

Surrogate motherhood agreements and their confirmation: A new challenge for practitioners?

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OPSOMMING

Surrogaatmoederskap-ooreenkomste en hul Bevestiging: 'n Nuwe Uitdaging vir Praktyns?

Ondanks die feit dat onlangse regspraak sommige onduidelikhede aangaande die regsposisie van surrogaatskap uit die weg geruim het, bestaan verskeie regs- en etiese dilemmas steeds op dié gebied. Ten spyte van die huidige *lacunae* dien die kontrak as 'n hulpmiddel om die belange van beide die lasgewende ouer(s) en die surrogaatmoeder te bevestig en te beskerm.

Die howe vereis 'n volledige, eerlike en omvattende kontrak, beëdigde verklaring en aansoek. Ten spyte hiervan blyk partye onbewus of ongeërg oor die moontlikheid en uitwerking van hul versuim om gehoor te gee aan hierdie vereistes. Voordat surrogaatskap deur die Kinderwet¹ gereuleer was, het onvrugbare paartjies waarskynlik surrogaatskap onwettiglik beoefen. Die vraag is dus waarom, nou dat die praktyk wettig is, paartjies steeds die gereg tart?

Vanweë die aard van surrogaatskap bestaan die praktyk grotendeels uit die strewe na 'n balans tussen die belange van die verskeie partye, die kind en die gemeenskap as 'n geheel – 'n taak wat byna onmoontlik blyk te wees. Tans is die surrogaatmoederskapsooreenkoms die mees gepaste instrument om die belange van alle betrokkenes te beskerm. Die moontlikheid van 'n surrogaatskap-spesifieke model moet ondersoek word, om sodoende voornemende partye, asook ons howe leiding te bied in die uitleg, bekragting en implementering van surrogaatmoederskapsooreenkomste onder Hoofstuk 19 van die Kinderwet.

Todat 'n surrogaatskap-spesifieke model ontwerp word, of 'n hof 'n uitspraak lewer wat só 'n model impliseer, word daar aanbeveel dat die kontraktereg-model toegepas word. Dit maak voorsiening vir die moontlikheid dat die bedoeling van die partye nagejaag kan word. Verder word ook aan die hand gedoen dat toepassing van die kontraktereg-model

1 'n Nie-amptelike vertaling van die Children's Act 38 of 2005 is beskikbaar by [http://www.vra.co.za/vorms/KINDERWET%20\(No%2038%20van%20005\)%20Afr.pdf](http://www.vra.co.za/vorms/KINDERWET%20(No%2038%20van%20005)%20Afr.pdf).

kan lei tot die teëwerking van die onsekerhede wat daargestel word deur die afwesigheid van regulasies kragtens Hoofstuk 19 van die Wet.

1 Introduction

This article will examine surrogacy law in South Africa with a view to making some suggestions for the implementation of regulations to chapter 19 of the Children's Act.² Surrogacy remains a controversial topic both in South Africa and elsewhere. There has been considerable debate about the desirability of surrogacy in any form and, more particularly commercial surrogacy.³ This article will focus on the provisions of the Children's Act (CA) and will not explore the moralistic and other arguments associated with surrogacy. The discussion of the CA will be prefaced by a brief discussion of the nature of surrogacy and a broad overview of the legal position preceding the promulgation of the CA. This overview serves only to contextualise the discussion of the provisions of the CA and does not include a comprehensive discussion of the legal position preceding the legislative intervention. The overview will be followed by a discussion of the current legislation. Shortcomings in the current legal provisions will be explored and, finally, suggestions will be made regarding how the current legislation may be improved by the introduction of essential regulations and the design of a surrogacy specific model.

2 The Nature of Surrogacy

Surrogacy, in its most basic sense, is the situation where one woman bears a child for another.⁴ The word "surrogate" means "substitute" and a woman may agree to act as a substitute mother for many reasons,

² 38 of 2005 (CA).

³ Lupton "Surrogate parenting The advantages and disadvantages" 1986 *J Juridical Sc* 148; Tager "Surrogate motherhood, legal dilemma" 1986 *SALJ* 381; Pretorius "A comparative overview and analysis of a proposed surrogate mother agreement model" 1987 *CILSA* 275; Annas "Death without dignity for commercial surrogacy" *The Hastings Centre Report* April/May 1988 21; Lupton "The right to be born: Surrogacy and the legal control of human fertility" 1988 *De Jure* 36; Anderson "Is woman's labour a commodity" 1990 *Philosophy & Public Affairs*; Lupton "The effect of the *Baby M* case on commercial surrogacy" 1991 *TSAR* 224; Pretorius "Practical aspects of surrogate motherhood" 1991 *De Jure* 52; Satz "Markets in women's reproductive labor" 1992 *Philosophy & Public Affairs* 107; Meyerson "Surrogacy agreements" 1994 *Acta Juridica* 121; Sloth Nielsen & Van Heerden "Putting Humpty Dumpty back together again: Towards restructuring families' and children's lives in South Africa" 1998 *SALJ* 156 164-165; Louw "Surrogate motherhood" in *Commentary on the Children's Act* (eds Davel & Skelton) (2007) Ch 19; MacKenzie "Beyond genetic and gestational dualities Surrogacy agreements, legal parenthood and choice in family formation" in *Human fertilization and embryology: Reproducing regulation* (eds Horsey & Biggs) (2007) 181-204.

⁴ Pretorius 1991 *De Jure* 52 54.

whether financial (commercial) or compassionate (altruistic).⁵ It has been suggested that the prefix “surrogate” suggests that in some way the woman who carries the child is not a “real” mother.⁶ Other terms used to describe the surrogate include “hostess mother”⁷ “host mother”,⁸ and even “plumbing”.⁹

There are two main types of surrogacy agreements, total surrogacy, where the surrogate is not biologically related to the child, and partial surrogacy where her ovum is used.¹⁰ Commissioned adoption, where an infertile couple contract with a surrogate to carry a child unrelated to either the surrogate or themselves is not permitted.¹¹

Surrogacy as a means to provide families with children that are biologically related to them has received scant attention over the decades, despite it being a reality of a world in which infertility is rife and adoption processes complex.

Surrogacy became a common topic of conversation in South African households in 1987 when Pat Anthony, a Tzaneen grandmother, gave birth to her own grandchildren.¹² Anthony’s daughter, Karen Ferreira Jorge then adopted the children and raised them as her own. Although surrogacy has remained a practice in South Africa, the sensationalism surrounding the birth of the Ferreira Jorge triplets has remained unparalleled since. Despite this, a wealth of articles on surrogacy followed the birth.¹³

3 The Legal Position Regarding Surrogacy Before Promulgation of the Children’s Act

The Children’s Status Act¹⁴ (CSA) became operative less than two weeks after the Ferreira Jorge triplets were born.¹⁵ This legislation provided that the gestational mother and her husband, where he consented to the artificial insemination, were the parents of a child born of artificial insemination using donor sperm or eggs.¹⁶ By implication therefore, the gestational mother and, in the presence of spousal consent to the insemination, her husband, would be the parents of any child born of surrogacy. The CSA was not designed to deal with surrogacy and thus the unique nature of such arrangements was not considered in drafting the

5 Lupton 1986 *J Juridical Sc* 148.

6 Meyerson 1994 *Acta Juridica* 121.

7 SALC *Project 65 Report on surrogate motherhood* (1993) par 8.2.13 ff.

8 Pretorius 1991 *De Jure* 52 57.

9 Anderson 1990 *Philosophy & Public Affairs* 83.

10 See Lupton 1986 *J Juridical Sc* 148.

11 Meyerson 1994 *Acta Juridica* 121 123.

12 Pretorius 1991 *De Jure* 52 53, 55-59.

13 *Supra* n 12.

14 82 of 1987.

