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THE SCOPE AND CONTENT OF THE CHILD'S RIGHT TO IDENTITY IN THE CONTEXT OF SURROGACY

A research paper submitted in partial fulfilment of the requirements for the
degree

LLM in Children's Rights

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Date: October 2017

DECLARATION

'I **Shane-Leane Rispel** declare that **THE SCOPE AND CONTENT OF A CHILD'S RIGHT TO IDENTITY IN THE CONTEXT OF SURROGACY** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references'.

Signed: _____ **S.Rispel** _____

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Date: October 2017



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Keywords

Best Interest

Right to identity

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Donor-conceived child

Disclosure

Gamete donor

Surrogate



List of Acronyms

ACRWC	African Charter on the Rights and Welfare of the Child
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
SALC	South African Law Commission
SALRC	South African Law Reform Commission



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Chapter one

1.1 Introduction: Surrogacy

The development of assisted reproductive technology (ART)¹ has radically changed the landscape of the conventional family.² It has permitted a platform for the creation of families and family structures with tremendous diversity in their demographic characteristics.³ It has also changed the way in which individuals become parents.⁴ The advances in medical and scientific fertility treatments have meant that for many the dream of having a child of their own has now become a real possibility.⁵ Public perception and attitudes towards infertility treatments and more latterly surrogacy has changed tremendously and becoming increasingly acceptable.⁶ While there are those who have celebrated the advancement in reproductive technologies and potential freedoms that this may contain, ART has opened the proverbial Pandora's Box amongst scholars and the public policy makers, principally in the area of rights.⁷

'Surrogacy, a form of ART, occurs where one woman bears a child for another.'⁸ It may be total (gestational), where the surrogate is not biologically related to the child or partial, where the gamete of the surrogate is used.⁹ Another form of surrogacy is commercial surrogacy, which occurs when more financial compensation is given to the surrogate than her actual expenses.¹⁰ However, my research paper will not be dealing with commercial surrogacy and it will only be referred to where relevant.

¹ Assisted Reproductive Technology (hereafter ART) - the treatment for infertility.

² Sabatello M 'Are the kids alright? A child centred approach to assisted reproductive technologies' (2013) 31 *Netherlands Quarterly of Human Rights* 74.

³ Sabatello M (2013) 75.

⁴ Sabatello M (2013) 75.

⁵ Connolly B 'Surrogacy from an English perspective (but increasingly a global issue)' 2012 para 1.3 available at (www.millerduitoitcloeteinc.co.za/family-law-cape-town-img/Conf2012/Conf2012/Paper%20-%20B%20Connolly%20-%20202.pdf) accessed 02 September 2016.

⁶ Connolly B (2012) para 1.4.

⁷ Sabatello M (2013) 75.

⁸ Nicholson C 'When moral outrage determines a legal response: Surrogacy as Labour' (2013) 29 *SAJHR* 497.

⁹ Nicholson C (2013) 497.

¹⁰ Nicholson C (2013) 497.

Surrogacy has often been presented as a treatment for infertility, a way to obtain medical assistance in the process of reproduction.¹¹ Surrogacy arrangements are sometimes concluded within families and on an informal basis; this generally escapes the attention of the courts, unless a dispute arises between the parties involved.¹² A contrasting view of surrogacy other than a reproductive phenomenon has also caused much controversy in which it has been characterised as exploitative and compared to baby selling.¹³ This opposition to surrogacy, which exists, is mostly moralistic in nature and directed towards the perceived immoral and degrading practice of commercial surrogacy.¹⁴

This research paper will look at the right of a child born through the services of ART but more specifically surrogacy, to identity. This paper will show that in order for the child's best interest to be considered as primary or paramount in surrogacy, there has to be an acknowledgement that a child has a legal right to know her biological origins.¹⁵

Before the enactment of chapter 19 of the Children's Act,¹⁶ surrogacy was not expressly regulated in South Africa by any legislation. The Children's Status Act¹⁷, which prevailed at the time, did not expressly regulate surrogacy. There were also no pre-constitutional judgments where parties approached our courts in an attempt to enforce a surrogacy contract.¹⁸ In the year 1992, the South African Law Commission (SALC) had concluded that the 'practical application of existing legislation [The Children's Status Act] leaves much to be desired' as it 'does not provide adequate protection for the parties involved'.¹⁹

In the same year, the SALC sought to fill this legislative lacuna. The SALC drafted the Surrogacy Bill and recommended that Parliament adopt it as an Act. However, the Bill was

¹¹ European Centre for Law and Justice *Surrogate Motherhood: A Violation of Human Rights* (2012)3 available at icolf.org/surrogate-motherhood-a-violation-of-human-rights/ (accessed 10 October 2017).

¹² Nicholson C (2013) 498.

¹³ European Centre for Law and Justice (2012)6.

¹⁴ Nicholson C (2013) 499.

¹⁵ South African Law Reform Issue Paper 32 (Project 140) *The Right to Know One's Own Biological Origins* (2017) available at <http://www.justice.gov.za/salrc/ipapers.htm> (accessed 10 October 2017).

¹⁶ The Children's Act 38 of 2005 (hereinafter the Children's Act).

¹⁷ Children's Status Act 82 of 1987.

¹⁸ *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC) para 34.

¹⁹ South African Law Commission (Project 65) *Report on Surrogate Motherhood* (1992) para 4.6.3

never passed due to the criticism lodged against the Bill.²⁰ The Legislature then set up an *Ad hoc* Select Committee (*Ad hoc* Committee) to make recommendations regarding the proposal of the SALC. The *Ad hoc* Committee subsequently compiled its own report²¹ and based on this, the legislature enacted chapter 19 of the Children's Act, which presently regulates surrogacy in our law.²²

The Children's Act 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 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.'²³

This definition makes it apparent that the type of surrogacy referred to involves artificial fertilisation²⁴ and that stems from the development of modern reproductive technologies, particularly In Vitro Fertilisation (IVF). The development of IVF technology is believed to have paved the way for modern surrogacy arrangements; it forms part of the artificial fertilisation process referred to in the Children's Act.²⁵

²⁰ Parliamentary Committee Report of the AD Hoc Committee on Report of South African Law Commission on Surrogate Motherhood (11 February 1999) available at www.assets-s3-website-eu-west-1.amazonaws.com/docs/990211slrcreport.doc. (Hereafter the AD Hoc Report).

²¹ Parliamentary Committee Report of the AD Hoc Committee on Report of South African Law Commission on Surrogate Motherhood (11 February 1999) available at www.assets-s3-website-eu-west-1.amazonaws.com/docs/990211slrcreport.doc. (Hereafter the AD Hoc Report).

²² Note that not all recommendations were incorporated into the Children's Act. See recommendations of the Ad Hoc Report: That a statutory body should be constituted to operate as the panel to screen parties wishing to enter into a surrogacy agreement. That a child over the age of ten should be informed of their genetic background. Further that a guardian ad litem be appointed for the child in partial surrogacy cases. These recommendations were never incorporated into the chapter dealing with surrogacy in the Children's Act.

²³ Section 1 of the Children's Act.

²⁴ AB (2017) para 37.

²⁵ AB (2017) para 37.

Chapter 19, spanning sections 292 to 303 of the Children's Act, delineates the procedural and substantive boundaries of surrogate motherhood agreements. The section this research paper will focus on is section 294 of the Children's Act, which states:

'No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person'.²⁶

In 2016, the SALRC embarked on an investigation into the right of a child to know her own biological origins.²⁷ One of the reasons for this investigation cited by the SALRC is due to the recent judgment of *AB v Minister of Social Development and Others*.²⁸ Section 294 of the Children's Act came under constitutional scrutiny and the court ultimately concluded that more clarity is needed regarding the origins of donor-conceived children, as this clarity is important to the 'self-identity' and 'self-respect' of the child.²⁹ By doing so, the Justices recognised that the right of a child to know her biological origins is important to that child's identity formation.

Given the recent judgment of the *AB* case, it is timely to consider the implications of the judgment within the context of the child's right to identity. Furthermore based on the judgment, it is also timely to consider the scope of the child's identity rights and the acknowledgment that the child has a legal right to know her biological origins. In order to determine the scope and content of this legal right of a child to know her biological origins, one has to ascertain firstly what is identity, how can it be protected and why it is in the best interest of the child to preserve this right.

²⁶ Section 294 of the Children's Act.

²⁷ South African Law Reform Issue Paper 32 (Project 140) *The Right to Know One's Own Biological Origins* (2017) available at <http://www.justice.gov.za/salrc/ipapers.htm>.

²⁸ *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC).

²⁹ *AB* (2017) para 288. See also SALRC Issue Paper 32.

The current legal position in South Africa allows anonymous gamete donation as well as protection of the identity of a surrogate.³⁰ Furthermore, it is an offence to reveal the identity of a gamete donor as well as the surrogate.³¹ This is in direct contrast to the judgment of the *AB* case.

1.2 Research problem

As mentioned above the *AB* case concluded that the child's right to identity i.e. the biological origins should be protected because it is in the best interest of the child. The research question this paper aims to determine is the scope and content of the child's right to identity in the context of surrogacy. To achieve this, one needs to look at the right of a child to know her origins, which is a right greatly impacted by the process of surrogacy. Furthermore, one needs to analyse what the right to know one's biological origins entails.

The concept of knowing your biological origins is a difficult issue to understand and can have a different meaning for different people.³² The right to know one's biological origins can therefore cover a variety of concepts, which consists of at least three specific aspects.³³

- '[T]he medical aspect, i.e. the right to know one's full family medical history and to know medically relevant genetic information about the donor;
- the identity aspect, i.e. the right to personal narrative information about the donor that could assist offspring in completing the picture of their own identity; and
- the relational aspect, i.e. the right to know the full identity of the donor in order to attempt to establish a relationship with him or her'.³⁴

This research paper will focus on the identity aspect i.e. 'the right to personal narrative information about the donor that could assist the child in completing the picture of her own

³⁰ See section 41(2) of the Children's Act.

³¹ See Regulation 21 of GN 1165 GG 35099 of 30 September 2016.

³² Ravitsky V 'The Right to Know One's Genetic Origins and Cross Border Medically Assisted Conception' (2017) 6 *Israel Journal of Health Policy Research* 2.

³³ Ravitsky V (2017) 2.

