

Onlangse regspraak/Recent case law

Ex parte WH

2011 6 SA 514 (GNP)

Discussion of genetic links and monetary payments in South African and foreign surrogate mother agreements with particular reference to the English experience

1 Introduction

1 1 Background and Aim of the Note

The legal requirements pertaining to a surrogate motherhood agreement (SMA) in South Africa are contained in Chapter 19 of the Children's Act (38 of 2005) (CA). On 27 September 2011, Tolmay J and Kollapen J delivered the first available reported judgment that resulted in the confirmation of an SMA: *Ex parte WH* 2011 6 SA 514 (GNP). In a previous judgment – *Ex parte applications for the confirmation of three surrogate motherhood agreements* 2011 6 SA 22 (GSJ) – the agreements were not confirmed by the court, due to lack of evidence (for a discussion of the latter case, see Soni & Carnelley “Surrogate Motherhood Agreements” 2011 (May) *De Rebus* 30-35). However, to date there has been no judgment relating to foreign SMAs involving South African commissioning parents, although such arrangements are not unheard of.

The first aim of this note is firstly to assess the SMA agreement as it crystallised in the judgment of *Ex parte WH*, in light of the two particular statutory requirements: the origin of the gametes (genetic material) used for the artificial fertilisation of the surrogate, and any payments made in connection with the SMA. All the South African legislative provisions relating to surrogacy will not be discussed in detail, as this has been done previously (see Carnelley & Soni “A tale of two mummies. Providing a womb in South Africa: surrogacy, the agreement and the legal rights of the parents within the CA. A brief comparative study with the United Kingdom” 2008 *Speculum Iuris* 36 36-52). The second aim of the note is to discuss the issue of foreign SMAs. This focuses on South African couples entering into an SMA with a foreign surrogate, and the consequences of the agreement thereafter in South Africa.

The comparative legislative provisions in England (and Wales) will be discussed relating to both genetic links and monetary payments, and will be compared to the outcome in *Ex parte WH*. In addition, the comparable English legal principles dealing with foreign surrogacy will also be discussed, in light of numerous recent English court decisions dealing with these issues.

The note will commence with a brief overview of the relevant statutory provisions in both jurisdictions. This is followed by a discussion of the South African case of *Ex parte WH*, specifically the section relevant

to the genetic material and payment. The note concludes with a discussion of the payment for foreign surrogate arrangements in both jurisdictions.

The rationale for the comparative jurisdiction used, is because the regulatory framework regarding surrogacy is similar in both countries. Both jurisdictions strictly regulate surrogacy, require a genetic link between the commissioning parents and the child, and prohibit commercial surrogacy through limitation of payments to the surrogate mother. There are, however, some differences: the court order confirming, *inter alia*, the legal parents (holders of parental responsibilities and rights) of the child in South Africa, is obtained prior to the fertilisation of the surrogate; and in England, the parental order is only obtained in court after the child is born. As surrogacy has been regulated in England since 1985, there have been numerous judgments about such arrangements, especially latterly with regard to foreign SMAs. These could provide useful insight for the South African courts, should they be faced with similar issues.

1 2 Relevant Legal Principles in South Africa and England

For purposes of expedience, it is noted that in South Africa, a pre-artificial fertilisation court-confirmed SMA will only be valid, *inter alia*, if the gametes of at least one of the commissioning parents are used for the artificial fertilisation of the surrogate (s 294 CA), and if it is not a commercial SMA. Payments in respect of surrogacy are prohibited, except for specific claims relating to the compensation of expenses, loss of earnings, and insurance cover (s 301(2) CA). However, persons rendering bona fide professional legal and medical services are entitled to reasonable compensation (s 301(3) CA). However, no person may with a view to compensation make known that any person might be willing to enter into an SMA (s 303(2) CA).

