the King's illegitimate son, Robert of Gloucester, who had many of his father's talents, would have made a fine king. Instead he could only support his half sister in her claim to be recognised as Queen in accordance with the Barons' oaths to their father that her right to the succession was fully acknowledged in his lifetime.

12 That is, after the death of Henry VI, the legitimate line of descent of the Lancastrian Plantagenet kings was extinct .

13 When one or both were married to another person at the time of the child's birth.

14 S Cretney, *Family Law in the Twentieth Century* (Oxford University Press, 2003) 564.

15 [1891] AC 388.

16 *Wellesley v Wellesley* (1828) 2Bl (NS) 124, 145–146.

17 For example, Charles Dickens' *Oliver Twist*, Charles Kingsley's *The Water Babies* and George Crabbe's *Peter Grimes,* more recently a Benjamin Britten opera.

18 For example in Anthony Trollope's *Dr Thorne.*

19 Oxford University Press, 2003, 672.

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Surrogacy, South African style

The South African Children's Act 38 of 2005 (fully in force from 1 April 2010) has, for the first time, made surrogacy agreements legal, provided that the conditions set out in the Act are met. This article reviews the Act's provisions concerning surrogacy (Chapter 19 of the Act) and raises some questions for consideration.

First, a brief history of the inclusion of surrogacy in the omnibus Children's Act needs to be recorded. The issue was the subject of a pre-constitutional investigation by the South African Law Reform Commission, which produced a Report and a draft Bill on surrogacy in 1992.[1] The intention was that surrogacy would be regulated in a dedicated Act devoted to this. After the introduction of a new constitutional order in 1994, an ad hoc parliamentary committee was formed to enquire into and report on the SALC report, producing its own report in 1999. From 1997, the process of review of the Child Care Act 74 of 1983 (which led to the new Children's Act) was under way, also spearheaded by a project committee of the South African Law Reform Commission. Ultimately, since the earlier recommendations had not been brought to parliament in legislative form, surrogacy was added to the Children's Bill (now Act) since it purported to deal with the status of the child born of a surrogacy agreement, among other aspects.

The Act requires that a surrogacy agreement must be finalised and confirmed by a High Court before the fertilisation of the surrogate mother takes place. The commissioning parents – or a commissioning single person – must be domiciled in South Africa at the time of entering into the agreement, as must the surrogate mother and her husband or partner.[2] The possibility of South Africa becoming a destination for surrogacy tourism is therefore severely curtailed.

Commercial surrogacy is not permitted, and the Act specifically provides that a court confirming the agreement must ensure that the surrogate mother is not using surrogacy as a source of income and is entering into the agreement for altruistic reasons.[3]

There are some limitations imposed on both the commissioning parent(s) and upon the surrogate. As regards the commissioning parent(s), it is required that they confirm to the court that they are not able to give birth to a child, and that this condition is permanent and irreversible.[4] Furthermore, the gametes of both commissioning parents are required to be used, or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents must be used. Where the commissioning parent is single, the gamete of that person must be used.[5] Thus an infertile couple or single person is excluded from being party to a surrogacy agreement – a position that might be constitutionally suspect.

The Act further requires that the commissioning parents must 'in all respects' be suitable persons to accept parenthood of the child that is to be conceived, which sets a standard not applicable to parents of children conceived naturally.[6]

As far as the surrogate mother is concerned, she must furnish the written consent of her husband or partner if involved in a permanent relationship.[7] Further, she is eligible only if she is in all respects suitable to act as a surrogate mother,[8] if she has a documented history of at least one pregnancy and a viable delivery,[9] and has at least one living child of her own.[10] It was thought that this would promote adherence to the terms

of the agreement by the surrogate, but again, it can be raised whether these requirements are necessary and would pass constitutional muster if challenged.

There are no upper or lower age limits set for either commissioning parent(s) or surrogate, although any medical risks to the surrogate mother relating to the pregnancy must be disclosed to the court.[11]

Both full and partial surrogacy are contemplated in the Act, the distinction being that a surrogate mother who is genetically related to the child may apply to court to terminate the contract within 60 days of the birth of the child.[12] Where this occurs, the parental rights that would otherwise vest in the commissioning parent(s) are terminated and vest in the surrogate mother, her husband or partner, if any, or if none, the commissioning father.[13] Where full surrogacy agreements are in place, the effect is that the child is for all purposes the child of the commissioning parents as from birth, and the surrogate mother is obliged to hand over the child as soon as reasonably possible after the birth.

In ex parte *WH* (2011) (6) SA 384 GNP, one of the first surrogacy cases decided after the Act came into operation, the court laid down further criteria to be met before a surrogacy agreement would be confirmed. These include proposals relating to the involvement of agencies who may be involved in surrogacy on which the Act is currently silent. The matter before involved an agency who sourced the surrogate mother and effected the link to the commissioning parents.

If any agency is involved, full particulars regarding that agency should be revealed in the papers filed. An affidavit by the agency should contain information relating to the business of the agency, whether any form of payment is paid to or by the agency in regard of any aspect of the surrogacy, what exactly the agency's involvement was regarding the introduction of the surrogate mother, how the information regarding the surrogate mother was obtained by the agency and whether the surrogate mother received any compensation at all from the agency or the commissioning parents.