³⁴ Ravitsky V (2017) 2.

identity'.³⁵ Furthermore, in order for the child's identity rights to be preserved, a right to know your biological origins should be recognised as part of the preservation of those identity rights.

A growing body of research, although primarily conducted in the adoption field, supports the argument that 'knowledge of one's genetic background is crucial to the development of a sense of identity or self'.³⁶ This is despite the fact that the comparison between donor-conceived children and adopted children is a controversial issue. However the use of a 'rights-based' argument supporting the assertion that children conceived by donor gametes should have access to identifying information about their gamete donor, has gained traction and is currently a common expressed argument.³⁷

The ability of donor-conceived children to access information about their biological origins initially depends on their awareness of the circumstances surrounding their conception.³⁸ Without this knowledge, these children will presume that the parents who raised them (social parents) are their biological parents.³⁹ Therefore, the duty to disclose the manner of conception rests on the parents who raised the child, unless the information is revealed by the state, for example through a birth certificate, or it is obvious that the child cannot be the biological child of both social parents.⁴⁰ According to McRae 'children who are deprived of knowing a biological parent or having a relationship with such a parent could grieve that parent's loss even if [she] has never met or been in contact with such parent'.⁴¹ There are thus several potential consequences that could transpire in these situations; the child could become resentful, antagonistic and exhibit disturbing and worrying behaviour.⁴² The child should at least be able identify her biological parent(s), so that she may be in a position to

³⁵ Ravitsky V (2017) 3.

³⁶ SALRC Issue Paper 32 (2017) para 1.5. See also Kothari J 'The child's right to identity: Do adopted children have the right to know their parentage?' (2010) 10 available at www.cry.org/resources/pdf/NCRRF/NCRRF_ReportBy_Jayna.pdf (accessed 5 August 2017).

³⁷ SALRC Issue Paper 32 (2017) para 1.5.

³⁸ SALRC Issue Paper 32 (2017) para 1.6.

³⁹ SALRC Issue Paper 32 (2017) para 1.6

⁴⁰ SALRC Issue Paper 32 (2017) para 1.7.

⁴¹ Issue Paper 32 (2017) para 1.10. See also Albertus L 'Some unresolved complexities in matters involving paternity: A South African Perspective' (2014) *Adam Mickiewicz University Law Review* available at cejsh.icm.edu/cejsh/element/bwmeta1.element.desklight.../c/13_Albertus.pdf 245 (accessed 22 September 2017).

⁴² Albertus L (2014) 245.

accept the circumstances surrounding her conception.⁴³ These children may further also experience 'genealogical bewilderment', which has often been described as the feeling of being deprived of one's personal history, religious community, culture and/or race.⁴⁴ Thus, knowing one's biological history would enable the child to construct her own self-identity.⁴⁵

This research paper will show based on the literature reviewed that the right to identity entails the right to have access to identifiable information about the donor, because this information is relevant and important to the sense of self.⁴⁶ Knowing who you are requires knowledge of how you came to be; therefore, biological origins may be regarded as an important part in the process of understanding of oneself.⁴⁷ Section 294 of the Children's Act requires there to be a genetic link between the child and one of the commissioning parents. This is to protect the identity rights of the child.

The purpose of section 294 may be circumvented by section 41(2) and section 302 of the Children's Act, which prevents the child from accessing identifiable information regarding the identity of the surrogate as well as the donor.

In each of the chapters of the SALRC Issue Paper 32, the SALRC, based on its investigation assessed whether the child has a legal right to know her biological origins; secondly if such a right can be enforced, and lastly whether the current law of South Africa should be amended to recognise and enforce this right. These are important issues to address and by determining the scope and content of the identity rights of children in the realm of surrogacy, this research paper could assist with these issues identified by the SALRC.

In determining the scope and content of the identity rights of the child in the context of surrogacy, the focus of the research paper will be on the Children's Act of South Africa. This will be done to determine whether adequate protection of the identity rights of the child is given by the Children's Act. A recent landmark Constitutional Court judgment will also be reviewed and analysed. Other relevant legislation reviewed is the National Health Act

⁴³ Albertus L (2014) 245.

⁴⁴ Albertus (2014) 245. See also Kothari J (2010) at pg 10. See also SALRC Issue Paper 32 (2017) para 1.10.

⁴⁵ Albertus L (2014) 245.

⁴⁶ Ravitsky V (2010) 674.

⁴⁷ Ravitsky V (2010) 675.

(NHA)⁴⁸ and the Regulations Related to the Artificial Fertilisation of People.⁴⁹ The research paper will also discuss certain aspects, which comprises the identity of the child and whether the right to identity includes the right to know the circumstances surrounding birth and a legal right to know. This research paper will show that in order to effectively protect the child's right to know her biological origins; the child is thus entitled to a legal right to know the circumstances surrounding her birth. International literature and International instruments aimed at protecting the rights of a child will also be reviewed. The aim of this research paper is to ensure that the scope and content of a child's right to identity is adequately set out to show that it's in the best interest of the child to have a legal right to know her biological origins.⁵⁰ This research paper will offer a child centred approach to the child's right to identity in the field of surrogacy and it will further recommend that certain legislative amendments be made to the Children's Act in order adhere to the standard of paramount importance.



1.3 Significance of research problem

Section 41(2)⁵¹ of the Children's Act prohibits the identity of a gamete donor or surrogate mother from being disclosed to a child or the child's guardian. Regulation 19 of the IVF Regulations state that 'no person shall disclose the identity of any person who donated a gamete or received a gamete, or any matter related to the artificial fertilisation of such gametes, or reproduction resulting from such artificial fertilisation except where a law provides otherwise or a court so orders'.⁵²

⁴⁸ National Health Act 61 of 2003 (hereafter NHA).

⁴⁹ Regulations Relating to Artificial Fertilisation of Persons in GN 1165 GG 40312 of 30 September 2016 (hereafter IVF regulations).

⁵⁰ See SALRC Issue Paper 32(2017).

⁵¹ Section 41 Children's Act states as follows

'(1) A child born as a result of artificial fertilisation or surrogacy or the guardian of such child is entitled to have access to-

(a) Any medical information concerning that child's genetic parents; and
(b) Any other information concerning that child's genetic parents but not before the child reaches the age of 18 years.

(2) Information disclosed in terms of subsection (1) may not reveal the identity of the person whose gamete was or gametes were used for such artificial fertilisation or the identity of the surrogate mother.'

⁵² Regulation 19 of GN 1165 GG 35099 of 30 September 2016.

Regulation 21 of the IVF Regulations says that ‘any person who contravenes or fails to comply with any provision of the regulations commits an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 10 years, or to both such fine and imprisonment’.⁵³

The identity of the parties involved in the surrogacy process is also protected. Identifying information regarding any donor or surrogate is not allowed to be published. The Children’s Act sets it out at section 302,

(1) ‘The identity of the parties to court proceedings with regard to a surrogate motherhood agreement may not be published without the written consent of the parties concerned.

(2) No person may publish any facts that reveal the identity of a person born as a result of a surrogate motherhood agreement’.⁵⁴

It is clear that these provisions prevent the child from knowing the identity of either her donor or surrogate. This is in direct contrast to the ruling of the Constitutional Court in the *AB* case that a child’s genetic origins should be protected because it is in her best interests to do so. As this research paper will show in chapter three, preservation of genetic origins is derived from a child’s right to identity. This research paper will show due to the ultimate ratio of the court (protection of biological origins is in the child’s best interest), the time has come to review all relevant legislation which deter the child born through ART and specifically surrogacy, access to identifiable information of the donor. Furthermore, to acknowledge that the child’s identity rights cannot be fully protected if these sections are not amended.

Article 7 of the Convention of the Rights of Child⁵⁵ contains the right to registration of birth, to a name, nationality and to family care. Article 8 of the CRC protects a child’s right to preservation of identity. Both these articles could be interpreted to protect a child’s right to identity even though the concept of identity is not defined.⁵⁶ What the articles do contain

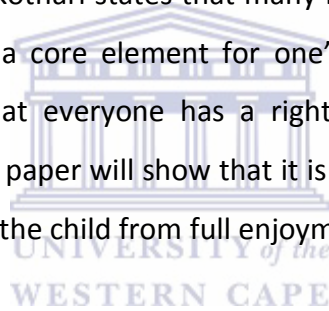
⁵³ Regulation 21 of GN 1165 GG 35099 of 30 September 2016.

⁵⁴ Section 302 of the Children’s Act.

⁵⁵ Convention on the Rights of the Child, 1989 (hereinafter the CRC).

⁵⁶ Clark B ‘A Balancing Act? The Rights of Donor Conceived Children to Know Their Biological Origins’ (2012) 40 *Georgia Journal of International & Comparative Law* 627.

are examples of what 'identity' constitutes, and furthermore that knowledge of one's family relations may be interpreted to extend to the right to know one's biological and birth parents.⁵⁷ In the field of ART, a plurality of rights of the different role players may conflict. It has been broadly accepted that children have an interest to know their biological origins and to know identifying details.⁵⁸ However, these rights may conflict with the rights of other people's interest and with the public interest.⁵⁹ According to Ravitsky⁶⁰, literature suggests that a donor has a right to anonymity, parents have the right to keep the circumstances of conception private and donor-conceived children have the right to know their biological origins.⁶¹ These are often the rights that are in conflict and striving to find a balance is difficult. The CRC Committee however interprets the CRC as giving a definitive right to donor- conceived children to knowledge of their genetic identity.⁶² The psychological need to know one's origins has been recognised as of central importance and indispensable to a person's identity formulation.⁶³ Kothari states that many researchers have agreed with this statement i.e. that it is indeed a core element for one's psychological stability to know where one comes from and that everyone has a right to know the truth about their biological origins.⁶⁴ This research paper will show that it is vital for South Africa to review all existing legislation that prohibits the child from full enjoyment of her right to identity.



1.4 Literature Review

According to Cohen⁶⁵ state intervention is misplaced and that the best interest of the yet to be born child is used as a cover for states to intervene in a person's reproductive choices.⁶⁶

⁵⁷ Clark B (2012) 627.

⁵⁸ Benson S 'Enforcing the Child's Right to know her origins: Contrasting Approaches under the Convention on the Rights of the Child & The European Convention on Human Rights' (2007) 21 *International Journal of Law, Policy & the Family* 138.

