

Before the current legislation regulating surrogacy was promulgated, surrogacy agreements were subject to contractual law and the children born from surrogacy arrangements were subject to the Children's Status Act.¹ This Act deemed a child born to a surrogate mother and her husband to be the legitimate child of that couple. The commissioning parents could only become the child's legal parents through legal adoption in terms of the Child Care Act.² There was no legislation to regulate what would happen in the event of the surrogate mother refusing to hand over the child for adoption and the commissioning couple had no way of knowing whether a court would grant an order of specific performance to enforce their particular contract.³ This created legal uncertainty for parties to surrogacy agreements. The South African Law Reform Commission (SALRC) eventually launched an investigation which resulted in *Working Paper 38: Surrogate Motherhood*⁴ and *The Report of the Ad Hoc Committee on the report of the SA Law Commission on Surrogate Motherhood*.⁵ These papers led to a resolution to regulate surrogacy in South Africa which culminated in Section 19 of the Children's Act (the Act).⁶ The section must be read in light of the Bill of Rights,⁷ which entrenches the right to parental care⁸ and holds the best interests of the child to be of the utmost importance.⁹ However, some parts of section 19 are potentially problematic in that they contain provisions that present practical difficulties and omissions of comprehensive legislation. Others may, without the accompaniment of the requisite constitutional justification and likely on the basis of normative valuations, be construed to limit the ability of the stakeholders to exercise their full constitutional rights. The following essay will discuss the South African legislation governing surrogacy and examine whether it adequately protects the interests of the parties involved in surrogacy agreements.

The parties in surrogacy agreements include the child, the commissioning parents, and the surrogate mothers. For the purposes of this essay, I have decided to focus primarily on the rights of the surrogate mother for a number of reasons. From reports by the SALRC, to ensuing legislation and recent case law, the focus of surrogacy regulation has been to provide a framework that functions in the best interests of the child, and to some extent the rights of the commissioning parents. The consequence of this is that little regard is given to the surrogate mother's role beyond being a means of reproduction or to her possible parental rights and responsibilities. This essay aims to show that this may lead to opportunity for the exploitation of these women as they are neglected as equal stakeholders in the surrogacy process. In her article about the ideological implications of surrogacy agreements,¹⁰ Denise Meyerson suggests that South African law does not adequately protect surrogate mothers from exploitation because the SALRC's definition of surrogacy implies that they are not to be considered as the 'real' mothers in the first place—that one should view them rather for their purpose in providing children for would-be parents than as potential parents.¹¹ This

¹ Act 82 of 1987. This act has since been repealed.

² Section 17 (a) of Act 74 of 1983. This Act has since been repealed.

³ Katarina Trimmings and Paul Beaumont (eds) *International surrogacy arrangements : legal regulation at the international level* (2013) 325.

⁴ Project 65 (April 1991).

⁵ February 1999.

⁶ Act 38 Of 2005.

⁷ Constitution of the Republic of South Africa, 1996.

⁸ Ibid s 28(1)(a).

⁹ Ibid S 28(2).

¹⁰ D Meyerson 'Surrogacy Agreements' (1994) *Acta Juridica* 121.

¹¹ Ibid 21.

attitude would preclude the SALRC from championing these women's rights as equally important to those of the commissioning parents as the very definition of their interaction implies the sole legitimate parenthood of the commissioning parents.

Section 1 of the Act¹² defines a surrogate mother as 'an adult woman who enters into a surrogate commissioning agreement with the commissioning parent.'¹³ The Act further defines a surrogate motherhood agreement as 'an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilized 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.'¹⁴

An illustration of the latter section's shortcomings is, first, that it distinguishes between full¹⁵ and partial surrogacy¹⁶ with regard to parental rights. If the surrogate in a valid surrogacy agreement has no genetic relationship to the child (full surrogacy), she is legally required to hand the child over as soon as is reasonably possible after it is born.¹⁷ But, if she is also the child's genetic parent, she is permitted to cancel the surrogacy agreement up to 60 days after the child is born.¹⁸ Thus, full surrogacy confers full parental rights on the commissioning couple upon the child's birth and partial surrogacy suspends those rights for 60 days. The justification for this is that the surrogate has a stronger bond with a baby to whom she is genetically related and that it would unjustifiably infringe her rights (to dignity and bodily autonomy) to force her to give up that baby, should she wish not to do so.¹⁹ It is unclear why this degree of reproductive autonomy is not given to full surrogates as they undergo the same physiological changes and undertake the same risks whilst experiencing the same social pressures as partial surrogates.²⁰ There is thus no compelling evidence to suggest that a partial surrogate should be entitled to keep a baby she delivers whilst a full surrogate should not.