In England, SMAs are regulated by the Surrogacy Arrangements Act 1985 (SAA), read with the Human Fertilisation and Embryology Act 2008 (HFEA). The HFEA provides that a commissioning couple (the applicants) can apply for a parental order in respect of a child born as a result of an SMA, where the child was the result of artificial insemination and not carried by one of the applicants, within a specific period after the birth of the child (s 54(1) HFEA). In addition, it is a requirement that the child must be genetically related to at least one of the applicants (s 54(1)(b) HFEA). Furthermore, no money or other benefit, other than for reasonable expenses, may be given or received by either of the applicants for, or in consideration of, the making of the order, the SMA, the handing over of the child to the applicants, or the making of arrangements with a view to the making of the order – unless the court has authorised such payment (s 65(8) HFEA). The SAA specifically prohibits and criminalises commercial surrogacy arrangements (ss 2, 4 SAA).

The rationale for these provisions, effectively limiting surrogacy, is to prevent commercial surrogacy. The aim of the legalisation and regulation

is to make it possible for the commissioning couple to have a child genetically linked to either or both of them. Such surrogacy arrangements are legalised as a last possible option for infertile couples, or same-sex persons, to conceive a child genetically linked to either of them (Herring *Family Law* (2004) 344). If there is no genetic connection, there is no need for surrogacy, as adoption could be a viable alternative. It has also been argued that commercial surrogacy arrangements should be avoided for ethical reasons, as it “commodifies” children and treats them as possessions that can be brought and sold (Herring 343). Moreover, commercialisation could lead to poorer women being exploited and forced into surrogacy arrangements for monetary purposes (Herring 343). Whatever the rationale, the principles have been firmly established in the legislation of both jurisdictions.

2 The South African Judgment in *Ex parte WH*

2.1 The Judgment

The stated aim of this particular judgment is “to ensure consistency and develop a uniform practice” with surrogacy-related court applications, and to “determine and provide guidelines on how similar applications should in future be dealt with” (par 9).

The court requested address on four aspects – two of which are relevant to this note. The first of these, is the approach that should be followed where the genetic material used is not that of the parties. Secondly, as the application referred to an agency-introduction of the surrogate mother to the commissioning parents, the court requested additional information about the agency. The additional information required was: an affidavit setting out the procedures followed by the agency in facilitating surrogacy; copies of additional agreements between the commissioning parents and the potential surrogate mother, and/or the agency, as well as between the agency and the surrogate mother; indications as to compensation (and if so, full particulars thereof) paid by the commissioning parents to the agency and/or the surrogate mother, and by the agency to the surrogate mother (parr 10–12, 24).

(The questions relating to the approach that should be followed when a same-sex couple applies for a surrogacy agreement to be made an order of court, the appropriate steps to be followed, and factors to be considered to determine the best interests of the child, are ignored for the purposes of this note.)

The facts of *Ex parte WH* are straight-forward. The application was brought by a male same-sex couple (the commissioning parents), domiciled in South Africa, and united (presumably) in terms of the Civil Union Act (16 of 2006) (the court uses the word “married” (par 15)). The couple do not have children of their own, and “both being male persons are incapable of having children that are genetically related to them except via the process of surrogacy” (par 16).

The application by the commissioning parents, supplemented by the affidavits of the surrogate mother and her spouse, and coupled with

psychological reports, were found to have met the statutory requirements (par 19–22 as read with the Act). However, there was no information before the court about the origin of the donor-egg, except that it will not be that of the surrogate mother (par 22). The judgment is silent on the identity of the other gamete donor (the sperm donor).

With regards to an exchange of funding, the parties were at pains to convince the court that no money had been or would be paid to the agency, or the surrogate mother, in contravention of the Act (par 18). The evidence presented was that profits of the agency – an online egg donation business – were the sole source of income for the owner of the agency. She gave evidence that she does not charge a fee for surrogacy services, as it is an extension of the core business of the agency (par 25). She noted that there was no agreement between the agency and the prospective surrogate mother, and no payment was promised or paid to the surrogate (par 26). Similarly, there was no payment or promise to pay the agency for the introduction of the commissioning parents to the surrogate mother (par 27).