⁵⁹ Benson S (2007) 138.

⁶⁰ Ravitsky V 'Knowing Where You Come From: The Rights of Donor Conceived Individuals & The Meaning of Genetic Relatedness' (2010) 11 *Minnesota Journal of Law, Science & Technology*.

⁶¹ Ravitsky V (2010) 667.

⁶² Clark B (2012) 628.

⁶³ Kothari J (2010) 10.

⁶⁴ Kothari J (2010) 10.

⁶⁵ Cohen IG 'Regulating Reproduction: The problem with best interest' (2011) 96 *Minnesota Law Review Headnotes* 423 Part I in a two part series. See also Louw A 'Surrogacy in South Africa: Should we reconsider the current approach?' (2013) 76 *THRHR* 569.

⁶⁶ Louw A (2013) 569.

Louw states that a child centred approach is not possible when dealing with surrogacy (which is a service offered in the field of ART).⁶⁷ The only practical way therefore to determine best interest of the yet to be born child is to ensure the suitability of the surrogate mother and the intended parents.⁶⁸ Therefore, the courts should endeavour to protect the yet to be born child's interest as far as reasonably possible at the time of the confirmation of the agreement, given the available information at the court's disposal.⁶⁹

Alvare argues that this best interest concept makes sense if understood as a way to encourage the parents at pre-conception stage to step up to the level of fitness as parents whereby the children's best interest comes first and the parents' rights follow only if they accept this duty.⁷⁰

Crawford⁷¹ on the other hand contends that regulation of ART services targets whether people conceive, when and with whom.⁷² Hence the best interest of the yet to be born child justification is not logical, as a child brought into existence due to a targeted reproductive decision is by definition not harmed.⁷³ Sabatello takes a more holistic approach by stating there should be a balance between the competing rights of parents and children.⁷⁴ She maintains that legally, no right can be regarded as being violated simply based on being born under a particular set of circumstances or mode of conception.⁷⁵ It is not the technology that dehumanises the act and ultimately violates the child's right, but rather societal beliefs that tend to lead to discrimination.⁷⁶ Her recommendation is that one should adopt a family based approach⁷⁷ and not overemphasise individual rights.⁷⁸

Analysing the literature survey, one would agree with the contention of Sabatello, i.e. that society's moral bias and social perceptions do have an enormous effect on policy maker's

⁶⁷ Louw A (2013) 573.

⁶⁸ Louw A (2013) 573.

⁶⁹ Louw A (2013) 573.

⁷⁰ Alvare HM 'A response to Professor I. Glenn Cohen's "Regulating Reproduction: The Problem with Best Interests' (2012) 96 *Minnesota Law Review Headnotes* 11.

⁷¹ Crawford BJ 'Authentic Reproductive Regulation' (2012) 96 *Minnesota Law Review Headnotes* 34.

⁷² Crawford BJ (2012) 33.

⁷³ Crawford BJ (2012) 35.

⁷⁴ Sabatello M (2013) 95.

⁷⁵ Sabatello M (2013) 90.

⁷⁶ Sabatello M (2013) 92.

⁷⁷ Sabatello M (2013) 95.

⁷⁸ Sabatello M (2013) 97.

decisions. However, one must not lose sight of the issue highlighted by the SALRC that the law cannot intervene after the fact, as this would be undesirable since then the problem has already arisen.⁷⁹ The best interest of the child should at all times be the primary consideration as mandated by the CRC.⁸⁰ This principle runs like a golden thread throughout the children's rights field and there is no good reason as to why it cannot be applied in the sphere of ART.

It is clear from the above that the focus has been primarily on the infringed rights of parents using the services of ART. This research paper will focus exclusively on the rights of the child and the infringement of their identity rights in the context of surrogacy. This research paper will advocate for the child's legal right to know her own biological origins, which is in her best interest. This research paper will recommend that anonymous gamete donation and anonymous surrogate use no longer forms part of South African law.



1.5 Methodology

The methodology that I will be adopting is termed desk study and library research. The research comprises information that is already available on the internet or published in books and journal articles available at the library. The research method will comprise of gathering and analysing information, which may support my overall recommendation. It will furthermore focus on the potential effect of the *AB* judgment in the field of South African surrogacy law. The Children's Act and other relevant South African legislation will be reviewed. International children's rights protection instruments will also be analysed. The SALRC Issue Paper 32 will also be used in support of the overall recommendation.

1.6 Chapter Overview

Chapter one, introduces the research topic, the research question as well as a brief overview of what the research paper will deal with. Chapter two will discuss whether the child's right to identity is of paramount importance in the field of surrogacy by giving an

⁷⁹ Louw A (2013) 570.

⁸⁰ CRC article 3(1).

analysis of the best interests of the child standard. Chapter three will discuss a child's right to identity and the different aspects, which comprise this identity. European case law on the identity rights of a child as well as an analysis of the landmark South African Constitutional Court case will be reviewed. Chapter three will cover the international children's rights instruments and look at how identity is defined. This chapter will also discuss what the judgment of the *AB* case may mean in the field of surrogacy in South Africa. Chapter four will show that the child has a right to know about the circumstances surrounding her birth. It will also deal with the issue of disclosure, which is a component of the right to know one's origins. This chapter will conclude that the child has a legal right to know her biological origins in answer to the questions posed by the SALRC in their issue paper. It will also contain recommendations as to when, how and by whom disclosure should be made. Chapter four will also contain the conclusion and legislative recommendations.

Chapter 2: Analysis of the best interest standard

2.1 Introduction

'The best interest of the child is a fundamental legal principle of interpretation developed from a compassionate self-imposed limitation on adult power'.⁸¹ The principle is based upon the recognition that an adult makes decisions on behalf of a child due to the child's immaturity.⁸² In the context of surrogacy, the child has not been born yet. Therefore, it remains unclear how the principle of best interest will be applied in this context. In this chapter, I will discuss the principle of best interest of the child; I will look at the applicable national as well as international instruments dealing with this principle. South African case law will be referred to as a guideline how this principle of best interest has been interpreted. The criticism against this principle will be discussed. This analysis will be done to delineate the groundwork for the starting point of dealing with best interest in the context of surrogacy.

⁸¹ Van Bueren G *Child Rights in Europe* (2007) 30.

⁸² Van Bueren G (2007) 30.

2.2 Children's rights in South Africa

Today it is generally accepted that children have rights and a body of rules informing these rights is in the form of legislation.⁸³ In South Africa, children's rights are embodied in the Children's Act⁸⁴ as well as the Constitution of the Republic of South Africa⁸⁵, through which all rights in South Africa should be interpreted. Other guiding principles, which serve as a yardstick from which children's rights should be developed, are international instruments like the United Nations Convention on the Rights of the Child⁸⁶ and the African Charter on the Welfare and Rights of the Child,⁸⁷ which mandate that the rights of all children should be protected and developed.

The children's rights clause in the South African Constitution was one of the first in the world modelled on the principles of the CRC. The children's rights clause is contained in the middle of the Bill of Rights (chapter two of the South African Constitution).⁸⁸ The applicable section in chapter 2 is section 28⁸⁹ and all the rights contained in section 28 are justiciable.

⁸³ Songca R 'Evaluation of children's rights in South African Law: the dawn of an emerging approach to children's rights?' (2011) 44 *The Comparative and International Law Journal of Southern Africa* 343.

⁸⁴ Children's Act 38 of 2005 (hereinafter the Children's Act).

⁸⁵ Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).

⁸⁶ United Nations Convention on the Rights of the Child, 1989 (hereinafter the CRC).

⁸⁷ The African Charter of the Rights and Welfare of the Child, 1990 (hereinafter the ACRWC).

⁸⁸ Chapter 2 of Constitution of the Republic of South Africa, 1996.

⁸⁹ Section 28 of Constitution of the Republic of South Africa, 1996

'(1) Every child has the right:

- (a) To a name and a nationality from birth;
- (b) To family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) To basic nutrition, shelter, basic healthcare services and social services;
- (d) To be protected from maltreatment, neglect, abuse or degradation;
- (e) To be protected from exploitative labour practices;
- (f) Not to be required or permitted to perform work or provide services that: (i) Are inappropriate for a person of that child's age; or (ii) Place at risk the child's wellbeing, education, physical or mental health or spiritual, moral or social development;

Every child has the right:

(g) Not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be:

- (i) Kept separately from detained persons over the age of 18 years; and
- (ii) Treated in a manner, and kept in conditions that take account of the child's age
- (h) To have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and (i) Not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years'.

Furthermore, all children in South Africa are beneficiaries of all the rights contained in the Bill of Rights except the right to vote.

The protection and promotion of children's rights has not always been the focal point of the international human rights agenda. Certainly, in the field of ART and more specifically surrogacy, the right of the child has not been the focus as will be discussed in chapter three of this research paper.⁹⁰ One specific right, which is the focus of this paper, is the right of a child to know her biological parents. This is one of the most contentious issues to have risen over the past twenty years, as knowledge of one's origins is something most people take for granted.⁹¹ According to article 3 in the CRC 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.⁹² The CRC mandates that when dealing with actions concerning or affecting the child, the best interest of the child should be the primary consideration. The Bill of Rights in the Constitution elevates the best interest of a child to paramount importance when dealing with issues affecting children. The Children's Act in section 7 sets several specific factors to consider when dealing with the best interest of the child standard.

Based on section 28(2) of the Children's Act it is evident that the best interest of the child standard should and must be applied in the context of Surrogacy. Furthermore, the best interest of the child should be primary consideration in all matters affecting the child. The meaning of the word 'primary' according to the Oxford English Dictionary 'is both the highest rank and of belonging to the first stage in a process of compounding or combination'.⁹³ In other words, 'a primary consideration is the first stage before considering any other aspects'.⁹⁴ Therefore, the concept of best interest is as a general principle the first consideration when one deals with issues affecting the child.⁹⁵ Certainly, a child's right to identity, to her biological origins is a right that has vast implications for the child once born

⁹⁰ See 3.1 of chapter 3.

⁹¹ Solis L 'The Voiceless Citizens: Surrogacy Contracts and the Rights of the Child' (2015) 3 *Texas A & M Law Review* 435.

⁹² CRC article 3.

⁹³ Van Bueren G (2007) 31.

⁹⁴ Van Bueren G (2007) 31.

