surrogate motherhood agreement may be terminated after the artificial fertilisation of the surrogate mother has taken place;
- (f) the child will have no claim for maintenance or of succession against the surrogate mother, her husband or partner or any of their relatives.

(2) Noncompliance with the requirements of the Surrogacy Act (Act xx of 2001) or the surrogate motherhood agreement will not affect the determination of parenthood under this Act.

Termination of surrogate motherhood agreement

2. (1) A surrogate mother who is also a genetic parent of the child concerned, may, at any time prior to the lapse of a period of sixty days after the birth of the child, terminate the surrogate motherhood agreement by filing written notice with the court.

101 Allowing the surrogate mother to abort the child in terms of the Choice on Termination of Pregnancy Act 92 of 1996.

(2) The court will vacate the order entered pursuant to section xy of the Surrogacy Act (Act xx of 2001)¹⁰² upon finding, after notice to the parties to the agreement and a hearing, that the surrogate mother has voluntarily terminated the agreement and that she understands the effects of the termination.

(3) The surrogate mother will incur no liability to the commissioning parents for exercising her rights of termination pursuant to this section, except for compensation for any payments made by the commissioning parents in terms of the Surrogacy Act (Act xx of 2001).

Effect of termination of surrogate motherhood agreement

3. The effect of the termination of a surrogate motherhood agreement in terms of section 2 above will be that: -

(1) where the agreement is terminated after the child is born any parental rights established in terms of section 1 above will be terminated and will be vested in the surrogate mother and her husband or life-long partner, if any.

(2) where the agreement is terminated before the child is born, the child is the child of the surrogate mother and her husband or life-long partner, if any, from the moment of the child's birth;

102 Such provision to provide that the surrogate motherhood agreement must be in writing and confirmed by the court.

(3) the surrogate mother and her husband or life-long partner, if any, shall be obliged to accept the obligation of parenthood;

(4) subject to subsections (1) and (2) above, the commissioning parents will have no rights of parenthood and can only obtain such rights through adoption;

(5) subject to subsections (1) and (2) above, the child shall have no claim for maintenance or of succession against the commissioning parents or any of their relatives.