15 Pretorius 1991 *De Jure* 52 58.

16 S 5(1)(a) CSA.

legislation. The consequence was that the effect of the CSA was to attribute parenthood to a mother who never intended to keep the child and to a father whose involvement was minimal at best. This seems untenable.¹⁷

In instances where donor sperm is used for artificial insemination, the donor's rights are terminated by legislation.¹⁸ This termination of the donor's rights might effectively mean that the husband of a surrogate mother may be unable to rebut the *pater est quem nuptiae demonstrant* presumption.¹⁹

The only means by which parents commissioning a baby through the surrogacy process (the commissioning parents) could acquire parental rights and responsibilities in respect of such a child was to adopt it through the normal channels.²⁰ This process was fraught with its own difficulties.²¹

Commissioning parents may prefer surrogacy arrangements to adoption for a number of reasons, *inter alia*, because: The nine month period of gestation associated with the pregnancy of a surrogate may be far shorter than the waiting period associated with an adoption; surrogacy allows for the possibility that one or both of the commissioning parents may be biologically related to the child; and commissioning parents are not subject to the age limits associated with adoptive parents.²²

Thus, until the advent of the CA, surrogacy was regulated indirectly by three pieces of legislation that were designed for other purposes: The Human Tissue Act²³ (HTA) and its regulations, the Child Care Act²⁴ and the CSA.²⁵ These pieces of legislation were not ideal for a number of reasons, not least because the HTA was very restrictive in that it provided, *inter alia*, that only married women could be artificially inseminated or fertilized *in vitro*, effectively excluding unmarried women from acting as surrogates.²⁶

There existed a patent need for legislative intervention. Responding to this need, the South African Law Commission (SALC),²⁷ as it then was, conducted research on surrogacy. This research resulted in a report and

17 Pretorius 1991 *De Jure* 52 58.

18 S 36 HTA.

19 Pretorius 1991 *De Jure* 52 58-59.

20 In terms of the Child Care Act 74 of 1983. Now in terms of ch 15 CA.

21 Lupton 1991 *TSAR* 224 230; Pretorius 1991 *De Jure* 52 59.

22 Lupton 1988 *De Jure* 36; Pretorius 1991 *De Jure* 52 54; Mills "Certainty about surrogacy" 2010 *Stell LR* 429.

23 65 of 1983.

24 74 of 1983.

25 82 of 1987. See Pretorius "Surrogate motherhood: A detailed commentary on the Draft Bill" 1996 *De Rebus* 114.

26 See case study Pretorius 1991 *De Jure* 52 61; Lupton 1988 *De Jure* 36 149.

27 Now the South African Law Reform Commission: s 5 Judicial Matters Amendment Act 55 of 2002.

a draft Bill.²⁸ The SALC draft Bill predated the Constitution²⁹ and required scrutiny regarding constitutionality.³⁰ Surrogacy relates to such rights as the right to procreate,³¹ the right to make decisions on health and body, etcetera.³² The Constitution does not directly protect the right to procreate although the rights to equality, privacy, religion, belief and opinion may indirectly protect this right.³³ Certainly, both the Cairo Declaration of the International Conference on Population and Development, 1994 and the African National Congress's National Health Plan for South Africa³⁴ support the right to freedom of procreative choice.³⁵

A number of academics wrote about the draft Bill,³⁶ however it is sufficient here to note some of the observations made by Pretorius. In the introduction to her review of the draft Bill, Pretorius indicated that despite some public law dimension, surrogacy relates mostly to the private law sphere and stressed the importance of the advisory role of the legal professional.³⁷ She demanded that the legislator should provide for the status of the child and for abortion³⁸ and called upon the legislature to review the Canadian contract law model, which stresses careful scrutiny of commissioning parents and the need to emphasise the welfare of the child.³⁹

In Pretorius' in-depth examination of the draft Bill she, *inter alia*, called upon the legislator to: Limit surrogate mothers to adults;⁴⁰ permit surrogacy in circumstance where the surrogate has given birth by means such as Caesarian section;⁴¹ and to allow unmarried persons to act as surrogates.⁴² She criticised the inclusion of a definition of marriage that would exclude lesbian and homosexual couples;⁴³ and the limitation of commissioning parents to married infertile couples.⁴⁴ She berated the Bill for limiting surrogacy to cases of full surrogacy, whilst recognising the

28 *Report on surrogate Motherhood Project 65* (1993).

29 Constitution of the Republic of South Africa, 1996.

30 One such examination was conducted by Pretorius 1996 *De Rebus* 114.

31 See Lupton 1991 *TSAR* 224 230 on the US procreation arguments.

32 S12 Constitution.

33 Ss 9, 14 & 15 respectively.

34 www.un.org/popin/icpd/conference/bkg/egypt/html (accessed 2012-12-6); www.imsa.org.za/PB7R%20ANC%20HEALTH%20PLAN%201994.pdf (accessed 2012-12-6).

35 Pretorius 1996 *De Rebus* 114.

36 *Inter alia*, Pretorius *ibid*; Clark "Surrogate motherhood: Comment on the South African Law Commission's report on surrogate motherhood (Project 65)" 1993 *SALJ* 769.

37 1996 *De Rebus* 115.

38 *Idem* 116.

39 *Ibid*.

40 *Ibid*.

41 *Idem* 117.

42 *Ibid*.

43 *Idem* 116.

44 *Idem* 117.

difficulties exacerbated in cases of partial surrogacy.⁴⁵ Pretorius welcomed the inclusion of clause 2 which introduced the requirement for a valid legal agreement to precede any medical procedures pursuant to surrogacy arrangements as adding certainty to the relationship and offering the various parties an opportunity to regulate important aspects of the relationship not specifically legislated for.⁴⁶ She noted that the confirmation of such agreements by the court would be premised upon a comprehensive screening of the surrogate and commissioning parents as well as the consideration of the welfare and best interests of the child.⁴⁷ Pretorius called for medical expertise to be relied upon by the court in determining the time after confirmation within which the artificial insemination should take place.⁴⁸

In clause 8, the draft Bill stated that where a validly confirmed agreement is present, the surrogate's parental rights are terminated on birth of the child.⁴⁹ In the absence of such a validly confirmed agreement, the *status quo* is maintained.⁵⁰ Pretorius also welcomed clause 9 which provided for abortion. She opined that the final decision regarding an abortion should lie with the surrogate.⁵¹

Pretorius stressed that in cases of commercial surrogacy the possibility of exploitation is increased.⁵² Clause 10 purported to prevent commercial surrogacy by limiting payments to the surrogate. Likewise clauses 10 to 12 limited fees payable to brokers or agencies. Pretorius called for a total ban on surrogacy agencies and on advertisement of surrogacy services.⁵³ Finally, Pretorius welcomed both the privacy provisions as well as the introduction of penalties for the artificial insemination of a surrogate in the absence of compliance with legislative provisions.⁵⁴

The Bill thus envisaged that surrogacy agreements would regulate the relationship between the intended parents and the surrogate mother, and that the parties would comply with legislative imperatives. The legislative requirement for a formal agreement would prevent informal and verbal arrangements. The manner of creation of valid agreements and the legal implications of such an agreement for the parties would be legislatively regulated.

Despite the existence of the report and the draft Bill, it was not until the CA, that surrogacy was legislated for. This legislative intervention is welcome as surrogacy has been a troubled issue veiled in uncertainty for

45 *Idem* 118-119.

46 *Idem* 119.

47 *Ibid.*

48 *Ibid.*

49 Clause 8(1).

50 Clause 8(2).

51 Pretorius 1996 *De Rebus* 114 121.

52 *Ibid.*

53 *Ibid.*

54 *Ibid.* Clauses 11 & 12 Draft Bill respectively.

a very long time. As will appear from the discussion that follows, chapter 19 of the CA is not however, the cure-all that was hoped for.

4 Surrogate Motherhood Agreements in South Africa and Chapter 19 of the CA⁵⁵

4.1 The Surrogate Motherhood Agreement

All surrogacy arrangements in South Africa must now be the subject of a valid, written surrogate motherhood agreement, the provisions of which, together with the CA, regulate the surrogacy arrangement.⁵⁶ The surrogate motherhood agreement has been described as “a contract of a special kind”⁵⁷ and is defined as:

[a]n agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.⁵⁸

The effect of the common law maxims *mater semper certa est* and *pater est quem nuptiae demonstrant* can thus be altered by a validly concluded and confirmed surrogate motherhood agreement.⁵⁹ Consequently a surrogate motherhood agreement actively aims to thwart the effect of certain common law and legislative rules concerning families and children.⁶⁰ Chapter 19 of the CA aims to systematically order these surrogate motherhood agreements, but, being new law in South Africa, the provisions are surrounded by uncertainty.⁶¹ Given the far-reaching consequences of surrogacy agreements for all parties involved, it is imperative that the utmost care is taken in drafting the agreement and compiling supporting documentation.⁶²

55 In approaching the CA, a predominantly contract law model has been assumed. A detailed discussion follows *infra* at 6.2. For the purpose of the remainder of this article only situations of formal surrogacy, as regulated by the CA, will be discussed. For a discussion of informal surrogacy see Sloth Nielsen & Van Heerden 1998 *SALJ* 156 164; Louw 19-3.

56 S 292 CA.

57 *Ex parte WH* 2011 6 SA 514 (GNP) 530D.

58 S 1 CA (sv “surrogate motherhood agreement”).

59 S 297 CA.

60 Annas *Hastings Center Report* April/May 1988 21; Lupton 1991 *TSAR* 224 225.

61 *Ex parte WH* 2011 6 SA 514 (GNP) 524B-C.