⁹⁵ Van Bueren G (2007) 31.

if it is not given its due regard. The right to identity also includes the right to nationality and birth registration as enumerated by the CRC.

The Constitution transformed the best interests of the child principle into a constitutional imperative. Section 28(2) of the Constitution has been understood as a guarantee, that the child's best interests must be the paramount consideration in each matter concerning the child.⁹⁶ The Constitution applies a much stricter requirement in section 28(2) in respect of the best interests of the child than that which is applicable in terms of article 3(1) of the CRC and article 4(1) of the ACRWC. Both these articles respectively dictate that a child's best interest is 'a primary consideration' in matters concerning the child.⁹⁷ Heaton concludes that 'the use of the word 'paramount' in section 28(2) of the Constitution thus elevates the best interests of the child to be superior in any matter concerning the child'.⁹⁸

Skelton states that looking at the wording used in section 28(2) of the Constitution at face value, 'the paramountcy principle may act as a 'trump card', outweighing all other factors'.⁹⁹ However, the rights of the child cannot be superior to other rights since it would represent 'positive discrimination' of children against other groups, for example women, workers, and the disabled etc., which would be contradictory to other principles in international treaties and to other constitutional claims.¹⁰⁰

2.3 Case Law

When assessing the child's best interests as paramount, the court must give adequate attention to the rights of the parents; this does not mean that other constitutional rights, which are relevant, may be disregarded or limiting the best interests of the child is

⁹⁶ *Minister of the Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) and *Sonderup v Tondelli* 2001 (1) SA 1171 (CC).

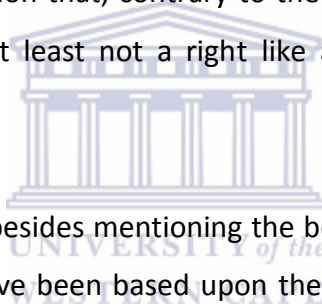
⁹⁷ Heaton J 'An individualized, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context' (2009) 34 *Journal of Juridical Science* 4 extracted from Boyd MT *The Determinants of the Child's Best Interests in Relocation Disputes* (Unpublished LLM thesis, University of the Western Cape, 2015).

⁹⁸ Heaton J (2009) 34.2. See also Boyd MT (2015) 16.

⁹⁹ Boyd MT (2015) 16.

¹⁰⁰ Doek J & Zermatten J *The rights of the Child in International Law: Rights of the Child in a nutshell and in context: all about children's rights* (2012) 99-100 extracted from Boyd MT (2015) 16.

impermissible.¹⁰¹ According to the court in *S v M (Centre for Child Law as Amicus Curiae)*,¹⁰² the correct approach is to apply the 'paramountcy principle in a meaningful way without obliterating other valuable and constitutionally protected interests'.¹⁰³ Also, according to Bonthuys, in order to make sense the courts' application of the best interests' principle in South Africa, 'it is necessary to determine whether the best interests principle is a value, a principle of interpretation, a rule or a right'.¹⁰⁴ Since 2000, with cases such as *Christian Education South Africa v Minister of Education*¹⁰⁵ and *Minister for Welfare and Population Development v Fitzpatrick*,¹⁰⁶ there has been a practice in case law to view the best interests as a right that is independent of the other rights contained in section 28(1) of the Constitution.¹⁰⁷ However, confusingly in some of these very same cases, the best interest of the child is also referred to as a 'standard',¹⁰⁸ or a 'principle'.¹⁰⁹ 'The fact that the Constitutional Court has not dealt with the best interests principle as it normally treats other rights, creates the impression that, contrary to the rhetoric, the best interests is not really a fundamental right, or at least not a right like all the other rights in the Bill of Rights'.¹¹⁰



In the *Christian Education* case, besides mentioning the best interests, the court was of the opinion that a decision could have been based upon the child's rights to dignity, freedom and security of the person in order to limit the parent's rights to freedom of religion.¹¹¹ The *Fitzpatrick* matter the court could also have adjudicated the matter based on the child's right to family or parental care, or to appropriate alternate care when removed from the family environment.¹¹² In the matter of *Du Toit*, the court reviewed legislation, which

¹⁰¹ Heaton J *South African Family law* 3ed (2010) 165 extracted from Boyd MT (2015) 16.

¹⁰² *S v M (Centre for Child Law as Amicus Curiae)* 2008(3) SA 232 (CC).

¹⁰³ Heaton J (2009) 34.2. *S v M (Centre for Child Law as Amicus Curiae)* 2008(3) SA 232 (CC) para 25.

¹⁰⁴ Bonthuys E 'The best interests of children in the South African Constitution' (2006)20 *International Journal of Law, Policy and the Family* 5 extracted from Boyd MT (2015) 17.

¹⁰⁵ *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) para 41.

¹⁰⁶ *Minister for Welfare and Population Development v Fitzpatrick* 2000 (7) BCLR 713 (CC) para 17.

¹⁰⁷ *Sonderup v Tondelli* 2001 (1) SA 1171 (CC); *Du Toit Minister for Welfare and Population Development v Fitzpatrick* 2003 (2) SA 198 (CC) para 20; *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC); *De Reuck v Director of Public Prosecutions* 2003 (12) BCLR 1333(CC) para 55.

¹⁰⁸ *Minister for Welfare and Population Development v Fitzpatrick* para 18.

¹⁰⁹ *Du Toit v Minister for Welfare and Population Development v Fitzpatrick* para 22.

¹¹⁰ Bonthuys E (2006) 7-8.

¹¹¹ *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) para 47.

¹¹² Section 28(1) (b) of the Constitution of the Republic of South Africa, 1996.

infringed the best interests of the children,¹¹³ as well as the parental rights to equality and dignity.

In *De Reuck*, besides applying the best interests of the child standard,¹¹⁴ children's rights to dignity limited an adult's right to privacy and freedom of expression when the adult was found in possession of child pornography.¹¹⁵ The *Sonderup* case¹¹⁶ was an exception to the cases mentioned above, given that it concerned a direct challenge to the Hague Convention and the argument advanced was that the Hague Convention did not give effect to the best interest of children.¹¹⁷ According to Bonthuys, 'these Constitutional Court cases highlight that the best interest principle does not have to be referred to as a right as there are other children's rights which are applicable more directly in these matters'.¹¹⁸

The above-mentioned cases seem to create the impression that when other rights of children are directly applicable, the best interest principle should not be applied. This seems illogical as the Children's Act as well as the Constitution unequivocally states that the best interest must be a consideration in *all matters* (my emphasis) affecting the child. So irrespective if one is dealing with the child's right to dignity or parental care, the court must ensure that the best interest standard is a primary or paramount consideration.

One of the fundamental values of the rule of law is certainty, yet because the best interest of the child principle is open to judicial discretion there is generally no consistency in its application.¹¹⁹ Furthermore, it is difficult to determine the weight attached to each of the many components constituting best interests and when the principle of best interests will

¹¹³ *Du Toit Minister for Welfare and Population Development v Fitzpatrick* 2003 (2) SA 198 (CC) para 21.

¹¹⁴ *De Reuck v Director of Public Prosecutions* 2003 (12) BCLR 1333(CC) para 55.

¹¹⁵ *De Reuck v Director of Public Prosecutions* 2003 (12) BCLR 1333(CC) para 63. The children's rights to bodily integrity and to be protected from abuse and degradation would have also limited the adult's rights. Section 28(1) (d) of the Constitution of the Republic of South Africa, 1996.

¹¹⁶ *Sonderup v Tondelli* 2001 (1) SA 1171 (CC).

¹¹⁷ Even in the *Sonderup* case it was not necessary to classify the best interests' principle as a right in order to come to the conclusion that the Convention was intended to serve the children's interests in returning them to their countries of origin. Bonthuys E 'The best interests of children in the South African Constitution' (2006) *International Journal of Law, Policy and the Family* 8-9.

¹¹⁸ Boyd MT (2015) para 2.7.2.

¹¹⁹ Van Bueren G (2007) 37.

be applied as a predominant principle.¹²⁰ In the next section, the critique against the best interest principle will be discussed.

2.4 Criticism against the best interest standard

The best interest principle has been criticised by many as it is open to judicial discretion and there is generally no consistency in its application. However, it is principle that must be applied. Marquadt¹²¹ raised the issue that children born as a result of ART face great uncertainties and vulnerabilities.¹²² This is specifically because the process of ART involves a move away from the traditional way nuclear families have been constructed.¹²³ Scientific advancements in the field of reproduction and surrogacy have changed the concept of parentage and the definition of what a family is, as it is no longer based on a biological connection.¹²⁴ Reproductive technologies may have given people the ability to conceive children despite their infertility, but it has also taken away the right of the child to ‘...know and be cared for by his or her parents’.¹²⁵

Cohen¹²⁶ argues that the child only has interests once born, therefore if not yet conceived, the child’s interest should not play a role.¹²⁷ He therefore states that reproductive services and technology should not be regulated to protect the interest of a child not yet conceived.

Cohen also states that if there is recognition that the yet to be born child has a right to know her genetic origins, such a right must extend to all children irrespective of their mode of conception.¹²⁸

¹²⁰ Van Bueren G (2007) 37.

¹²¹ Marquadt E *The Revolution in Parenthood: The emerging global clash between adult rights and children’s needs* (2006) available at www.americanvalues.org/search/item.php?id=48 (accessed 13 September 2016).

¹²² Marquadt E (2006) 6.

¹²³ Sabatello M (2013) 81.

¹²⁴ Burns CE, Martin L & Moyal D *Future Child’s Rights in New Reproductive Technology: Thinking outside the tube* (2006) ch 33 available at [www.lians.ca/sites/default/files/documents/2012_01_23_Future_Child’s_Rights-Burns_\(00006414\).pdf](http://www.lians.ca/sites/default/files/documents/2012_01_23_Future_Child’s_Rights-Burns_(00006414).pdf) (accessed 19 December 2016).

¹²⁵ CRC art 7(1) see also Thomas V *Children have Rights-Say No to Repo Tech* (2014) available at <http://childrenhaverights-saynotoreprotech.blogspot.co.za> (accessed 19 December 2016).

¹²⁶ Cohen IG ‘Regulating Reproduction: The problem with best interest’ (2011) 96 *Minnesota Law Review Headnotes* 423 Part I in a two part series.