Second, for the agreement to be valid, the surrogate's husband (if she is married), is required to give his consent and be a party to the agreement.²¹ The rationale behind this provision appears to be that the surrogate's husband should be given a say in the agreement because his rights to an undisturbed marriage and family life are to be affected. Though a court may confirm the surrogacy agreement without the husband's consent if he unreasonably with-holds it, I believe that even the

¹² Supra note 6.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Full surrogacy refers to when none of the surrogate's genetic material is used in the fertilization process and she thus bears no genetic relation to the child.

¹⁶ This is when the surrogate's own ova are used in the fertilization process, thus rendering her genetically related to the child.

¹⁷ Supra note 6 at S 297 (1)(b).

¹⁸ Ibid S 297 (1)(d).

¹⁹ Supra note 3 at 329.

²⁰ Supra note 10.

²¹ Section 293(3) of the Children's Act.

reasonable withholding of the husband's consent from the surrogacy agreement is an unjustifiable intrusion on the surrogate's right to bodily autonomy. For the same reason a husband's consent is not required for his wife to have an abortion of his own foetus, he should not preclude her from the deeply personal decision of entering into a surrogate pregnancy. The Act gives the surrogate (whether single or married) the right to decide on her own whether she wants to terminate her surrogate pregnancy, and the Act gives her the right to keep the child in the case of partial surrogacy.²² No mention is made of the husband's consent in these instances because the legislature obviously recognised the personal nature of the decisions. No reasonable distinction is drawn between those choices and the choice to become a surrogate and fall pregnant. The decision to become a surrogate surrogacy involves the right to bodily autonomy and dignity and, just as with the right to abort or retain the child, should not require the consent of another.

Another point of concern is the lack of a comprehensive framework legislating private international law rules which are applicable to surrogacy.²³ Section 292 (1) (b)-(e) of the Act²⁴ governs surrogate motherhood agreements only if they are concluded in South Africa and if the surrogate mother and her husband, as well as at least one of the commissioning parents are domiciled in South Africa. This is the only rule, however, and there are no regulatory provisions for situations where a surrogacy agreement may be valid in the country in which it is concluded but invalid elsewhere.²⁵ There are no conventions regulating surrogacy agreements and each country has different methods of dealing with it.²⁶ This will likely lead to difficulties: for example, in countries where surrogacy is not recognized, the government may refuse to register the child as a full citizen of the commissioning parent's country or homeland and in countries where same-sex couples are not afforded fundamental rights, the governments may refuse to register them as the child's legal parents.

A key problem in the South African context is that a lack of international law and agreements appears to have resulted in adverse consequences for South African women in that they are vulnerable to exploitation in various aspects related to the surrogacy industry.²⁷ Numerous reports by the South African media have indicated exponential growth of the surrogacy industry, particularly in Asia. In 2003, India legalized commercial surrogacy and it is reported that in a bid to meet the demand of foreign commissioning couples that require Indian surrogates, Indian fertility agencies have opened agencies around the world and are recruiting young women as egg donors. An article in the *Mail and Guardian*²⁸ published 17 May 2013 reported a large number of South African women who are enlisted by the South African branches of these clinics and flown to India for the harvesting of their eggs, which are then implanted into local surrogates for monetary compensation. Because these agencies are not regulated or even recognized by South African officials, they exploit these

²² Children's Act, s298(1).

²³ Supra note 3 at 343.

²⁴ Supra note 6.