Full particulars should be set out in the founding affidavit on how the commissioning parents came to know the surrogate mother and why she is willing to act as a surrogate to them. The surrogate mother's background, as well as her financial position, should be investigated and set out in the affidavit. Furthermore, a comprehensive report by a psychologist is essential to parents, and a separate report in respect of the surrogate and her partner, as well as a medical report regarding the surrogate mother, which must include the details referred to as to whether the proposed surrogacy poses any medical risk for her or the child and her HIV status.

The court required that details and proof of payment of any compensation for services rendered be provided, either to the surrogate herself or to the intermediary, the donor, the clinic or any third party involved in the process; further, that copies of all agreements between the surrogate and any intermediary or any other person who is involved in the process be furnished; and information as to whether any of the commissioning parents have been charged with or convicted of a violent crime or a crime of a sexual nature.

The court also required a proper list of estimated costs (maternity clothes, health and life insurance) and copies of any additional agreements between the surrogate and the commissioning parent(s) for the purposes of transparency and curtailing commercial surrogacy.

The surrogacy provisions discussed above are probably being quite widely used, especially by same-sex couples, if anecdotal reports are to be believed. Also, the involvement of agencies – for example, egg donor clinics – was not foreseen at the time of drafting of the provisions in the 1990s. Therefore, although the Act does not currently provide for regulations on surrogacy to be drafted, it is proposed that the suggestions of the court in *WH* could usefully be added as further requirements to guide courts. At the same time, it may be necessary to revisit some of the exclusionary clauses, which deny eligibility to certain categories of people.

Notes

1 SALC Report on surrogate motherhood, 1992.
2 Section 292(1)(c)and (d).
3 Section 295(c)(iv) and (v).
4 Section 295(a).
5 Section 294.
6 In ex parte *WH* (2011) (6) 384 GNP, the court opined that when deciding on the suitability of a parent 'an objective test should be applied which would include an enquiry into the ability of the parents to care for the child both emotionally and financially and to provide an environment for the harmonious growth and development of the child'.
7 This can be dispensed with by a court if unreasonably withheld.

8 Section 295(c)(ii).
9 Section 295(c)(vi). It is not required that this child still be alive.
10 Section 295(c)(vii). It is not specifically required that this child be genetically linked to the surrogate – technically the provision could refer to an adopted child.
11 Ex parte *WH* (2011) (6) SA 384 GNP.
12 Section 298(1).
13 Section 299(a).

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Surrogacy for single and unmarried persons: a challenge under Indian law

Introduction

At a time when the world's first test-tube baby – Louise Brown, born in 1978 in the UK – has now herself become a mother, and high-profile international adoptions by celebrities such as Madonna and Angelina Jolie are glorifying international adoption, India does not lag behind. Noted Indian film actress Sushmita Sen inspires single women both in India and abroad to adopt children, breaking conventional taboos and age-old practices. As a result, orphan girls are finding mothers in India and abroad. However, genuine adoptive foreign and non-resident would-be parents are also pitted against an insurmountable wall. Child adoption in India is a complicated issue. It is over-burdened with knotty legal processes and complicated lengthy procedures for those who want to give a new home and a new life to a reported 12 million Indian orphans.

A silent revolutionary change is fast heralding a new dawn in matter of inter-country adoptions. However, the plethora of Indian laws does not improve the plight of 12 million orphaned children in India who need adoptive parents. The Guardian and Wards Act 1890 (GWA) permits guardianship and not adoption. The Hindu Adoption and Maintenance Act 1956 (HAMA) does not permit non-Hindus to adopt a Hindu child. Requirements of immigration have further hurdles, even after adoption. Perhaps the urge to be a parent has now taken over in the form of 'embryo adoption' wherein fertilised sperm and eggs developed into an embryo are successfully implanted in Indian clinics and nurtured by foreign mothers in their homeland, ensuring hassle-free adoption of Indian embryos without complicated procedures. Technology has overtaken law.

As a background to the practice of surrogacy today, mythological surrogate mothers in the past are well known in India. Yashoda played mother to Krishna, though Devki and Vasudeva were biological parents. Likewise, in Indian mythology, Gandhari made Dhritarashtra the proud father of 100 children, though he had no biological relation to them. The primordial urge to have a biological child of one's own flesh, blood and DNA aided with technology and the purchasing power of money coupled with the Indian entrepreneurial spirit have generated the 'reproductive tourism industry'. This comes as a boon to childless couples all round the world. Clinically called assisted reproductive technology (ART), it has been in vogue in India since 1978 and today an estimated 200,000 clinics across the country offer artificial insemination, in vitro fertilisation (IVF) and surrogacy.

Recent cases

In a decision of the Supreme Court on 29 September 2008 in *Baby Manji Yamada v Union of India & Anr* AIR 2009 SC 84, the Japanese baby Manji, born on 25 July 2008 to an Indian surrogate mother with IVF technology upon fertilisation of her Japanese parents' eggs and sperm in Tokyo and the embryo being implanted in Ahmedabad, triggered off complex, knotty issues. The Apex Court directed the central government to issue the infant with a passport so as to facilitate travel with its grandmother, even though the Japanese biological parents were divorced and the biological mother had disowned the