¹²⁷ Crawford BJ ‘Authentic Reproductive Regulation’ (2012) 96 *Minnesota Law Review Headnotes* 34.

¹²⁸ SALRC Issue Paper 32 (2017) para 2.136.

Another argument holds that when reproductive services and the access to it are regulated, 'it strips individuals of agency,¹²⁹ denies privileges of citizenship¹³⁰ and deprives people of dignity and human rights'.¹³¹ There are others, who argue that regulation of ART services in the name of best interest of the child undeniably violates parents' right to privacy.¹³²

With regard to the arguments raised by Cohen, Mutcherson contends that one has to take into account the interests of future children and cannot just focus on those already living.¹³³ Furthermore, she states that lack of knowledge of genetic origins is a denial of a basic human right and harm, which is preventable with the necessary regulation in place.¹³⁴

As will be discussed in chapter 3 of this research paper, the *AB* case was an opportune moment for the Constitutional Court to unequivocally apply the best interest of the child principle and make analysis of how this standard should be applied in the context of surrogacy.¹³⁵ Therefore, it is unclear if a child's right to identity is of 'paramount importance' in the context of surrogacy and how this standard should be applied when in conflict with rights of individuals to reproductive services.

In the next chapter the best interests of the child will be used, as a framework to highlight why a child's right to identity should be protected. The chapter will discuss how the best interest principle makes it imperative that the right to identity should be protected.

CHAPTER 3 The child's right to identity

3.1 Introduction

Surrogacy means 'substitute' and originates from the Latin word 'surrogates'. It can be for commercial or altruistic purposes.¹³⁶ It can further be divided into two sub groups,

¹²⁹ Mutcherson KM 'In Defence of Future Children: A Response to Cohen's Beyond Best Interests' (2012) 96 *Minnesota Law Review Headnotes* 49.

¹³⁰ Mutcherson KM (2012) 49.

¹³¹ Mutcherson KM (2012) 49.

¹³² Van Bueren G *International Rights of the Child* (2006) 35.

¹³³ Mutcherson KM (2012) 57.

¹³⁴ Mutcherson KM (2012) 62.

¹³⁵ See ch 3.5.3 (c) of this paper.

¹³⁶ Mondal SC, Verma A & Gupta SK et al 'Genetic and Gestational Surrogacy: An overview' (2012) 9 *Walailak Journal of Science and Technology* 189.

gestational surrogacy or traditional surrogacy. In gestational surrogacy, no genetic material of the surrogate is used. This form of surrogacy is the preferred type but is the more expensive one. In gestational surrogacy, the couple and the surrogate have to go through the process of invitro fertilisation. In traditional surrogacy the genetic material of the surrogate is used (her own eggs are used) and there is a genetic link between the child and the surrogate. This form of surrogacy is less expensive; however, it has more potential for legal complications should the surrogate renege on the surrogacy agreement.¹³⁷ In South Africa when there is a genetic link between the surrogate and the child, the surrogate can terminate the surrogate agreement. The only requirement is that such termination occurs within 60 days if the child has already been born.¹³⁸ There is no similar provision in the case where no genetic link exists between the surrogate and the child. In this instance, the surrogate can terminate the pregnancy, which effectively terminates the surrogacy agreement.¹³⁹ Surrogacy is often engaged in the tangled web of trying to balance the interests of the various parties to the agreement, the child and society as a whole.¹⁴⁰

There has been an unfortunate history in the field of ART of elevating the interests of adults over the needs and vulnerability of children.¹⁴¹ In the past, the focus has been entirely on the adult's ability to access ART services like surrogacy¹⁴² and less attention on the interests and rights of the child to be born. Somerville states that currently the focus has shifted from parent's rights to access ART services, to the rights of ART born children with respect to the

¹³⁷ Mondal SC, Verma A & Gupta SK et al (2012) 190.

¹³⁸ Section 298 of the Children's Act.

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

(2) The court must terminate the confirmation of the agreement in terms of section 295 upon finding, after notice to the parties to the agreement and a hearing, that the surrogate mother has voluntarily terminated the agreement and that she understands the effects of the termination, and the court may issue any other appropriate order if it is in the best interest of the child.

(3) The surrogate mother incurs no liability to the commissioning parents for exercising her rights of termination in terms of this section, except for compensation for any payments made by the commissioning parents in terms of section 301.'

¹³⁹ See section 300 of the Children's Act.

¹⁴⁰ Nicholson C & Bauling A 'Surrogate motherhood agreements: A new challenge for practitioners' (2013) *De Jure* 537.

¹⁴¹ Alvare HM 'The case for regulating collaborative reproduction: A children's rights perspective' (40) 2003 *Harvard Journal on Legislation* 4.

¹⁴² Solis L 'The voiceless citizens: Surrogacy contracts and the rights of the child' (2015) 3 *Texas A & M Law Review* 426.

nature of their genetic heritage and knowledge of what that heritage is.¹⁴³ The impact of these reproductive technologies on children born through the utilisation of ART services has primarily focused on their physical health.¹⁴⁴ Further concerns such as the psychological effects on these children, have mostly been ignored.¹⁴⁵ Surrogacy affects a child's right to identity in that the process may leave the child unaware of who her biological donor(s) are.

3.2 A Child's Right to Identity

3.2.1 Identity defined

'Children must move from being the voiceless citizens to becoming the new kids on the human rights block, and nowhere is that more important than with respect to the rights regarding their biological origins and biological families'.¹⁴⁶

The right to identity is an existing right but lacks clear and complete definition.¹⁴⁷ Therefore, what does this right to identity entail?

The CRC was the first document to recognise a child's right to identity (identity rights are contained in article 7 and article 8 respectively).¹⁴⁸ Article 7 of the CRC¹⁴⁹ protects a child's right to nationality, name and family¹⁵⁰ and places a positive obligation on state parties to the Convention to implement policies that enforce and protect these rights. In the application and interpretation of article 7 of the CRC, the fundamental principle of the best interest of the child should be applied.¹⁵¹ Therefore, in light of the principle of best interest

¹⁴³ Somerville M 'Children's human rights to natural biological origins and family structure' *The Jurisprudence of the family: Foundations and Principles* (2010)4 also available at www.law2.byu.edu/page/categories/marriage_family/past_conference/may2010/drafts/CHILDREN%20RIGHT%20S.pdf (accessed 30 may 2017).

¹⁴⁴ Somerville M (2010) 5.

¹⁴⁵ Somerville M (2010) 5.

¹⁴⁶ Solis L (2015) 436.

¹⁴⁷ McCombs T & Gonzalez JS 'Right to Identity' (2007) *International Human Rights Law Clinic* 5.

¹⁴⁸ Solis L (2015) 426.

¹⁴⁹ Article 7 of the CRC '(1) The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. (2) States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless'.

¹⁵⁰ McCombs T & Gonzalez JS (2007) 8.

¹⁵¹ Ziemele I *A Commentary on the United Nations Convention on the Rights of the Child* (2007) ch 4.

it is clear that failure to register the birth of a child, statelessness and lack of knowledge of one's biological origins as part of one's identity and lack of a family environment are not in the best interests of the child.¹⁵² The CRC guarantees that the child's best interest should be a primary consideration in all matters concerning the child.¹⁵³

Article 8 of the CRC includes the right to name, nationality and family relations, and knowledge of one's family relations is usually interpreted as extending to one's biological and birth parents.¹⁵⁴ Erikson has defined identity 'as the subjective feeling of continuously being the same person'.¹⁵⁵ There seems to be a consensus that identity development of the child develops during the course of the child's development and at different age-related stages.¹⁵⁶ The concept of identity is inclined to recognise a variety of identities a person could possibly have, so that the collection of all of them provides a unique identity that would characterise one person.¹⁵⁷ Hence a person and by extension a child should have a 'family identity', a 'social identity', a 'genetic identity' and a 'biological identity'.¹⁵⁸ In the context of surrogacy, the child born as a result of the surrogacy agreement will possibly not know who one of her biological parents are due to the practice of anonymity in this area. She may have access to non-identifiable medical information but this will only be realised if she is told about the circumstances of her birth. Surrogacy may therefore affect a child's genetic identity- if she is not told she will not have access to medical records. It will also affect her biological and social identity as due to anonymous donations she may never know who her genetic parent is or be raised by this genetic parent.

One may regard article 7 and article 8 of the CRC as giving a definitive and absolute precedence to the interests of the child over that of her parents.¹⁵⁹ Article 8 was inserted into the CRC as a result of children disappearing during the period 1975-1983 in Argentina

¹⁵² Ziemele I (2007) ch 4.

¹⁵³ Article 3 of the CRC '(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

¹⁵⁴ Clark B (2012) 627.

¹⁵⁵ Doek J A *Commentary on the United Nations Convention on the Rights of the Child* (2006) 10.

¹⁵⁶ Doek J A *Commentary on the United Nations Convention on the Rights of the Child* (2006) 10.

¹⁵⁷ Page C *Artificial Womb Technology and the Safeguarding of Children's Rights through an Analysis of the Right to Identity* (unpublished LLM thesis, Leiden University, 2017) 7.

¹⁵⁸ There are numerous other components of identity but it is beyond the scope of this research paper to address all. See Page C unpublished LLM thesis 2017 in this regard.

¹⁵⁹ Besson S (2007) 149.

during the military junta.¹⁶⁰ They were either kidnapped or separated from their parents and then fraudulently adopted.¹⁶¹ The delegation of Argentina then submitted a draft article which stated that a child has a 'right to retain her true and genuine personal, legal and family identity' and the state has an obligation to preserve such identity.¹⁶² Due to the fact that article 7 already includes the right to name, nationality, birth registration and to family care, article 8 of the CRC can be interpreted to protect an independent right.¹⁶³ This is inclusive of the right to identifiable information about the donor. Due to present day developments and a bold interpretation of the CRC, the right to be informed about your biological origins¹⁶⁴ can be read into the preservation of identity rights. Preservation of a child's right to identity can only be realised if one acknowledges that a child has a right to be informed about her biological origins.