62 See *In re confirmation of three surrogate motherhood agreements* 2011 6 SA 22 (GSJ) (hereinafter referred to as “the Confirmation case”) 25H-I regarding consequences for legal practitioners who do not draft these applications with the due care and respect for judicial procedure.

The legislative regulation of the content, conclusion and confirmation of surrogate motherhood agreements is essential for various reasons, *inter alia*, to give effect to the best interests of the child(ren)⁶³ born of surrogacy;⁶⁴ to minimise the risks attached to surrogacy arrangements; to give effect to the wishes of all the parties involved; and to clarify the parental responsibilities of the parties to the agreement.⁶⁵

The surrogate motherhood agreement is regarded as being so complex that the general principles pertaining to the law of contract alone were deemed inadequate to regulate it.⁶⁶ For this reason, chapter 19 of CA was needed to stringently regulate the parental responsibilities that flow from the validly concluded agreement. Chapter 19 also attempts to provide guidelines regarding the drafting of the terms of such an agreement. Sadly however, CA fails to establish guidelines regarding supporting documentation that should be submitted to the court in support of the confirmation of such agreements. The South African courts recently attempted to clarify matters in *Ex parte: WH*⁶⁷ and *In re confirmation of three surrogate motherhood agreements*⁶⁸ by aspiring to develop a standard practice for confirmation applications.⁶⁹ Pursuant to its decision in the latter case, the South Gauteng High Court published a practice directive relating to the confirmation of surrogate motherhood agreements.⁷⁰

63 Where reference is made to “the child” it must be read to include the plural as well.

64 S 28(2) Constitution enshrines such protection, Louw 19-7.

65 Louw 19-7.

66 SALC *Project 65* par 8.3.

67 2011 6 SA 514 (GNP). In this case the court confirmed that homosexuality should not exclude a couple from qualifying as commissioning parents, as this would be unfairly discriminatory and thus unconstitutional (526F-527A).

68 2011 6 SA 22 (GSJ). The court had to deal with an attorney who “copied and pasted” three surrogate motherhood agreements and brought them before the urgent court. The agreements were not confirmed because the court did not deem them urgent and the grossly negligent manner in which the applications were drafted and compiled most likely hindered the case even further. The matter was postponed for three months during which time the attorney opened new case files and brought the matter before three more judges in an attempt to have the agreements confirmed. In their judgment Wepener J & Victor J referred the matter of punishing the attorney to the Law Society of the Northern Provinces (24I-25F).

69 Nöthling Slabbert *SA J Bioethics and Law* June 2012 28.

70 Practice Directive 05 of 2011 of the South Gauteng High Court, *Re: Application for Confirmation of Agreements in terms of Section 295 Children’s Act* 2011-02-16.

4 2 Legislative Requirements for a Validly Concluded and Confirmed Surrogate Motherhood Agreement⁷¹

Section 292 of the CA provides the formal requirements for a valid and enforceable surrogate motherhood agreement.⁷² This section provides that the agreement between the parties must be in writing and signed by all involved;⁷³ it must be concluded in the Republic of South Africa;⁷⁴ at least one of the commissioning parents (or the commissioning parent if a single person)⁷⁵ and the surrogate mother (and her “husband”⁷⁶ or partner, if any) must be domiciled in the Republic at the time of concluding the agreement;⁷⁷ and, most importantly, the surrogate motherhood agreement must be confirmed by the high court within the area of jurisdiction in which the commissioning parent is domiciled or habitually resident.⁷⁸ A lack of compliance with these fundamental requirements will invalidate the agreement and render it unenforceable between the parties.⁷⁹

The following substantive requirements are entrenched in the remainder of Chapter 19:

- (a) The agreement must contain the written consent of the partner or spouse of the commissioning parent, where the commissioning parent is in a permanent relationship or married.⁸⁰ This requirement applies *mutatis mutandis* to the partner or spouse of the surrogate mother.⁸¹
- (b) The surrogate motherhood agreement must include “adequate provisions for the contact, care, upbringing and general welfare of the child that is to be born in a stable home environment” and should further include detailed provisions concerning the child’s position in the

71 It must be borne in mind throughout, that the best interest of the child and the individual circumstances of the parties must always be considered by the courts when adjudicating these matters (s 295(e) CA).

72 In *Ex parte WH Supra* (523B-C, 530G-H) the court distinguishes between the “formal” (s 292 CA) and the “substantive” legislative requirements (found in the remainder of ch 19 CA).

73 S 292(1)(a) CA.

74 S 292(1)(b) CA.

75 S 292(1)(c) CA. Where reference is made to “the commissioning parents” it must be read to include the singular as well.

76 Louw’s argument (19-10) that the term “husband” is unconstitutional and discriminatory is supported and it is suggested that the CA be amended to read “spouse”.

77 S 292(1)(d) CA. In terms of s 292(2) CA this requirement may however be set aside by a court if “good cause” can be shown.

78 S 292(1)(e) CA.

79 S 292(1) CA. For the effect of an invalid surrogate motherhood agreement see the discussion *infra* at 5 3.

80 S 293(1) CA.

81 S 293(2) CA. If such consent is unreasonably refused (and the spouse is not the genetic parent of the child), the Court may still confirm the agreement in terms of s 293(3) CA. See further Louw 19-10 – 19-11. This consent requirement is even more crucial where the partner and the surrogate mother are in a “permanent life-partnership” and he is also the biological parent of the child (see further Louw 19-9).

eventuality of the death, divorce or separation of the commissioning parents prior to the birth of the child.⁸²

- (c) The commissioning parent, or in the case of two commissioning parents, one or both must be a biological parent of the child.⁸³
- (d) The sterility of the commissioning parent(s) must be irreversible.⁸⁴
- (e) The artificial fertilisation of the surrogate mother is obligatory, but may only be performed in the eighteen-month period after a high court has confirmed the surrogate motherhood agreement.⁸⁵
- (f) Importantly, the agreement must stipulate that no compensation or promise to compensate (in cash or otherwise) has been made by any party to the surrogate mother.⁸⁶ This excludes compensation related to the fertilisation, pregnancy and birth or the confirmation of the surrogate motherhood agreement;⁸⁷ loss of earnings of the surrogate mother as a result of the conclusion of the agreement;⁸⁸ or insurance to cover death or disability suffered by the surrogate mother as a result of the pregnancy.⁸⁹

Certain requirements and formalities concern the parties themselves:

- (a) The commissioning parents should be competent, as required by the CA, to enter into the agreement;⁹⁰ be appropriate individuals to act as parents to the child;⁹¹ and appreciate and recognise the legal consequences of the conclusion of the agreement and the rights and responsibilities emanating from it.⁹²
- (b) The surrogate mother should be competent, as required by the CA, to enter into the agreement;⁹³ constitute a “suitable” person to act as a surrogate;⁹⁴ appreciate and recognise the legal consequences of the agreement and her rights and responsibilities in terms thereof;⁹⁵ not use surrogacy to acquire compensation but should be motivated by a selfless drive to help others;⁹⁶ and finally, have a documented history of one or more pregnancies, “viable” deliveries and living children of her own.⁹⁷

82 S 295(d) CA.

83 S 294 CA. It has been argued that s 294 CA is unconstitutional as it infringes on the infertile person’s rights to freedom, dignity and decisions regarding reproduction. See Louw 19-13 in this regard.

84 S 295(a) CA.

85 S 296(a), (b) CA.

86 S 301(1) CA.

87 S 301(2)(a) CA.

88 S 301(2)(b) CA.

89 S 301(2)(c) CA.

90 S 295(b)(i) CA. Louw 19-15 presumes that this refers to the *domicilium*, consent, genetic link and sterility requirements as set out in ch 19 CA.

91 S 295(b)(ii) CA.

92 S 295(b)(iii) CA.

93 S 295(c)(i) CA. Louw (19-16) opines that this section refers to the fact that the surrogate mother should be an adult of sound mind and the *domicillium* and consent requirements of her and her spouse.

94 S 295(c)(ii) CA.

95 S 295(c)(iii) CA.

96 S 295(c)(iv), (v) CA.

97 S 295(c)(vi), (vii) CA.

Guidelines for the termination of the pregnancy or of the surrogate motherhood agreement and the effect of such termination are provided by the CA.⁹⁸

5 Problematic Requirements in terms of Chapter 19 of the CA

The two most recent cases relating to surrogate motherhood agreements⁹⁹ demonstrate that the CA is unclear regarding what is required of the parties to such agreements. Furthermore, our courts have not yet ruled on chapter 19 extensively. Some of the requirements that give rise to uncertainty will now be considered in more detail.¹⁰⁰ The discussion will incorporate a brief evaluation of recent case authority and recommendations regarding the promulgation of regulations to the CA designed to address persistent uncertainties.