The payment by the commissioning parents to the surrogate mother was listed: health insurance (R20,400 pa); life insurance (R6,000 pa); and “surrogate various expenditure (transport, maternity clothes, etc)” (R20,000) (par 28). The court registered concern about this last generic amount, as there could be a risk that it may disguise payment of compensation (which is not allowed in terms of the CA). Moreover, the court noted that a detailed list detailing specific expenses should in future be provided to the court, to minimise the possibility of abuse (par 29). The court nonetheless accepted the *bona fides* (and evidence) of the applicants and other witnesses – that no payment was or would be made in contravention of the CA (par 30).

The court confirmed that commercial surrogacy is prohibited in South Africa, and that it is only allowed for altruistic purposes, and with only specific payments being allowed (par 40). The court - under the heading “The surrogate mother and the risk of commercial surrogacy” - notes that agencies facilitating the introduction of surrogate mothers to commissioning parents play an important role, although this role can easily lead to abuse (par 64). The judges continue (par 64):

One would be naïve not to see how it is possible to develop to the point where ‘a womb for hire’ could become *de facto* part of surrogacy practice ... It becomes clear that, particularly in countries such as ours with deep socio-economic disparities and the prevalence of poverty, that the possibility of abuse of underprivileged women is a real and ever present danger. Ideally the involvement of agencies should be the subject of regulation and oversight in order to avoid abuse which ordinarily is very difficult to detect from the face of a contract of surrogacy. 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.

The court confirmed that any payment outside s 301 of the CA is prohibited, including any facilitation fee (par 65). The court specifically stated that if an agency is involved, there should be added safeguards,

including providing additional information to the court. This should include the details of the agency, any payments made, and information about the involvement of the agency, including about the introduction of the surrogate, how the information of the surrogate was obtained, and whether the surrogate received any compensation from the agency or the commissioning parents. This allows the court to exercise its discretion before confirming the agreement (par 67). The court also notes that the application should state where the gametes will come from, without revealing the identity of the donor (par 68).

The court concluded that the parties made out a proper case for the relief they sought, that the parties concluded the SMA for altruistic rather than commercial reasons, that the payments were in line with the legislation, and thus confirmed the SMA (parr 79–80).

2 2 Genetic Link

The first problem with the judgment is that it is not made clear if one of the commissioning parents will actually be a gamete donor as required by s 294 of the CA. In light of the stated aim of the judgment – consistency, uniform practice and provision of guidelines – this is unfortunate, as it ignores one of the basic statutory requirements for a valid SMA. On the one hand, the court requested information about the approach that should be followed where the genetic material used is not that of the parties (par 10). Does this mean there will be no donation by either of the commissioning parents or the surrogate, or is the court referring just to the surrogate mother? This is especially unclear, as the court notes that the application should state where the gametes will come from, without revealing the identity of the donor (par 68). If the donor is a commissioning parent, secrecy of the donor would be irrelevant. However, if one of the commissioning parents is not a gamete-donor, the agreement would be in contravention of the CA and unlawful. On the other hand, the court acknowledges that same-sex couples cannot have children that are genetically related to them, except through the process of surrogacy (parr 16, 36).

It is submitted that the lack of clarity on this very important point is unsatisfactory and regrettable. At best it is an unfortunate omission in the judgment itself; at worst a contravention of the legislation. This would have important consequences. If neither of the commissioning parents is genetically related to the child, the agreement itself would be unlawful, and the child would legally be regarded as the child of the surrogate mother (s 297(2) CA). Her husband would be presumed to be the legal father of the child (*in casu*), unless evidence of the real biological father is presented to court (possibly one of the commissioning parents) – who then may be regarded as a holder of parental responsibilities and rights, depending on the factual situation interpreted in light of s 21 of the CA. This outcome would hardly be what the parties had anticipated when they entered into the agreement. Clarity and specificity are exactly why the court order should be obtained before fertilisation of the surrogate mother. It is submitted that – where there is no genetic link to the

commissioning parents – adoption should be the only viable alternative for the commissioning parents, although the legislative provisions in this regard should be adhered to (ch 16 CA).