3.2.2 Importance of knowing your biological origins

Separating the role of the mother between different women in the process of surrogacy (egg donor, commissioning woman and birth mother) and the role of the father (sperm donor, commissioning man) also breaches the child's right to know her biological origin and identity, as guaranteed by article 7 and article 8 of the CRC.¹⁶⁵

A child born through surrogacy may never have the opportunity to know her surrogate mother, irrespective of whether she has provided genetic material or not.¹⁶⁶ This deprives the child of her right to identity insofar as it includes the right to know one's origins. The right to know one's origins amounts to the right to know one's parentage i.e. one's biological family, family history and circumstances surrounding one's conception.¹⁶⁷ The interest protected here is the right to know where you come from.¹⁶⁸ The right to identity

¹⁶⁰ Doek J (2006) 7.

¹⁶¹ Doek (2006) 7.

¹⁶² Doek (2006) 7.

¹⁶³ McCombs T & Gonzalez JS (2007) 8.

¹⁶⁴ Doek J (2006) 12.

¹⁶⁵ The Iona Institute: *The ethical case against surrogate motherhood* (2012) 3 available at <https://www.ionainstitute.ie/assets/files/Surrogacy%20final%20PDF.pdf> (accessed 30 may 2017).

¹⁶⁶ Watson C 'Womb rentals and Baby selling: Does Surrogacy undermine the Human Dignity and Rights of the surrogate mother and child?' (2016) 22 *The New Bioethics* 224.

¹⁶⁷ Besson S (2007) 140.

¹⁶⁸ Besson S (2007) 140.

entails many aspects besides those mentioned in article 7 and article 8 of the CRC. It includes aspects of psychological wellbeing and development of personal identity.¹⁶⁹ Withholding information relating to identification of biological parents negatively affects the child's sense of personal identity.¹⁷⁰ Furthermore, the right to identity includes the right to know one's medical family history and genetic lineage in order to be aware of health risks.¹⁷¹ Lack of information regarding medical family history and genetic heritage can also negatively affect the child's health planning.¹⁷² These health risks should be made available to donor-conceived children as soon as possible so that they can make informed decisions regarding their health.

The argument has been made that when undertaking surrogacy, couples are motivated by the need to have offspring that bear a genetic link with the commissioning parents.¹⁷³ The report of the SALRC and the recommendation that altruistic surrogacy be allowed was also based on the fact that surrogacy would fulfil the need of parents to conceive a child who is biologically related to them.¹⁷⁴ However, Van Niekerk argues that the right to know one's genetic origins does not relate to requiring genetic material in the case of surrogacy.¹⁷⁵ There are also certain studies, which indicate that biological relatedness between parents and children is not essential for positive child adjustment.¹⁷⁶ However, the right to identity is a basic human right, irrespective of the lack of empirical data as to whether that knowledge is beneficial or not.¹⁷⁷ If the truth is not revealed regarding her origins, she is being wrongly treated.¹⁷⁸

Identity is the individuals' social profile, which makes them unique from other human beings and genetic code is regarded as one of the distinguishing features.¹⁷⁹ When one is prevented from knowing your biological origins or enjoying a relationship with your birth

¹⁶⁹ Ravitsky V (2010) 670.

¹⁷⁰ Burns CE, Martin L & Moyal D 'Future child's right in new reproductive technology: Thinking outside the tube and maintaining connections' (2010) 3 *Family Court Review*.

¹⁷¹ Ravitsky V (2010) 670.

¹⁷² Burns CE, Martin L & Moyal D (2010) 3.

¹⁷³ Van Niekerk C (2015) 399.

¹⁷⁴ SA Law Commission (project 65:1993).

¹⁷⁵ Van Niekerk C (2015) 421.

¹⁷⁶ Metz T 'Questioning South Africa's 'Genetic Link' Requirement for Surrogacy' (2014) 7 *SAJBL* 35.

¹⁷⁷ Ravitsky V (2010) 669.

¹⁷⁸ Ravitsky V (2010) 670.

¹⁷⁹ McCombs T & Gonzalez JS (2007) 15.

family due to lack of information and access, it can affect your ability to develop a full sense of identity.¹⁸⁰

In the context of surrogacy, there is a lack of sufficient data on the donor- conceived child's views regarding her conception; this is due to the secrecy and non- disclosure surrounding the practice.¹⁸¹ Based on a study founded by the SALRC during their investigation of parental disclosure conducted during 2002, as little as 5% of parents had disclosed to their donor- conceived children nearing adolescence, information regarding the circumstances surrounding their conception.¹⁸²

Thus far, an analysis of how the CRC and the Committee of the CRC has defined a child's right to identity in the context of ART and specifically surrogacy has been elaborated. The importance of the identity right of a child has also been highlighted. In the next section a case discussion about the judgments of the European Court of Human Rights¹⁸³ on surrogacy and identity rights will be done. These judgments provide an illustration of how the principle of the best interest of the child has been applied when it comes to the identity rights of children born through the process of ART and more specifically surrogacy. Furthermore, in one case it is clear that the ECtHR view the right to know your biological origins as so important that this right does not end once adulthood commences.

3.3 European Case Law

The ECtHR has been called upon to make judgments regarding a child's right to identity. The ECtHR had to decide whether this includes identifying information of the donor. The earliest case is *Rose v Secretary of the State for Health*¹⁸⁴ in which the applicant upon reaching the age of maturity sought review of the state's decision not to release information regarding the identity of her biological father. The policy argument advanced was that children have a right to know they were conceived through ART. The court found that the applicant had a

¹⁸⁰ McCombs T & Gonzalez JS (2007) 3.

¹⁸¹ SALRC Issue Paper 32 (2017) para 1.8.

¹⁸² SALRC Issue Paper 32 (2017) para 1.8.

¹⁸³ European Court of Human Rights (hereafter the ECtHR).

¹⁸⁴ *Rose v Secretary of the State for Health* (2002) E.W.J NO 3823 (H.C.J).

right to identifying information. The court interpreted article 8(1)¹⁸⁵ of the European Convention on Human Rights¹⁸⁶ to include the right of a child to establish the details of her identity. This right included the right to know her biological parents, social parents and the person who carried her during pregnancy.¹⁸⁷ The court furthermore found that the reality of the right to know is not based on the concern for individual emotional health but rather on the idea that no person or state entity has the right to decide on another's behalf whether that person should or should not know about their own biological history.¹⁸⁸

A different approach was adopted in the case of *Odievre v France*¹⁸⁹. The biological mother of the applicant upon giving birth to the applicant had requested that the details of the birth be kept secret. Her identity as the mother was then kept secret and the birth certificate of the applicant was declared null and void. The applicant was later adopted and when she became of age obtained access to her file, which was under the supervision of the children's welfare services. She gained access to extensive non-identifying information through which she discovered that she had other biological siblings. Upon discovering that she had siblings, she then requested the release of the full records of her birth. The rules in France regarding confidentiality on birth prevented the applicant from obtaining information about her natural family. The French court found no violation of article 8 of the ECHR. The ECtHR found at para 29 that matters which are of relevance to personal development, are inclusive of details of a person's identity as a human being and the core interests protected by the Convention.¹⁹⁰ Therefore, obtaining vital information necessary to reveal the truth concerning important aspects of one's personal identity included the identity of one's parents.¹⁹¹ However, the court noted that the applicant had been given access to extensive

¹⁸⁵ Article 8(1) of the ECHR (1) 'Everyone has the right to respect for his private and family life, his home and his correspondence'.

¹⁸⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

¹⁸⁷ In the realm of international surrogacy agreements this is almost impossible as usually the donors and or the surrogate is unknown to the commissioning parents (see *report of the experts group on the parentage/surrogacy project 2017* available at <https://assets.hcch.net/docs/ed997a8d-bdcb-48eb-9672-6d0535249d0e.pdf> (accessed 30 May 2017).

¹⁸⁸ See fn 181.

¹⁸⁹ *Odievre v France* [GC] no 42326/98 judgment 13 February 2003. See also European Court of Human Rights *Research Report Bioethics and the Case Law of the Court* (2016) 98 available at www.echr.coe.int/Documents/Research-report-bioethics.Eng.pdf (accessed 30 August 2017).

¹⁹⁰ *Odievre v France* [GC] no 42326/98 judgment 13 February 2003. See also European Court of Human Rights *Research Report Bioethics and the Case Law of the Court* (2016) 98 available at www.echr.coe.int/Documents/Research-report-bioethics.Eng.pdf (accessed 30 August 2017).

¹⁹¹ See ECHR Research Report (2016) 101.

non-identifying information about her mother, which would place her in a position to trace her roots, while also ensuring the protection of the privacy rights of the mother and her other biological children.¹⁹² In the present case, the court found that France had struck a balance between the protection of third party privacy rights and the child's vital interest to know her origins.¹⁹³ The court noted that this case did not concern a conflict between the rights of an adult and those of a child, but a conflict between the competing rights of two adults, both of them equipped with their own free will.¹⁹⁴

The court further noted that the anonymous birth problem could not be addressed separately from the issue of the protection of third parties, which were essentially the adoptive parents; the father and the other members of the natural family.¹⁹⁵ The court noted that the applicant was now an adult and that disclosure without the consent of the affected parties, could entail substantial risks for all involved, each of whom also had a right to respect to their private and family life.¹⁹⁶ There was also a general interest at risk, as the domestic legislature had invariably sought to protect the mother's and child's health during pregnancy and birth in order to avoid abortions, in particular illegal abortions and to prevent children being abandoned other than under the proper procedure.¹⁹⁷ In addition, the court noted that a National Council on Access to Information about Personal Origins had recently been established, which the applicant could now use to request disclosure of her birth mother's identity, subject to the mother's consent being obtained to ensure that her need for protection and the applicant's legitimate request was fairly reconciled.¹⁹⁸

In the case of *Jaggi v Switzerland*¹⁹⁹ a judgment delivered in the same year as the *ODievre* the ECtHR came to a different conclusion. Although not a surrogacy case, the court seemed to view the knowledge of biological parentage as essential to the development of identity. The applicant, Andreas Jaggi a Swiss national wanted to do DNA testing on the deceased to ascertain if the deceased was his biological father.

¹⁹² *Odievre* (2003) para 48.

¹⁹³ See ECHR Research Report (2016) 101.

¹⁹⁴ See ECHR Research Report (2016) 101.

¹⁹⁵ See ECHR Research Report (2016) 101.

¹⁹⁶ *Odievre* (2003) para 49.

¹⁹⁷ *Odievre* (2003) para 49.

¹⁹⁸ *Odievre* (2003) para 49.

¹⁹⁹ *Jaggi v Switzerland no 58757/00* judgment on the 03 July 2003.