²⁵ In the United Kingdom, surrogacy is legal, but surrogacy agreements are not legally binding on any of the parties thereto. In the United States of America, each state is empowered to make its own laws, thus creating a situation where surrogacy may be subject to permissive laws in some states and prohibitory laws in others. In France, Iceland and Italy, all forms of surrogacy are prohibited.

²⁶ Ibid.

²⁷ "The Brave New World of the International Egg Trade" *Mail and Guardian*, 17 May 2013.

²⁸ A newspaper which circulates in South Africa.

women by misrepresenting the risks involved as minimal. Many of these agencies are reported to use harmful hormones, which are banned in South Africa, for the reduced cost and the higher yield of eggs. The result is that many women return from India with Ovarian Hyperstimulation Syndrome—a disease for which there is no specific treatment and which may result in organ loss, renal failure and strokes. The victims in this event have no legal recourse because South Africa has no statutory provisions regulating egg donation in other countries. And because there is no international treaty or convention²⁹ in this regard to which both India and South Africa are parties, the agencies continue to operate openly and without consequence in India. Interestingly, no legislation regarding surrogacy agreements in India has yet been formalized, and this has created a vacuum in which surrogacy agreements are unregulated and in which no legal protection is offered to the parties involved. Unlike South Africa, however, India has National Guidelines which specifically offer protection to surrogate mothers.³⁰ The surrogate is rebuttably deemed the child's mother upon delivery.³¹ The guidelines do not differentiate between full and partial surrogacy and deem the surrogacy contract valid subject to the surrogate's right to keep the baby if she wishes. The only remedy for the commissioning parents to recover the child is to claim adoption based on the best interests of the child.³² Both partial and full surrogates are given six weeks after delivery to confirm whether they want the surrogacy contract enforced.³³ Though not yet binding, these guidelines give specific consideration to the need to protect the surrogate mother from exploitation and possible violation of her rights. They give effect to her rights to dignity and her personhood as a 'legitimate' mother and not just as a surrogate.

The surrogate agreement (as per the Children's Act) ends only by termination of the pregnancy, though the surrogate must first inform and consult with the commissioning parents when doing so. If the termination is for medical reasons, she incurs no liability towards the commissioning parents. It is difficult to discern the rationale behind allowing both types of surrogates to terminate a surrogate agreement through an abortion, yet only allowing partial surrogates to terminate the agreement by choosing to keep the child as their own.

Thus, granting only partial surrogates the right to keep a child born of a surrogacy agreement compromises the equal rights of full surrogates to dignity, privacy and bodily autonomy. And inadequate private and public international law governing surrogacy agreements as well as subsidiary branches of the surrogacy industry are steadily resulting in the exploitation of young women who become involved in it. This is unacceptable because it is the government's constitutional mandate to protect its citizens as far as possible and it has failed to do so in this regard. Thus, the effect of section 292 of the Act is that it is inconsistent and fails to afford adequate consideration to the rights and possible need for legal protection by all forms of surrogate mothers.

²⁹ Supra note 3 at 344.

³⁰ Supra note 3.

³¹ Ibid.

³² Ibid.

³³ Ibid.

MOTIVATION FOR WELA MLOKOTI

Dear Sir or Madam

I am writing to enter the Family Law Award as advertised by the UCT Law Faculty.

Though our Constitution is liberal and seeks to empower its citizens to realize their socio-economic rights, there still remains a great divide between the text itself and the realization of those rights by the people. I believe that the development and enforcement of our family law system is integral to protecting the most vulnerable members of our society—women and children. As a black woman from the Eastern Cape, each time that I go home I witness first-hand the destitution suffered due to a lack, in some cases, of proper legislative frameworks to make help their rights a reality. I believe that the influence of principles such as liberal individualism has helped America make great strides in its family law system and though our own law is founded on 'community-based thinking', many of the principles that provide liberty in the US system can be transposed and developed into our own in order to empower each individual—for all.

I believe that am an ideal candidate to enter the United States mentoring program because I intend to work hard to absorb as much information as possible in my time there. This is ultimately beneficial because my return will have the maximum impact that I believe the program seeks to achieve: learning enough to make a meaningful contribution to the legal discourse that facilitates the development of South African family law.

I hope that my essay will meet with your favourable consideration.

Wela Mlokoti

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