In England there has not been a judgment regarding an application for a child born as a result of surrogacy, where one or both of the commissioning parents were not the genetic parent. It is submitted that if such a scenario arose before the court, the court would not make a parenting order, as it would be in contravention of the HFEA (s 54(1)). The consequences in such instances would be that the birth (surrogate) mother would be the legal mother of the child (s 33(1) HFEA), and her spouse the legal father (ss 35 & 42 HFEA) – unless there is evidence of lack of consent (*Re G (Surrogacy: Foreign Domicile)* 2008 1 FLR 1047 parr 31–32). As in South Africa, if there is no genetic link to the commissioning parents, the only option for the commissioning parents would be an adoption order in terms of the relevant legislation (Adoption and Children Act of 2002).

2 3 Payments

The second unsatisfactory aspect of the South African judgment in *Ex parte WH*, relates to the financial aspects of the SMA. As mentioned above, the starting point is that the legislation specifically prohibits commercial surrogacy, subject to three limited exceptions. *In casu*, as mentioned above, the listed payments included health and life insurance as well as a general amount of R20,000 described as “surrogate various expenditure (transport, maternity clothes etc)”.

Section 301 of the CA makes provision for the following: (a) compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and confirmation of the SMA; (b) loss of earnings suffered by the surrogate as a result of the SMA; and (c) insurance to cover the surrogate mother for anything that may lead to death or disability brought about by the pregnancy. It is submitted that (c) above would cover the health and life insurance paid *in casu*.

The problem lies with the R20,000 “surrogate various expenditure (transport, maternity clothes etc)” payment, that was unfortunately not further described. Despite all the additional warnings voiced by the court, the court itself did not interrogate the breakdown of the amount in more detail – as the court advocated should be done in future cases. This attitude is problematic, and exactly the scenario that the legislature wanted to avoid. It is submitted that in a country where there are substantial levels of poverty, a poor woman may be forced to become a surrogate for this unspecified amount of R20,000.

The use of agencies is also problematic. Can the agency be classified as “persons rendering bona fide professional medical services” that are entitled to reasonable compensation as set out in s 301(3) of the CA? If so, the agency can charge a fee for the donated egg, just as the gynecologist could charge for the delivery of the baby.

But further to this, can the agency – as an add-on – promote surrogacy along the lines of: “We specialise in egg-donation for which you have to pay, but we will introduce you to a possible surrogate for surrogacy if you need it at no cost”? Section 303 of the CA prohibits certain acts, including that a person may not for compensation in any way make known that a person might possibly be willing to enter into an SMA. Has the agency *in casu* not done exactly that? It did make it known that the potential surrogate mother could be willing to enter into an SMA – for compensation (for the egg donation). It is submitted that this distinction is unconvincing. The provision is after all aimed at prohibiting women from advertising that they are willing to be surrogates and to prohibit agencies from advertising commercial surrogacy services. The court specifically notes that agencies facilitating the introduction of surrogate mothers to commissioning parents play an important role. The court seems to take an approach that does not adhere to the spirit of non-commercialisation in the legislation. In fact, it commended the work of the agencies. Once the connection is made with the agency, especially in the case of male couples, there is, however, nothing preventing the agency bringing commissioning parents and surrogates together – a *de facto* commercial surrogacy arrangement. This scenario may be practical, but nonsensical in light of the legislation. It is submitted that if there is evidence that the aim of the agency from the start was to link the commissioning parent with a surrogate, it would clearly amount to *fraus leges*. It is submitted that it would be naive to presume that a commercial entity aimed at making money, would introduce commissioning parents to surrogates on a permanent basis for free. If the agency is allowed to continue to do what the court sanctioned, the egg donor industry might suddenly have a whole host of surrogacy-related inquiries.

It should also be noted that any contravention of ss 301 or 303 of the CA is a criminal offence (s 305(1)(b) CA).

It is submitted that the court should have done two things regarding payment: postponed the matter until full details of the R20,000 had been submitted; and reiterated the legislative provisions regarding commercial surrogacy. The approach of the court – instead of clarifying issues – muddled clear statutory provisions.