The court found that refusal to authorise the DNA testing by the state affected the personal life of the applicant. It was held that the right to identity included the right to know one's parentage and as such is an integral part of one's private life.²⁰⁰ The court found that a fair balance had to be struck between the right to identity and the rights of third parties not to be forced to make themselves available for medical testing.²⁰¹ However, the applicant had an overriding interest²⁰² and that to establish the identity of ascendants was an important interest to be protected.²⁰³ With reference to the circumstances of the case and the overriding interest at stake for the applicant, the Swiss authorities failed to secure to him the respect for his private life, to which he is entitled under the Convention.²⁰⁴

In *Menneson v France*²⁰⁵ and *Labassee v France*,²⁰⁶ the ECtHR found in essence that the best interest of the child must prevail and that France had violated the child's article 8 rights by failing to recognise the birth certificate.²⁰⁷ The applicants had been unable to secure recognition under French law of the legal parent-child relationship secured between them in the United States, as the French authorities maintained that the surrogacy agreements entered into by the applicants were unlawful. With regard to the children's right to respect for their private life, the court noted that they were in a state of legal uncertainty: the French authorities although aware that the children had been recognised in another country as the children of the applicants, they had still been denied status under French law.²⁰⁸ The court considered that the refutation undermined the children's identity within French society.²⁰⁹ Moreover, although their biological father was French, they faced uncertainty as to the possibility of obtaining French nationality, a situation that would have unintended

²⁰⁰ *Jaggi* (2003) para 37.

²⁰¹ *Jaggi* (2003) para 38.

²⁰² *Jaggi* (2003) para 44.

²⁰³ *Jaggi* (2003) para 38.

²⁰⁴ See also ECHR Research Report (2016) 102.

²⁰⁵ *Menneson v France*, ECtHR application no 65192/11 judgment 26 June 2014. See also case summary available at <https://www.crin.org/en/library/legal-database/menneson-v-france> (accessed 30 August 2017). See also ECHR Research Report (2016) 30.

²⁰⁶ *Labassee v France*, ECtHR application no 65941/11 judgment 26 June 2014. See also case summary available at <https://www.crin.org/en/library/legal-database/labassee-v-france> (accessed 30 August 2017). See also ECHR Research Report (2016) 30.

²⁰⁷ ECHR Research Report (2016) 30.

²⁰⁸ See case summary available at <https://www.crin.org/en/library/legal-database/menneson-v-france> and <https://www.crin.org/en/library/legal-database/labassee-v-france> (accessed 30 August 2017).

²⁰⁹ See case summary available at <https://www.crin.org/en/library/legal-database/menneson-v-france> and <https://www.crin.org/en/library/legal-database/labassee-v-france> (accessed 30 August 2017).

consequences on the definition of their own identity.²¹⁰ The court further observed that they could only inherit from Mr and Mrs Mennesson as legatees, which meant that their inheritance rights would also be negatively affected; the court regarded this as a further deprivation of a component of their identity in relation to their parentage.²¹¹ The effects of the refusal to recognise a parent-child relationship in French law between children born following surrogacy treatment abroad and the couples who had the treatment, were not just confined to the couples, but also had the consequence of extending to the children.²¹² The children's right to respect for their private life, which implied that everyone should be able to establish the essence her identity, including their parentage, was therefore affected substantially. There was therefore a serious incompatibility between the situation, and the children's best interests, which must guide any decision concerning them.²¹³ The court also found that because of the biological connection between the one parent and the child, the importance of biological parentage as a component of each individual's identity, it would not be in the best interests of the child to deprive him or her of a legal tie of this nature.²¹⁴ In preventing the recognition and establishment of the children's legal relationship with their biological father, the French state had overstepped the permissible margin of appreciation.²¹⁵ The court found that there had been a violation of the children's right to respect for their private life, in breach of Article 8.²¹⁶

In *Foulon v France*²¹⁷ and *Bouvet v France*²¹⁸ at issue was the non-recognition in France of the paternity of intending biological fathers' of children born to surrogates in India. In both cases, the applicants have been unable to obtain recognition under French law of their biological affiliation as established in India. The French authorities, suspecting recourse to

²¹⁰ ECHR Research Report (2016) 31.

²¹¹ ECHR Research Report (2016) 31.

²¹² See case summary available at <https://www.crin.org/en/library/legal-database/mennesen-v-france> and <https://www.crin.org/en/library/legal-database/labassee-v-france> (accessed 30 August 2017).

²¹³ ECHR Research Report (2016) 31.

²¹⁴ See case summary available at <https://www.crin.org/en/library/legal-database/mennesen-v-france> and <https://www.crin.org/en/library/legal-database/labassee-v-france> (accessed 30 August 2017).

²¹⁵ ECHR Research Report (2016) 31.

²¹⁶ ECHR Research Report (2016) 31.

²¹⁷ *Foulon v France*, ECtHR application no 9063/14 judgment on the 21 July 2016. See also case summary available at <https://www.hrlc.org.au> (accessed 30 August 2017). See also ECHR Research Report (2016) 31.

²¹⁸ *Bouvet v France*, ECtHR application no 10410/14 judgment on the 21 July 2016. See also case summary available at <https://www.hrlc.org.au> (accessed 30 August 2017). See also ECHR Research Report (2016) 31.

unlawful gestational surrogacy agreements were refusing to transcribe the birth certificates, which were issued in India.

The ECtHR found that there was a violation of the child's article 8 rights but the court did not find that there was a violation of the applicants' parents' rights.²¹⁹ The court found that the circumstances of the applicants were similar to those of the applicants in the *Mennesson* and *Labassee* cases and decidedly found no reason to deviate from its previous reasoning.²²⁰ The court also found that a violation of the right to respect for private life of the children had occurred, but that no violation of the right to respect for family life was proved on the facts.²²¹ The ECtHR delivered a judgment protecting the rights of children born through the conclusion of an international commercial surrogacy agreement to have their relationships with their biological parents legally recognised.²²²

At the heart of the reasoning of the court was the principle that where a child is concerned, the best interests of that child must be paramount.²²³ Although the court recognised the 'margin of appreciation' of member states to prohibit surrogacy agreements domestically, the court's decision in this matter limits the legal effect of such prohibitions where commercial surrogacy occurs abroad.²²⁴ The court held that while the state may prohibit surrogacy agreements, once the child is born through surrogacy, the state's laws could not be used to prejudice the child's rights.²²⁵

²¹⁹ ECHR Research Report (2016) 31.

²²⁰ ECHR Research Report (2016) 31.

²²¹ ECHR Research Report (2016) 31.

²²² *Foulon v France*, ECtHR application no 9063/14 judgment on the 21 July 2016 case summary available at <https://www.hrlc.org.au>. *Bouvet v France*, ECtHR application no 10410/14 judgment on the 21 July 2016 case summary available at <https://www.hrlc.org.au> (accessed 30 August 2017).

²²³ *Foulon v France*, ECtHR application no 9063/14 judgment on the 21 July 2016 case summary available at <https://www.hrlc.org.au>. *Bouvet v France*, ECtHR application no 10410/14 judgment on the 21 July 2016 case summary available at <https://www.hrlc.org.au> (accessed 30 August 2017).

²²⁴ *Foulon v France*, ECtHR application no 9063/14 judgment on the 21 July 2016 case summary available at <https://www.hrlc.org.au>. *Bouvet v France*, ECtHR application no 10410/14 judgment on the 21 July 2016 case summary available at <https://www.hrlc.org.au> (accessed 30 August 2017).

²²⁵ *Foulon v France*, ECtHR application no 9063/14 judgment on the 21 July 2016 case summary available at <https://www.hrlc.org.au>. *Bouvet v France*, ECtHR application no 10410/14 judgment on the 21 July 2016 case summary available at <https://www.hrlc.org.au> (accessed 30 August 2017).

The above judgments of the ECtHR indicate that the best interest of the child has guided the decisions of the court in the context of surrogacy as well as in instances where the right to know biological origins is being hampered by state laws. The ECtHR recognises that the recognition of legal parentage and access to identifiable information of donors is integral to a child's right to identity. Although a margin of appreciation is afforded to states to maintain their sovereignty when it comes to the imposition of national legislation, the CRC mandates that the best interest of the child must be a primary consideration when dealing with issues, which affect the child. The court has also declared that the provision of article 8 in the ECHR does not include a right to create a family.²²⁶

In the next section, the findings of the Special Rapporteur tasked by the Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly in Europe will be discussed. The report relates to the human rights and ethical issues related to surrogacy and one of the purposes of the report was to consider the desirability and feasibility of drawing up European guidelines to safeguard children's rights, also specifically rights protected by the CRC in relation to surrogacy agreements.²²⁷ This is relevant to South Africa as the report concludes that tighter regulation of surrogacy is needed in order to protect the best interest of the child. Europe is moving away from anonymous donation in order to protect the identity rights of the child. The purpose of this research paper as indicated in chapter one is to establish clear motivation why South Africa should do the same. Legislative reform is needed in order to be compliant with the decision of the Constitutional Court case of *AB*.

3.4 Key points of the Report of the Special Rapporteur

The Special Rapporteur for the Council of Europe Petra De Sutter, tasked with drafting a recommendation to the Committee on Social Affairs, Health and Sustainable Development

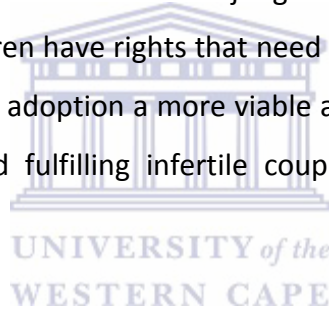
²²⁶ *Mennesen v France*, ECtHR application no 65192/11 judgment 26 June 2014. See also case summary available at <https://www.crin.org/en/library/legal-database/mennesen-v-france> (accessed 30 August 2017). See also ECHR Research Report (2016) 30. *Labassee v France*, ECtHR application no 65941/11 judgment 26 June 2014. See also case summary available at <https://www.crin.org/en/library/legal-database/labassee-v-france> (accessed 30 August 2017). See also ECHR Research Report (2016) 30.