In relation to the general legislative requirements to be met by parties applying for confirmation of a surrogate motherhood agreement, the North Gauteng High Court has ruled that the affidavit presented to the court in support of the application should contain “all factors set out in the Act together with documentary proof where applicable”.¹⁰¹ An example would be documentary proof regarding the sterility of the commissioning parent(s) in terms of section 295(a). Such proof may take the form of a letter from a specialist medical professional stating the exact cause of the irreversibility of the sterility of the commissioning parent(s). The court emphatically stated that for an application for confirmation of the agreement to succeed, every aspect regarding the application and the agreement required by the CA must be proven to the satisfaction of the court. The question that remains is what proof of satisfaction of legislative prerequisites will be required.

The court has warned that its role is not simply to “rubber stamp” agreements.¹⁰² The court views its role as upper guardian of all children as overriding and, as such, expects to be fully apprised of certain facts pertaining to the parties and their circumstances.¹⁰³ These facts and circumstances can only be made known to the court through the presentation of evidence, the veracity of which can then be evaluated by the court.

98 Ss 298-300 CA. See the discussion on breach of contract *infra* at 5 7.

99 *Ex parte WH* and the *Confirmation case Supra*.

100 Please note that this discussion will deal only with certain aspects of the legislation that appear potentially problematic and does not purport to be a complete discussion of the limitations in the legislation.

101 *Ex parte WH Supra* 531D.

102 *The Confirmation case Supra* 30F. See further 25E-F for a warning against attempting to avoid proper procedure.

103 *The Confirmation case Supra* 28B-29D.

The current lack of regulations pertaining to chapter 19¹⁰⁴ hinders the process of compiling an application for the confirmation of a surrogate motherhood agreement, as it remains unclear what constitutes sufficient evidence of compliance with the requirements.

Some of the requirements set out in the CA are themselves problematic. A brief exposition of these follows.

5 1 Requirements Relating to the Parties

The first problematic requirement relates to the individuals who are required to be parties to the agreement. Clearly, the commissioning parent¹⁰⁵ and the surrogate mother¹⁰⁶ must be parties, but the Act also requires the written consent of the commissioning parent and surrogate mother's respective partners if a "permanent relationship" is present on the facts. Where the commissioning parent is married or in a permanent relationship, it is unclear whether both should be identified as commissioning parents or whether the consent requirement is automatically met when they both become parties to the agreement.¹⁰⁷ The concept "permanent relationship" is vague and it has been opined that the courts will interpret the concept widely.¹⁰⁸ This matter has not yet been judicially considered and, for the sake of clarity, a regulation should stipulate what exactly parties should prove in this regard. Guidelines to determine the permanence of a relationship; who should be identified as a commissioning parent; and exactly who should consent should be provided for in a regulation to chapter 19.

The potential for interesting scenarios to develop through medical and technological advances should be provided for, given that the law responds slowly to social change. Presently, the technology already exists to create a human embryo from the sperm of a man and the ova of two women.¹⁰⁹ Implementing such technologies in relation to surrogacy might still be some way off, but it begs the question whether the CA is equipped to deal with such complex situations.

104 When presenting a version of this article at the Society of Law Teachers of Southern African Conference in July 2012, Sloth Nielson provided crucial information regarding the promulgation of these suggested regulations. She was tasked with the drafting of regulations to the CA, but a governmental "turf war" obstructed her efforts relating to regulations to ch 19 CA. Reportedly, the Departments of Social Welfare and Development, Health and Justice and Constitutional Development are all uncertain as to within whose jurisdiction matters regarding surrogacy fall. It is obvious that before such uncertainty is remedied none of the proposed, and much needed, regulations will be promulgated.

105 S 293(1) CA.

106 S 293(2) CA.

107 Louw 19-9 – 9-10.

108 *Idem* 19-9.

109 <http://m.news24.com/news24/SciTech/News/New-embryo-methods-should-be-allowed-20120612> (accessed 2012-06-13).

5 2 Requirements Relating to Care

The surrogate motherhood agreement must include sufficient provisions regarding the care and stable home of the child.¹¹⁰ The South African courts have not yet stipulated what should be incorporated in “care” clauses in order to be deemed sufficient. Furthermore, the CA does not explain what constitutes a stable home, or by whom the existence thereof should be determined. Clearly this section would benefit from the promulgation of a regulation providing for an appropriate screening process.¹¹¹ Louw addresses the poor drafting of section 295(d), stating that by “anticipating the eventualities” related to this section an attempt can be made to ensure the effectiveness and enforceability of the surrogate motherhood agreement as well as facilitate its confirmation.¹¹² The suitability of the commissioning parents is intrinsically linked to this care-requirement.

In addition, section 295(d) requires that the agreement should include provisions regarding the child’s position in the event of the death of the commissioning parents or their divorce or separation before the birth of the child. Here it is important to note that in the *Confirmation* case the court specifically required a psycho-social analysis of the suitability of *the person designated by the commissioning parent* in the event of his or her death.¹¹³ This requirement clearly illustrates how seriously the court considers an application of this nature.

5 3 Requirements Relating to Fertilisation

The requirement relating to the artificial fertilisation of the surrogate mother creates various problems and uncertainties. These will be discussed briefly.

5 3 1 Time Frame

Firstly, the provision that the fertilisation should take place within an eighteen month period is troublesome as the process of artificial fertilisation can be time consuming and is often not successful on a first or even second attempt.¹¹⁴ The relatively brief timeframe within which the fertilisation must be effected may necessitate the drafting and confirmation of a further surrogate motherhood agreement before the

110 S 295(d) CA. Louw (19-18) correctly questions why the legislature deemed “care” insufficient.

111 Louw 19-18.

112 *Ibid.*

113 30B, our emphasis.

114 Pretorius 1996 *De Rebus* 114 115. Louw (19-20) opines that this eighteen month restriction was likely put in place to protect the parties from radically altered circumstances. The time restriction is necessary, but extending it to 24 months could lead to a more equitable situation in practice. Cl 7 Draft Bill on Surrogate Motherhood prescribed a twelve month period, so some leeway has been granted in the CA, but it is argued that eighteen months is still too short.

process is completed. This will have severe cost implications for the commissioning parents.¹¹⁵

5 3 2 Confirmation of the Surrogate Motherhood Agreement

More problematic and unsettling than the cost implications associated with this requirement is the fact that it appears that in practice, parties are ignoring the requirement that court confirmation of the surrogate motherhood agreement must precede the artificial fertilisation of the surrogate mother.¹¹⁶ The law is thus being flouted, either out of ignorance or disrespect. This may be to the detriment of the parties or the child.

Surrogate motherhood agreements that are not confirmed by a court are invalid and unenforceable.¹¹⁷ If there is no valid agreement, either because no agreement was entered into or the agreement is unconfirmed, the child born of surrogacy will be considered the child of the surrogate mother and her partner, if any.¹¹⁸ The commissioning parents would then have to adopt the child.¹¹⁹ This process could become complicated when one (or both) adoptive parent(s) is biologically linked to the child, as problems are associated with adopting one's own child.¹²⁰ The fact that some commissioning parents ignore this crucial requirement for prior confirmation of the agreement, because they will do anything to have a child as soon as possible, is short-sighted. When the parentage of a child comes into question it could have disastrous effects on the child in question.

The lack of a confirmed surrogate motherhood agreement before fertilisation raises another troubling issue, this time in relation to the conduct of medical professionals. Section 303(1) emphatically prohibits any person from assisting in or effecting the artificial fertilisation without a confirmed surrogate motherhood agreement.¹²¹ Failure to comply is a criminal offence¹²² punishable by a fine, a maximum of twenty years imprisonment or both.¹²³ Without clarity on the degree of fault

115 Some report amounts as high as R450,000 for the entire process. See *Daily News* (2011-01-17) 11.

116 Informal interview with Dr Magriet Coetsee-Spies, 2012-08-24.

117 S 292(1)(e) CA.

118 S 297(2) CA. See further Louw 19-19 n 6. Meyerson 1994 *Acta Juridica* 121 137 argues that invalidating the contract provides no protection to the surrogate mother.

119 S 294 CA.

120 In terms of s 17 Child Care Act this was prohibited (Pretorius 1991 *De Jure* 52 59). See s 231(1)(c), (d), (7)(a) CA in this regard. A problem still arises where the commissioning mother is the biological parent and she does not have guardianship of the child. Although the CA improves the situation where the father is a biological parent, uncertainty still reigns where the mother or both parents are genetically linked to the child.