In England, where commercial surrogacy is also prohibited, the court is given a discretion to authorise any expenditure paid outside the legislation, that is more than the reasonable expenses as prescribed by the statute – especially where it is proven to be in the interest of the welfare of the child (see discussion hereunder). This is, however, not automatic, as the court in *In the Matter of C* 2002 FLR 909 refused to make the parental order as a result of payments made in contravention of the (previous) legislation, although the current statute has a similar provision (par 7). In addition, the English legislation makes provision that non-profit organisations are not regarded as commercial operations, and are allowed to charge a reasonable fee (s 2A-2C SAA).

It is submitted that the judgment by the South African court, on the issues of a genetic link and payment, is unfortunate. However, if the reality is that egg donor agencies have a role to play, it is suggested that the legislation be amended to give the court a discretion regarding payment, and to make provision for the use of non-profit organisations, as is the case in England.

3 Foreign Surrogacy

McEwen (“So you’re having another woman’s baby: economics and exploitation in gestational surrogacy” 1999 (32) *Vanderbilt J of Transnational Law* 271 295) commented on the situation in the USA, that the “... growth in the international surrogacy industry will be spurred by poor women in developing countries who will eagerly serve as surrogates for much less than the amount typically paid ...”. This comment is equally valid for the situation in South Africa and England.

International surrogacy or foreign surrogacy in South Africa, refers to the use of foreign surrogate mothers by South African commissioning parents (“Wombs for Hire” *Carte Blanche* (2011-11-13) available at <http://beta.mnet.co.za/carteblanche/Asticle.aspx?Id=4460&ShowId=1> (accessed 22 November 2011)). In this instance, a couple contracted a woman from India as a surrogate mother. The surrogates are to receive \$6,500–\$7,000 for being a surrogate, with a 25% bonus added should the surrogacy result in the birth of twins. The surrogacy was arranged through an agency clinic at a cost of \$15,000 (including the amount given to the surrogate). There was no indication as to the genetic relationship between the commissioning parents and the child.

There is no judgment relating to a foreign SMA in South Africa. The questions that immediately arise relate to the legal parenthood of the child. As the SMA has not been confirmed by the court, (as there is no evidence that the SMA adhered to the statutory provisions), the SMA would be invalid in South Africa, and the child would be regarded as the child of the surrogate birth mother (s 297(2) CA). As mentioned above, the legal father could be either the husband/partner of the surrogate mother or the male gamete-donor, if he is one of the commissioning parents and not an anonymous donor (s 40 CA). This scenario also creates additional immigration and citizenship issues (which are disregarded for purposes of this note).

The legal issues arising from a foreign SMA, have been the subject of numerous cases in England, that all followed a particular pattern. In each of these cases, commercial surrogacy is lawful in the countries where the surrogate resided and where the surrogacy occurred: mainly India, the Ukraine, Illinois (USA) and California (USA). In each of these cases, the commissioning parents paid more money to the surrogate mother than was allowed under English legislation (HFEA). Although the country of the surrogate mother (birth country) confers parental status of the child born as a result of an SMA, to the commissioning parents, English law does not recognise that status, as the SMA does not adhere to the legislative provisions.

In each of the English cases the court made the parental order asked for by the commissioning parents, based on three considerations: one, the *bona fides* of the couple and that there was not an attempt to defraud the authorities (*A v P* 2011 EWHC 1738 (Fam) par 33; *Re IJ (A child)(Foreign Surrogacy Agreement: Parental Order)* 2011 2 FLR 646 par 3; *Re S (Parental Order)* 2010 1 FLR 1156 par 2; *Re X and Y (Foreign Surrogacy)* 2009 2 WLR 1274 par 2, 21); two, the fact that the payments were not so excessive as to have “overborne the will of the surrogate mother” or to be an affront to public policy (*A v P* 2011 EWHC 1738 (Fam) par 33; *Re S (Parental Order)* 2010 1 FLR 1156 p 2; *Re X and Y (Foreign Surrogacy)* 2009 2 WLR 1274 par 22); and three, the welfare of the child demanded the order because the child’s welfare is regarded as the paramount consideration (*A v P* 2011 EWHC 1738 (Fam) par 16; *Re IJ (A child)(Foreign Surrogacy Agreement: Parental Order)* 2011 2 FLR 646 par 7; *Re S (Parental Order)* 2010 1 FLR 1156 1; *Re X and Y (Foreign Surrogacy)* 2009 2 WLR 1274 23; *Re L (A Child)(Parental Order: Foreign Surrogacy)* 2011 1 FLR 1523 par 9).

In all these matters the courts granted retrospective approval of the sums paid (see *inter alia* *Re IJ (A child)* par 6).

The court in *Re L (A Child)(Parental Order: Foreign Surrogacy)* 2011 1 FLR 1523 weighed the public policy considerations against the welfare of the child, and noted that “only in the clearest case of abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making” (par 10). The court continued and stated that if the desire is to control commercial surrogacy, the controls need to operate before the court process which takes place after the child had been born (*ibid*).

The court in *Re X and Y (Foreign Surrogacy)* 2009 1 FLR 733, however warned (par 29) that:

... the present law ... might encourage the less scrupulous to take advantage of the more vulnerable, unmarried surrogate mothers and to be less than frank in the arrangements that surround foreign surrogacy arrangements.

Hedley J, in the court in *S (Parental Order)*, warned that the public policy issues raised were the following (2):

(a) ensuring that commercial surrogacy agreements were not used to circumvent childcare laws in the United Kingdom so as to result in the approval of arrangements in favour of people who would not have been approved as parents in the UK; (b) ensuring that the court was not involved in anything that appeared effectively to be payment for the buying of children overseas; and (c) ensuring that sums of money which looked modest in themselves were not in fact of such substance as to overbear the will of the surrogate.

Gamble (“Crossing the line: the legal and ethical problems of foreign surrogacy” 2009 *Reproductive BioMedicine Online* 151 151–152) argues that the English approach to foreign surrogacy is untenable in light of the problems experienced by the parties, the importance of the welfare of the children, and the fact that the courts, in weighing up the welfare of

the children, grant parental orders as a matter of course. This practice effectively ratifies the commercial surrogacy arrangement as the court *ex post facto* legalises the payments made in contravention of the legislation (See also Lovell-Hoare “Family: handle with care” 2011 *New LJ* 797 797–798; Herring “Family: whose baby is it anyway” 2011 *New LJ* 195; Bednall “Family: distant relatives” 2011 *New LJ* 1433 1433–1434).

The experiences of the English courts seem to indicate that the ban on commercial surrogacy is fraught with possible abuses, resulting in the legislation being side-stepped by the courts. This is possible, as the courts have the discretion to ratify the excess payments for the SMA retrospectively. This power is, however, not given to the South African courts. If the payments are disclosed to a court in South Africa, and these amounts violate the legislation, the South African court would have no option but to refuse confirmation of the SMA, resulting in the forced abandonment of the SMA. The South African courts cannot rely on the argument about the best interests of the child (similar to the child welfare argument of English law), as the child had not yet been conceived. From a public policy perspective, it may, however, be wise to heed the warning of Hedley J in the case of *S (Parental Order)* quoted above.

4 Conclusion

The issue of surrogacy is relatively new in South Africa, and the court in this instance, has had little opportunity to test the various provisions. It is unfortunate that the judgment in *Ex parte WH* is inadequate. There is no doubt that it is a statutory requirement that one of the commissioning parents has to be genetically related to the child. This should have been expressly stated in the judgment. With regard to the payments, the court should have heeded its own *caveat* and demanded additional information to ensure adherence to the legislation.

With regard to foreign surrogacy, the scenarios and pitfalls experienced in England should sound an early warning - that the actual practice is far removed from the expectations of the legislature.

What is required in South Africa, is either a re-drafting of the legislation, or an enforcement of the existing provisions. What should be avoided is the seeming judicial-toleration of contraventions of the legislation as a result of lack of rigor in scrutinising the court documents, or worst still, deliberately maintaining a blind-eye thereto.

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