121 See Louw (19-19 - 19-20) for a discussion pertaining to the required culpability of medical professionals.

122 S 305(1)(b) CA.

123 S 305(1)(b) CA read with s 305(6), (7) CA.

necessary for criminal conviction, medical practitioners should be made aware of this provision and the repercussions of their failure to comply.¹²⁴ Before promulgation of the CA, doctors were often unwilling to assist couples due to their fear of attracting liability.¹²⁵ Regretfully, since surrogacy has been legalised and regulated these medical practitioners seem to be blasé about the possibility of criminal prosecution.¹²⁶ The effect of this disregard, for what can be considered a core legislative requirement relating to the surrogacy process, is to undermine the integrity of legal, medical and social service professionals. “Pressure from clients”¹²⁷ should not under any circumstances justify the shirking of legal, ethical or professional responsibilities.

5 3 3 Origin of Gametes

The court specifically required full information regarding the source of the gametes, without necessarily identifying the donors.¹²⁸ This would be necessary to establish whether or not the surrogate mother is genetically related to the child, which will affect the rules regulating the termination of the agreement.

The topic of egg donation is closely related to surrogacy as the two processes often go hand-in-hand. Chapter 8 of the National Health Act¹²⁹ (NHA) and its regulations¹³⁰ relate to the control of the use of human gametes. These provisions did not specifically regulate surrogacy but also do not specifically excluded surrogacy from their ambit.¹³¹ Section 60(4)(a) of the NHA declares it an offence to receive any form of reward, financial or otherwise, for the donation of a gamete by the person donating it, “except for the reimbursement of reasonable costs incurred by him or her to provide such donation”. Regulation 4 of the Regulations Relating to Artificial Fertilisation of Persons¹³² states that the donor may only be reimbursed “for any reasonable expenses incurred by him or her in order to donate a gamete” as contemplated in section 60(4)(a) of the NHA.

What can be deemed as “reasonable” in this context remains ambiguous and the regulation fails to expand upon or clarify the provision in any meaningful way. The *2008 Guidelines for Gamete*

124 On whom this “duty” rests to inform medical professionals of their responsibilities in terms of ch 19 CA is another unanswerable question. This issue is however directly linked to the governmental jurisdiction debate (*Supra* n 104).

125 Pretorius 1996 *De Rebus* 114 115.

126 Interview with Dr Coetsee-Spies *Supra*.

127 See in this regard the *Confirmation* case 25F par 12.

128 *Ex parte WH Supra* 329F.

129 61 of 2003.

130 Regulations published under GN R175 GG 35099 2012-03-02.

131 Nöthling Slabbert *SAJBL* June 2012 29. She views the need for regulations to ch 19 CA from the vantage point that the NHA and its regulations only regulate artificial insemination, but not as it relates to surrogacy.

132 *Supra* n 130.

Donation of the Southern African Society of Reproductive Medicine and Endoscopic Surgery¹³³ deals directly with this matter, stating that any compensation should reflect the time, inconvenience, expenses (travel, loss of income and childcare costs), physical and emotional demands and risks of the donor associated with the egg donation. It is also stated that the tariff compensated should minimise “the possibility of undue inducement of donors” or any implication that the compensation is for the gametes themselves.¹³⁴ The proposed compensation is R5,000.00 to R6,000.00 and the payment of compensation exceeding R10,000.00 “should only be paid in exceptional circumstances.”¹³⁵

Various red flags are immediately raised: what constitutes “exceptional circumstances”; would paying compensation in excess of R6,000.00 be acceptable even if not advised; and most importantly, why was a matter as crucial as this not sufficiently addressed in the regulations to Chapter 8 of the NHA? In contrast, the South African Medical Research Council has stated that where eggs are donated for the purposes of medical research no compensation may be paid for such donation.¹³⁶ The problem with these guidelines is that they are just that, unenforceable guidelines. It is thus advisable that the legislature should rethink and clarify its position relating to compensation for the donation of eggs used for human reproduction.

5 3 4 Intermediaries

Couples seeking to use surrogacy as an option to conceive a child appear to first approach egg donation clinics, surrogacy agents or fertility specialists for assistance.¹³⁷ They are then put in contact with social workers and psychologists who perform suitability assessments on the parties involved.¹³⁸ These prospective commissioning parents often first hear about the legal requirements through these agencies whose role must thus be carefully scrutinised and more closely monitored. Some agencies suggest the possibility of using both donor egg and sperm, which is not permitted by the CA and is tantamount to commissioned adoption.¹³⁹ Providing the egg donor with a gift is also encouraged: “This is please not to be [sic] an excessive gift, but just a small gesture to express gratitude for this amazing deed”.¹⁴⁰ It is submitted that such a

133 <http://www.fertilitysa.org.za/EggDonation/2008%20GUIDELINES%20FOR%20GAMETE%20DONATION.doc> (accessed 2012-09-13).

134 *Ibid.*

135 *Ibid.*

136 *Guidelines on Ethics for Medical Research: Reproductive Biology and Genetic Research* Book 2 (2002) par 2.8 (<http://www.sahealthinfo.org/ethics/ethicsbook2.pdf> (accessed 2012-09-19)).

137 Interview with Dr Coetsee-Spies *Supra*.

138 *Ibid.*

139 <http://baby2mom.co.za/page/11588/IntendingParentsViaEggDonation#%2FPage%2F11589%2FWhat-Does-Egg-Donation-Cost%3F> (accessed 2012-08-17). See also Nöthling Slabbert *SAJBL* June 2012 31.

140 <http://baby2mom.boltcms.com/Page/11588/Recipients#%2FNews%2F188%2FEgg-Donor-Gift> (accessed 2012-08-17).

“gift” equates compensation and may be viewed as an incentive, seriously bringing the ethics of these agencies into question. The practice of giving a gift could thus be construed as an attempt to sidestep the compensation guidelines.

The CA does not outlaw the practice of informal surrogacy between individuals such as friends or family members, however, where parties are contemplating informal surrogacy and intend to approach a family member or friend to act as surrogate, a surrogate motherhood agreement is still advised. Formalising the process will clarify the rights and responsibilities of all involved and thus aid in protecting the rights of each party.

Finding a surrogate is a contentious issue. Agencies inform commissioning parents that it is desirable that they find their own surrogate mother but indicate that when they, the agency, put the commissioning parents in contact with a potential surrogate there is no waiting period.¹⁴¹ These statements are irreconcilable. Agencies have lists of women readily and immediately available to act as surrogate mothers to total strangers. The motives of both the potential surrogate and the agency “brokering” the agreement must be questioned, as very few women would volunteer to act as a surrogate to strangers if no fee was offered for their services and discomfort.¹⁴²

5 4 Compensation

The court will only confirm a surrogate motherhood agreement if it is certain that no compensation or promise to compensate, in cash or otherwise, has been made by any party involved to the surrogate mother.¹⁴³ The courts have thus greatly expanded upon the information to be provided in order to ensure that the proposed surrogacy is not of a commercial nature.

Full particulars should be set out in the founding affidavit of how the commissioning parents became aware of the surrogate mother and exactly why she is willing act in this capacity.¹⁴⁴ The affidavit should further include information regarding any and all agreements between the surrogate mother and any intermediary, such as an agency or clinic, and between such intermediary and the applicants.¹⁴⁵ Details and documentary proof of the payment of any compensation, either to the surrogate mother, an intermediary, donor, clinic or any third party involved should be provided to the court, regardless of the service being

141 <http://baby2mom.boltcms.com/Page/11617/SurrogacyProgram#%2FPage%2F11838%2FFAQ-for-Intending-Parents-Via-Surrogacy-> (accessed 2012-08-17).

142 Meyerson 1994 *Acta Juridica* 121 138.

143 S 301(2) CA.

144 *Ex parte WH Supra* 529C-D.

145 *Idem* 531G.

compensated for or by whom such compensation is to be paid.¹⁴⁶ The affidavit should reflect that no facilitation fee was paid to any person for the introduction of the surrogate mother to the commissioning parent.¹⁴⁷ A detailed and specific “list of surrogacy expenses with sufficient specificity”¹⁴⁸ should also be provided. This is important so as to prevent the payment of compensation disguised as a generic payment for expenditure.¹⁴⁹

The court required these details of the agency after it became aware that the agency was facilitating introductions of surrogates and commissioning parents in order to ensure that no middleman was compensating the surrogate mother.¹⁵⁰ The court’s requirement of this information stems from the role it serves to protect women from the exploitation that could flow from such intermediaries’ involvement.¹⁵¹ Stricter regulation of the role, if any, that surrogacy agencies are to play is of the utmost importance if the legislative requirement of purely altruistic surrogacy is to be respected. The prevailing socio-economic landscape of South Africa and the hardships faced by certain groups of women could potentially create a situation in which agencies could exploit women.¹⁵²

Commercial surrogacy has been equated to slavery, but in contrast it has been argued that paying a fee for a service rendered “is merely consistent with liberal capitalist economies”.¹⁵³ Pretorius¹⁵⁴ contends that “most South African authors” writing on surrogacy between 1982 and 1991 favoured the banning of commercial surrogacy and most later authors agree or fail to comment on the matter.¹⁵⁵ The view that agencies are purely motivated by the profit-potential is widely held.¹⁵⁶ In the USA surrogacy brokers exploit infertile couples and surrogates to make large profits. It is often found that these agencies are not run by medical practitioners, but by lay people, who are purely motivated by greed.¹⁵⁷ In South Africa the possibility for exploitation is great and some believe that, in the best interests of all involved, these agencies and advertisements for them should be banned outright.¹⁵⁸ Pretorius equates keeping lists of potential surrogates to commercial surrogacy¹⁵⁹ and we support this view.

146 *Idem* 531F.

147 *Idem* 528H-I.

148 *Idem* 521D.

149 *Idem* 521C-D.

150 *Idem* 519C.

151 Lupton 1991 *TSAR* 224 225, 228.

152 *Ex parte WH Supra* 528F-G.

153 Clark 1993 *SALJ* 774.

154 1991 *De Jure* 56.

155 Meyerson 1994 *Acta Juridica* 121 being the exception.

156 Annas *Hastings Center Report* April/May 1988 22, 23; Lupton 1991 *TSAR* 227.

157 Pretorius 1996 *De Rebus* 114 121.

158 *Ibid.*

159 *Ibid.*

The fact that newspapers refer to “wombs for hire”,¹⁶⁰ “babymakers” and “Rent-a-womb”¹⁶¹ is not helping to remedy the erroneous perspective that it is possible to simply pay a woman to carry a child and that parenthood will automatically follow for the commissioning parent.¹⁶² It can also be argued that such reports create the impression amongst potential surrogate mothers that they can earn large sums of money by carrying children for others.

Section 303(2) of the CA specifically prohibits the advertising of women’s willingness to act as surrogate mothers if done for profit or with any view to compensation. The implication thereof is that it is illegal to arrange surrogate motherhood agreements or relationships on a commercial basis.¹⁶³ The question can then be posed as to whether or not, what most South African surrogacy agencies do in the course and scope of their everyday operations falls within the strict purview of the law. They receive fees from commissioning parents that are directly related to the surrogacy practice and are thus making money from their facilitation of surrogate motherhood agreements.

In light of section 12(2)(a) of the Constitution protecting a woman’s right to make decisions regarding reproduction, it could possibly be argued that the ban on commercial surrogacy is unconstitutional, but it is contended that such an infringement does in fact reflect current public policy. Commercial surrogacy has rightfully been condemned to a death without dignity and attempts to revive it or practice it illegally “would not be in the best interests of children, families or society”.¹⁶⁴ Therefore, regulations to Chapter 19 of the CA should expressly stipulate in detail what surrogacy and egg donation agencies may and may not do. The safe-guarding of altruistic surrogacy as the sole form of surrogacy practiced, is not ensured by the protection currently provided under Chapter 19 of the CA.

5.5 Suitability

Possibly the most important, yet uncertain requirements are those regarding the suitability of the commissioning parents and surrogate mother to act in these respective capacities. The courts have stated that in order for them to make assessments regarding whether the parties are fit and proper persons, the applicants “must supply proper and full details regarding themselves”¹⁶⁵ and that nothing but the “utmost good faith” would be tolerated.¹⁶⁶

160 *Sunday Tribune* (2012-01-15) 8.

161 *Sunday Times* (2009-10-25) 10.

162 Meyerson 1994 *Acta Juridica* 121 argues that the use of such rhetorical phrases deteriorates the quality of the entire surrogacy debate.

163 Nöthling Slabbert *SAJBL* June 2012 30.

164 *Annas Hastings Center Report* April/May 1988 24.

165 *The Confirmation* case *Supra* 30E.

166 *Ex parte WH Supra* 530H.

The details necessitated by the court include: the identities and full backgrounds of the commissioning parents; proof of their financial position; an exposition of their residential situation; and their criminal records¹⁶⁷ if any.¹⁶⁸ A clinical psychologist and social worker respectively, should draft expert assessment reports on the suitability and stability of the commissioning parents.¹⁶⁹ Here sufficient supporting documentation is of the utmost importance:

Ultimately the court must be satisfied that the conclusions arrived at are supported by the facts. Accordingly, vague and generic allegations in this regard that fall short of supporting a conclusion may well render an application defective.¹⁷⁰

A word of caution has been aimed at judges, warning them against allowing their private prejudices and preferences to influence their decisions on the suitability of parties.¹⁷¹ Guidelines can be found in the prescription of an objective test when assessing commissioning parents: the court should evaluate the prospective parents' ability to provide a safe environment for the healthy and optimal development of the child, as well as their ability to provide emotional and financial care.¹⁷² It is necessary for the court to have a wide array of information at its disposal in assessing the suitability of the commissioning parents, as their parenting of the intended child will go beyond their contractual statement of intentions.¹⁷³ Some aspects evaluated during the psychosocial assessment of commissioning parents may include the presence of existing psychological conditions, the reason for their desire to have a child, the length and stability of their relationship and whether or not the parent not genetically linked to the child will display a jealous tendency which might cause conflict in the relationship or adversely affect the child.¹⁷⁴ The inevitable result of surrogacy and adoption is that prospective parents are held to a higher standard of care than natural parents,¹⁷⁵ but this is unfortunately an unavoidable by-product of the quest to protect the child.

The court desires even more information on the surrogate mother before she will be considered fit to act in this capacity. A thorough medical report concerning the surrogate mother's health and physical suitability to bear a child is important for obvious reasons, but the report

¹⁶⁷ The *Ex parte WH* case (*Supra* 531H) specifically requires an affidavit stating whether any of the commissioning parents have been charged with or convicted of a violent crime or a crime of a sexual nature.

¹⁶⁸ The *Confirmation* case *Supra* 29B-C.

¹⁶⁹ *Ibid.* The court refers to the "good practice" relating to adoption and that it can be fruitfully applied to surrogacy.

¹⁷⁰ *Ex parte WH Supra* 541A-B. See further Sloth Nielsen & Van Heerden 1998 *SALJ* 156 164.

¹⁷¹ *Ex parte WH Supra* 529G-J.

¹⁷² *Idem* 530B-C.

¹⁷³ Annas *Hastings Center Report* April/May 1988 22.

¹⁷⁴ Interview with Dr Coetsee-Spies *Supra*.

¹⁷⁵ Meyerson 1994 *Acta Juridica* 121 128.

should also include information on her HIV status and any other illness that could possibly be transmitted to the child. The affidavit should contain detailed information pertaining to the surrogate mother's identity, background and financial position. The court should also be furnished with an extensive report by a psychologist, and preferably also a social worker, detailing her background and psychological profile, attesting to her suitability to act as surrogate mother and explaining the psychological effect the surrogacy and giving up the newborn could possibly have.¹⁷⁶ Whether the surrogate mother will act in a responsible manner to ensure the healthy development of the child is yet another important aspect that should be considered during the assessment.¹⁷⁷

In *Project 65* the SALC¹⁷⁸ recommended a strict six month screening process and counselling¹⁷⁹ for all parties before and after the conclusion and implementation of the agreement.¹⁸⁰ This provision aimed to ensure the suitable social and psychological backgrounds of all parties involved.¹⁸¹ Twelve months of HIV testing for all parties was also considered to be essential before the fertilisation.¹⁸² The screening was to be conducted by a state-run or private body "approved by legislation".¹⁸³ In light of the court's requirement of the "utmost good faith",¹⁸⁴ it can be argued that these assessments should preferably be done by accredited state-run entities.¹⁸⁵ Some surrogacy agencies "strongly recommend" specific individuals for these assessments.¹⁸⁶ It is questionable whether these individuals are recommended for their knowledge and understanding of the complex nature of surrogacy or because they are compliant in the issuing of positive reports against payment of their fee.

The CA, as it relates to the suitability of the surrogate mother and commissioning parent(s), is thus severely lacking as none of these recommendations, which seem crucial to the effective and successful implementation of the surrogate motherhood agreement, have been regulated. Unfortunately, the guidelines provided by the courts also fail

176 *Ex parte WH Supra* 529D-F.

177 Meyerson 1994 *Acta Juridica* 121 143.

178 As it was known then, see n 27.

179 In California some attorneys suggest group counselling throughout the period of the pregnancy, attributing a higher success rate to such an approach (Pretorius 1991 *De Jure* 52 54); Clark 1993 *SALJ* 777.

180 SALC *Project 65 Supra* par 8.2.3.

181 Louw 19-15 n 8.

182 Louw 19-15.

183 *Ad Hoc* Committee on *Surrogate Motherhood* par F6(2)-(3). For a detailed discussion regarding the screening of parties see Louw 19-15.

184 *Ex parte WH Supra* 531H.

185 This should preferably be done by a government department, body or committee in terms of guidelines set out in legislation or regulations to the CA. Louw (19-16 n 1); Meyerson 1994 *Acta Juridica* 121 143 reiterates the importance of the objectivity of such an assessment.

186 <http://baby2mom.boltcms.com/Page/11617/SurrogacyProgram#%2FPage%2F11621%2FPsychologists-for-Surrogacy-Assessments> (accessed 2012-08-17).

to clarify the matter. The promulgation of regulations to the CA remains an avenue to address these omissions,¹⁸⁷ and when, or if,¹⁸⁸ these are drafted care should be taken to provide details pertaining to screening panels, timeframes and aspects to be monitored. The South African Council for Social Service Professions could draft guidelines for the evaluation of parties to surrogate motherhood agreements to strive to achieve a uniform system until regulations have been promulgated.¹⁸⁹

5 6 Incidentalia

It should be noted that the parties may voluntarily include certain types of clauses in their surrogate motherhood agreement.¹⁹⁰ The purpose thereof is purely to regulate matters not addressed by the CA and not to attempt to alter the effect of the legislative provisions. The list of possible clauses is endless, but it should be borne in mind that these *incidentalia* should be both lawful and in accordance with the prevailing *boni mores*.¹⁹¹

Some of these *incidentalia* may include clauses requiring: Social disease testing on all parties;¹⁹² assurance provided by the commissioning parents that they will accept parentage of the child regardless of physical or mental defects or disabilities;¹⁹³ clarification of the situation where such disabilities are due to actions of the surrogate mother;¹⁹⁴ clarification regarding a duty of care where the surrogate mother is advised by a medical professional to terminate the pregnancy, and she chooses not to do so; policies insuring the health and life of the surrogate mother to be maintained by the commissioning parents for the duration of the pregnancy;¹⁹⁵ the clarification of the financial responsibilities of the parties, including provisos requiring funds to cover all anticipated expenses be kept in trust;¹⁹⁶ suggested courses of action in the eventuality that any of the parties wishes to terminate the pregnancy or the agreement;¹⁹⁷ the possibility of visitation rights, if any, of the surrogate mother;¹⁹⁸ confidentiality or privacy statements;¹⁹⁹ specifications regarding the number of embryos to be transferred at one

187 Louw 19-16.

188 See n 104 *Supra*.

189 A request for copies of any existing guidelines from this body was met with a response that they were unable to assist. Whether this was because such guidelines do not exist or because they were unwilling to make them available was unclear.

190 SALC *Project 65 Supra* par 8.3.1; Louw 19-18.

191 Louw 19-7.

192 *Ad Hoc Committee's Report* par F7(4)(j).

193 Pretorius 1996 *De Rebus* 114 117, 121.

194 See Louw's discussion (19-23) of such a situation.

195 Pretorius 1996 *De Rebus* 114 117; Louw 19-18.

196 Louw 19-18.

197 *Ibid.*

198 *Idem* 19-19.

199 *Ibid.* See also s 302 CA in this regard.

time;²⁰⁰ and the number of attempts to transfer embryos that the parties may make throughout the course of the validity of the agreement. The CA requires provision for the care of the child if the commissioning parents pass away, separate or divorce before the birth of the child.²⁰¹ However a similar clause relating to such an unfortunate turn of events and the procedures to follow at any stage after the birth of the child until it reaches majority could also be inserted to assure the surrogate mother of the long-term care of the child.

The fact that the surrogate mother should “observe a sensible lifestyle, diet and standard of hygiene” throughout the pregnancy was viewed as a contractual stipulation which should be required by legislation.²⁰² Since the CA does not specifically require the inclusion of such an undertaking it is advisable that parties include it as *incidentalia*. How non-compliance with requirements of such a personal nature or those regarding sexual abstinence by the surrogate during the fertilisation period or partaking in exercise during the pregnancy could be enforced remains to be seen.²⁰³ It is nevertheless advisable that all parties be made aware of the others’ expectations in writing so as to avoid uncertainty and confusion.

The financial arrangements between the parties should be very clearly set out in order to protect all parties to the agreement. A surrogate mother should not suffer financial loss due to her pregnancy, nor should the commissioning parents be extorted to provide more than was agreed upon.²⁰⁴ These financial clauses should specify all aspects that will be compensated for, as claims above and beyond what is stipulated might not be contractually enforceable. Amounts spent on maternity clothes should be identified and, where commissioning parents wish the surrogate mother to follow a specific diet, they may compensate her for groceries and dietary supplements if specifically and clearly defined and stipulated.

It seems preposterous that some of these optional provisions are not made mandatory by the CA. In light thereof it is expected of legal practitioners drafting surrogate motherhood agreements to foresee all possibilities that may arise during the period of the effective agreement. This surely is an impossible feat, and yet this is the practical implication

200 A maximum of three embryos per attempt is permitted, unless medical reasons determine otherwise (reg 12 *Regulations Relating to Artificial Fertilisation of Persons Supra* n 129); Nöthling Slabbert *SAJBL* June 2012 30.

201 S 295(d) CA.

202 Lupton 1986 *J Juridical Science* 155.

203 Pretorius 1996 *De Rebus* 114 115.

204 Unreported case. A surrogate from Bethlehem apparently demanded a motor vehicle and R100,000.00 before she would hand over the child. See *Beeld* (2011-01-22) 7; *Sunday Tribune* (2011-01-23) 3; *Daily News* (2011-01-26) 5; Nöthling Slabbert *SAJBL* June 2012 30. The incident even made headlines in the United Kingdom, see <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/8269085/Surrogate-mother-holding-couple-ransom-with-unborn-baby.html> (accessed 2012-09-12).

of poorly drafted legislation. A draft surrogate motherhood agreement has been formulated.²⁰⁵ This was however done before the handing down of the *Ex parte WH* judgment. It serves as a good point of departure, but it should be remembered that it was drafted from a family law perspective and that it does not address all the requirements as set out by the courts in the most recent case law.

5 7 Breach

Stipulations relating to breach of contract by any of the parties should be addressed and illuminated in the *incidentalia*.²⁰⁶ As surrogacy law and its adjudication in South African courts is still in its infancy, parties to surrogate motherhood agreements should act preventatively and include as much information in their agreements as possible. This will help the court in its attempt to balance the true intention of the parties with what Chapter 19 of the CA prescribes. The most obvious problem that could arise is that the surrogate mother, who is not genetically linked to the child, refuses to give up the child after its birth. Forcing her to do so has been described as “sacrifice[ing] a woman’s reproductive autonomy to the principle of *pacta servanda sunt*”.²⁰⁷

The Law Commission and the legislature endorse the application of the *pacta servanda sunt* principle.²⁰⁸ Due to the nature of surrogacy, the only performance that will truly satisfy the aggrieved party in the case of breach is specific performance. No court will order damages, beyond actual expenses incurred, be paid to the commissioning parents by the surrogate mother, the result being that where a dispute arises there will never be justice for both parties.²⁰⁹ The same applies to the situation where the surrogate mother wishes to undergo an abortion, to which she is legally entitled, and the commissioning parents wish to prevent this.²¹⁰ Louw²¹¹ is of the opinion that compelling specific performance could possibly be unconstitutional as such an order might unduly impact the surrogate mother’s rights to dignity, privacy and reproductive autonomy.²¹² The extremely personal nature of the surrogate motherhood agreement has also been identified as a reason why specific performance would not be an appropriate order in the instance of breach.²¹³

Lupton argues that prior to the CA, a court would have applied the *boni mores* test to determine whether a surrogate motherhood agreement would be enforceable.²¹⁴ It could be contended that even now that

205 Carnelley & Sheetal “Surrogate motherhood agreements” 2011 *De Rebus* 32.

206 Lupton 1986 *J Juridical Science* 155.

207 Clark 1993 *SALJ* 777.

208 *Idem* 773.

209 Meyerson 1994 *Acta Juridica* 121 141.

210 *Idem* 131; Louw 19-28.

211 At 19-23.

212 Respectively enshrined by ss 10, 14, 12(2) Constitution.

213 Lupton 1986 *J Juridical Science* 155, Clark 1993 *SALJ* 778.

214 1991 *TSAR* 229.

formal surrogacy is regulated by the CA, the court might still apply this test where either party to the agreement refuses to abide by it or to perform in terms of the contract. How South African courts will interpret section 298(1) in future remains to be seen. What will a court rule where in a case of full surrogacy the child is not related to the surrogate and she refuses to hand it over to the commissioning parent? Will the court in adjudicating custody disputes ascribe the highest emphasis to the parties' genetic link, or lack thereof, to the child? The question regarding the strict application of sections 298(1) and 297(1)(a) and (b) of the CA will only be answered if the Constitutional validity of these sections is tested.

6 Practical and Theoretical Approaches To Surrogacy

6 1 Practical and Procedural Aspects to be Kept in Mind by Practitioners

When drafting the surrogate motherhood agreement, attorneys are advised to refer to "the child(ren)" that is/are to be born as a result of the surrogacy, as artificial fertilisation often results in more than one child being conceived.²¹⁵

If any previous applications for confirmation of surrogate motherhood agreements have been submitted by any of the parties all information regarding these applications should also be provided to the court in the affidavit.²¹⁶

Directive 4.1 of Practice Directive of the South Gauteng High Court²¹⁷ stipulates that confirmation applications are not automatically urgent and that the Registrar of the court must issue them in the ordinary course. Thereafter, the entire file must immediately be taken to the office of the Deputy Judge President where the application will be assigned to a particular judge who may then further direct how the matter is to be heard and what further information should be provided to the court.²¹⁸ Counsel for the applicants should specifically direct the court's attention to the requirements contained in section 295 of the CA and indicate how they are met in the application.²¹⁹

6 2 The Contract Law and the Family Law Models

Surrogacy stands astride public and private law since constitutional, administrative and criminal law principles on the one hand, and family, contractual and delictual law principles on the other hand, all apply to

215 Pretorius 1996 *De Rebus* 114 117.

216 *Ex parte WH Supra* 531D-E.

217 *Supra* n 70.

218 *Idem* directives 4.2, 4.3 & 4.5.

219 *Idem* directive 4.4.

this unique niche of the law.²²⁰ Against the backdrop of childcare, child abduction, abortion, corporal punishment and surrogacy, Sloth Nielsen and Van Heerden discuss the need for a “paradigm shift” with regards to the doctrinal notion of the public law – private law divide.²²¹ This shift is of crucial importance in the context of surrogacy. When parties try to affect surrogacy amongst them, the debate further intensifies when the role of the private law approaches of contract law and family law are weighed up. Parties need to understand the role government bodies, the legislature and the courts play in the realm of the surrogate motherhood agreement. The notion of increased governmental intrusion into the private lives of citizens is undesirable in many instances; however, it must be welcomed in relation to surrogacy.²²²

One of the major policy issues in the legal approach to surrogacy is deciding on the appropriate paradigm to adopt in order to analyse surrogacy.²²³ The two traditional, polar opposite options are a family relations or family law model, based on the principles of adoption, and that of contractual relations or the contract law model, based on the concepts of the sale of products or services.²²⁴ Another, possibly more palatable, description of the two models is of the family law model as a “state regulation approach” and the contract law model as a “private ordering approach”.²²⁵ A detailed description of each model will not be provided, but the merits of the arguments for and against either will be evaluated.²²⁶

The CA implies²²⁷ that disputes regarding the parentage of the child will be settled differently where the surrogate mother is also the genetic mother of the child. Where the surrogate is not the genetic mother, the family law model’s stance is that the gestational mother (surrogate) has the strongest right to the child.²²⁸ However, this comes into direct contrast with this model’s approval of relying on the genetic link in cases of adoption where a genetic mother changes her mind about giving up her child.²²⁹ Directly transplanting the rules of adoption to surrogacy (as the family law model advocates) is also not viable under South African law, due to the genetic link of at least one of the commissioning parents to the child. This automatically sets the surrogacy situation apart from that of adoption.

220 Pretorius 1996 *De Rebus* 114.

221 Sloth Nielsen & Van Heerden 1998 *SALJ* 159-164.

222 *Idem* 164.

223 Capron & Radin 1988 *Law, Medicine and Health Care* 34.

224 *Ibid.*

225 Pretorius 1996 *De Rebus* 114 115.

226 Most of the literature on the paradigms dates from the 1980s when surrogacy and artificial fertilisation were not as advanced as they are today and may thus not be appropriate in the current context.

227 In s 298(1) CA.

228 Capron & Radin 1988 *Law, Medicine and Health Care* 35.

229 *Ibid.*

However the invaluable role of certain aspects of the family law model is undeniable. The essential involvement of the State through courts, social service institutions and legislative regulation is closely related to the family law model, as is the State's responsibility as upper guardian of all children.²³⁰ The family law model is preferred by Capron and Rodin, but no discussion of the merits of the contract law model is considered.²³¹ Their explanation of the family law model involves that the child be adopted, the possibility of which is not clear under the CA.²³²

The mere fact that a document to which everyone involved is a party is aimed at altering the effect of the existing common law as it is related to the family must mean that the role of the law of contract cannot be ignored. A rejection of the contract law model inadvertently means the rejection of the rights and duties associated with the law of contract, namely freedom of contract and *pacta servanda sunt*. Pretorius favours the contract law model, stating that it can successfully regulate surrogacy.²³³

The contract law model has been discarded in the United States of America due to the doctrine of valuable consideration which applies under American law.²³⁴ An automatic rejection of the contract law model in South Africa cannot be based on the same logic, as the doctrine is not applicable in South African law.²³⁵ Therefore the argument that promises without consideration (such as altruistic surrogacy) are not enforceable, cannot apply in the South African context.

The contract law model cannot be described as perfect either. If the parties to the agreement's relationship to the child rests on the validity and accuracy of a document like a surrogate motherhood agreement, and the validity of the document or its actual intention comes into question, the child's care and parentage is automatically jeopardised.²³⁶ Moreover the contract law concepts related to a transaction where "ownership" in a thing is being transferred from one individual to another²³⁷ is also highly unacceptable to the South African embodiment of the value of a human being. The traditional contracts of sale or letting and hiring of services remind too much of warranties, guarantees and the enforcement of performance by any legal means necessary. Consumer law and the effects thereof can under no circumstances be applied to the law of surrogacy.

Meyerson correctly argues that the situation regarding surrogacy is more complicated than allows it to squarely fit into the box of either the

230 *Idem* 37.

231 *Idem* 34.

232 *Supra* n 120.

233 1996 *De Rebus* 115 115-116.

234 Capron & Radin 1988 *Law, Medicine and Health Care* 40.

235 *Conradie v Rossouw* 1919 AD 279 298.

236 Capron & Radin 1988 *Law, Medicine and Health Care* 35.

237 *Idem* 36.

family law or contract law model: surrogacy is more complex than adoption and the surrogate motherhood agreement cannot be seen as just an ordinary contract.²³⁸ Because of the “unique mixture of contractual and personal interests” choosing one model over the other would not allow for dealing with the situation as effectively or temperately as possible.²³⁹ A mixed model, encasing aspects of both models should be designed.²⁴⁰

Furthermore, the fact that the general principles of the law of contract alone were deemed insufficient to regulate surrogacy means that a blending of the contract law and family models was what the Law Commission intended.²⁴¹ Academic research should thus be conducted on how to devise a surrogacy specific model suited to the current South African legal climate.

7 Conclusion

Despite the fact that the recent case law has cleared up some uncertainties regarding the law of surrogacy, many legal and ethical dilemmas remain.²⁴² Despite current *lacunae* the contract serves as a tool to clarify and protect the interests of both the commissioning parent(s) and the surrogate mother.

The courts demand a complete, honest and detailed contract, affidavit and application. Despite this, parties seem to either not know, or care about the effect of their non-compliance. Before surrogacy was specifically legislated by the CA, it is believed that the practice was driven underground and still practiced by infertile couples.²⁴³ The fact that surrogacy is now legislated for begs the question, why do parties persist in flouting the law?

Surrogacy is inevitably engaged in the intricate web of trying to balance the interests of the various parties to the agreement, the child and society as a whole – a seemingly impossible feat.²⁴⁴ At present the surrogate motherhood agreement is the best tool available to the parties to attempt to clarify and balance these individual interests. The possibility of a surrogacy specific model should be researched in order to provide prospective parties to surrogate motherhood agreements, as well as our courts, guidance in interpreting, enforcing and implementing surrogacy agreements under Chapter 19 of the CA.

238 Meyerson 1994 *Acta Juridica* 121 144.

239 *Ibid.*

240 *Ibid.*

241 *Supra* n 66.

242 Nöthling Slabbert *SAJBL* June 2012 31.

243 Pretorius 1991 *De Jure* 52 61. Lupton 1986 *J Juridical Science* 157 states that when the practice of surrogacy is driven underground, the possibility of exploiting surrogate mothers becomes significantly higher.

244 Lupton 1986 *J Juridical Science* 156; Nöthling Slabbert *SAJBL* June 2012 31.

Until such time as a surrogacy specific model has been designed, or a court hands down a judgment implying otherwise, it is suggested that the contract law model be adopted. It provides the best perspective from which to give effect to the parties' intentions. Furthermore, it is submitted that the reigning uncertainties resulting from the lack of regulations to Chapter 19 of the CA are better remedied by applying the contract law model.