²²⁷ De Sutter P 'Children's rights related to surrogacy report' (2016) *Council of Europe Parliamentary Assembly* DOC 13562 available at <website-pace.net/documents/19855/2463558/20160921-SurrogacyRights-EN.pdf/a434368b-2530-4ce4-bbc0-o113402749b5> (accessed 30 may 2017).

of the Parliamentary Assembly in Europe regarding surrogacy²²⁸, found that members of the Committee and its Parliamentary Assembly as a whole were divided on the human rights and ethical issues related to surrogacy.²²⁹

De Sutter recommended that altruistic surrogacy should not be prohibited and should be limited to gestational surrogacy (therefore where there is no genetic link between surrogate and child), should be tightly regulated and only legally available to resident nationals of the jurisdiction in question.²³⁰ This recommendation could assist the child to establish more readily her genetic origin, as the donors would then be nationals of the country in which the child resides as well as the surrogate. She makes the point that the CRC has guaranteed the rights of children for 25 years now²³¹ and that the rights of the child cannot be curtailed simply because intending parents flouted national law when it forbade surrogacy.²³²

Her concluding remarks, which are in line with the judgement of the ECtHR, are that there is no right to a child, but that children have rights that need to be respected even by states.²³³ She reiterates for states to make adoption a more viable alternative to surrogacy, providing a child with loving parents and fulfilling infertile couple's desire for a child -the best outcome for all.²³⁴



3.5 South Africa

'Legislative regulation of the content, conclusion and confirmation of surrogate motherhood agreements is essential to give effect to the best interests of the child'.²³⁵ During 2016, the SALRC launched an investigation regarding the right to know one's own biological origins. The SALRC states that the aim of the research is to establish whether a child has a *legal right* (my emphasis) to know her biological origins. One of the issues the SALRC identified as a

²²⁸ De Sutter P 'Children's rights related to surrogacy report' (2016) *Council of Europe Parliamentary Assembly* DOC 13562 available at website-pace.net/documents/19855/2463558/20160921-SurrogacyRights-EN.pdf/a434368b-2530-4ce4-bbc0-o113402749b5 (accessed 30 May 2017).

²²⁹ De Sutter Report (2016) para 2.

²³⁰ De Sutter Report (2016) para 6.

²³¹ De Sutter Report (2016) para 15.

²³² De Sutter Report (2016) para 16.

²³³ De Sutter Report (2016) para 27.

²³⁴ De Sutter Report (2016) para 32.

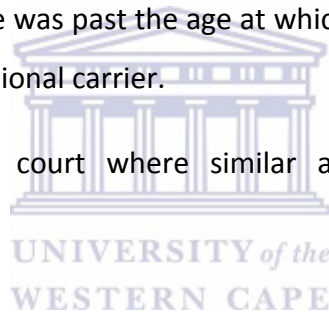
²³⁵ Nicholson C & Bauling A (2013) 517.

motivating factor for South Africa to reconsider the current legal position regarding anonymous gamete donation, is the recent Constitutional Court case of *AB*. The SALRC clearly states that given the decision in the *AB* case; South Africa needs to review the practise of anonymous gamete donation in surrogacy and other forms of assisted reproduction.

3.5.1. *AB and another v Minister of Social Development and others*

In the case of *AB*, section 294 of the Children's Act was under constitutional scrutiny. The particular section dictates that no surrogacy agreement is valid unless there is a genetic link between the child and at least one of the commissioning parents. *AB*²³⁶ was a single female at the time when she wanted to conclude a surrogacy agreement, but did not have any gametes of her own to use as she was past the age at which she still produced gametes. She was also unable to act as a gestational carrier.

The case started in the high court where similar arguments to those before the Constitutional Court were raised.



3.5.2 Factual Background of the case

During the period 2001 to 2011, *AB* underwent 18 *in vitro* fertilisation (IVF) cycles, which were all unsuccessful in helping her fall pregnant. In 2001, when she was in her early 40's, she underwent two cycles of IVF treatment by using her own ova and her then-husband's sperm. These endeavours proved unsuccessful on both occasions. After the second cycle failed, her gynaecologist advised *AB* that it would no longer be feasible to continue harvesting her own ova; she was unable to supply her own gametes for the purpose of conceiving a child. For this reason, *AB* then undertook a third IVF cycle using anonymous donor ova and the sperm of her then-husband. These attempts also failed. After her marriage ended, she then used anonymous donor ova as well as donor sperm, repeating the

²³⁶ The acronym *AB* is used for confidentiality purposes.

process nine times, on each occasion unsuccessfully. At a later stage, AB was informed that the chances of successful conception by way of IVF treatment had become improbable.

AB was thus permanently and irreversibly infertile in two different senses: first, she was unable to contribute her own gametes for conception and second, she was unable to carry a pregnancy to term. Later in 2009, the option of surrogacy was mentioned to AB as means to have a child. As a single woman who was unable to donate her own ova, the only way for AB to proceed was to use both donor ova and donor sperm.

However, during consultation with an attorney, AB was informed that she could not as a single woman incapable of donating a gamete, enter into a legal surrogacy agreement because of section 294 of the Children's Act.

Against this backdrop, AB approached the high court of South Africa, Gauteng Division, Pretoria, seeking an order declaring section 294 of the Children's Act inconsistent with the Constitution and invalid. The Surrogacy Advisory Group and the Centre for Child Law (The Centre) were subsequently joined as second applicant and amicus curiae respectively. The respondent was the Minister of Social Development cited in her capacity as the Minister responsible for the administration of the Children's Act.

The Surrogacy Advisory Group, which represented the interest of AB, argued that section 294 of the Children's Act violated AB's rights to equal protection before the law, the right to human dignity, reproductive autonomy and privacy.²³⁷

The Minister opposed the application and argued that it was not only AB's rights that were at issue, but also those of the child to be created by the surrogate mother and donor(s). The Minister contended that: 'the prospective child has the right to know her genetic origins, the adoption process in South Africa catered for AB's need to have a child, to allow a single infertile person to create a child with no genetic link to her would result in the creation of a

²³⁷ *AB* (2017) para 20.

“designer”²³⁸ child, this would not be in the public interest and that section 294 prevents commercial surrogacy’.²³⁹

The Centre stated that the purpose of chapter 19 of the Children’s Act in general and of section 294 in particular is to regulate surrogacy agreements in order to protect the rights of the child to be born. This purpose is achieved by ensuring that the child knows her genetic origin. The heading of section 294 is indicative of this. In the Centre’s view, genetic origin is something that belongs to the prospective child. The Centre insisted that the risk to children’s self-identity and self-respect – their dignity and their best interests- are all important. Section 294 was accordingly rationally connected to the purpose of ensuring that children know their genetic origin.²⁴⁰

The high court²⁴¹ concluded that ‘section 294 of the Children’s Act unjustifiably violates AB’s rights to equality, human dignity, “reproductive autonomy”, privacy and access to health care’.²⁴² In order for the Constitutional Court to confirm the order of invalidity of the High Court, the following had to be looked at:

- (1) ‘Is the impugned legislation irrational in terms of section 9(1) of the Constitution;
- (2) Are AB’s implicated rights to equality; dignity; bodily integrity including the right to make decisions concerning reproduction; access to reproductive health care; and privacy are limited by the genetic link requirement in terms of section 294 and if so;
- (3) Is the limitation of the rights justifiable in terms of section 36(1) of the Constitution’.²⁴³

3.5.3 Majority decision analysis

3.5.3 (a) Section 9 (1) of the Constitution and the issue of irrationality

²³⁸ This can be described as shopping around for gametes with the intention of creating children with particular characteristics- See *AB* (2016) para 262.

²³⁹ *AB* (2017) para 16.

²⁴⁰ *AB* (2017) para 29.

²⁴¹ It is beyond the scope of this research paper to discuss in depth the judgment of the high court. Reference to the reasoning of the high court will be made in the analysis of the Constitutional Court judgment. For the full case of the high court see *AB v Minister of Social Development* 2016 (2) SA 27 (GP).

²⁴² *AB* (2017) par 15.

²⁴³ *AB* (2017) para 273.

At the outset, the majority emphatically states the case is about the validity of section 294 of the Children's Act and not whether the genetic link requirement in that section has relevance to the legal conception of family.²⁴⁴

The argument the Surrogacy Advisory Group raised stated that the genetic link requirement of section 294 is irrational and inconsistent with section 9(1) of the Constitution. The requirement is irrational because the IVF Regulations permit a person to use double donor gametes but with surrogacy, double donor gametes is not allowed.²⁴⁵ The majority found the argument to be flawed and stated the correct approach when a legislative measure is challenged, is to determine if there is a rational connection between the means chosen and the objective sought to be achieved. They stated that 'a mere differentiation does not render a legislature measure irrational; the differentiation must be seen to be arbitrary or must manifest naked preferences which serve no legitimate governmental purpose'.²⁴⁶ The Justices go on to state that surrogacy is regulated by the Children's Act and IVF is regulated by the IVF Regulations, which are enacted in terms of the NHA.²⁴⁷ The objectives of both these acts are different. A statutory provision cannot be measured against a regulation under different legislation to decide whether it is rational or consistent with the Constitution, it is only when it is found to serve no legitimate government purpose, then it is inconsistent with section 9(1) of the Constitution.²⁴⁸ The legitimate measure chosen by the legislature in section 294 is rationally related to the public good sought to be achieved by government i.e. the establishment of a genetic link between commissioning parent and child in order to safeguard the genetic origins of the child. Therefore, the court cannot interfere with the lawfully chosen measure on the ground that the legislature should have taken other considerations into account or should have considered a different decision that is preferable.²⁴⁹ The majority explains that the section merely regulates the conclusion of a valid surrogacy agreement and that it does not disqualify AB from concluding a surrogacy agreement.²⁵⁰

²⁴⁴ AB (2017) para 273.

²⁴⁵ AB (2017) para 284.

²⁴⁶ AB (2017) para 285.

²⁴⁷ National Health Act 61 of 2003.

²⁴⁸ AB (2017) para 286.

²⁴⁹ AB (2017) para 292.

²⁵⁰ AB (2017) para 299.

At para 244, the court states that the rationale of the AD Hoc Committee's recommendation was that if both donor male and female gametes were to be used, then the situation would be similar to adoption and then surrogacy would not be needed. The court makes a comment that the rational purpose is to create a bond between the child and the commissioning parents;²⁵¹ if a genetic link exists between commissioning parent and child, it is more likely that the commissioning parents would more readily take the child after birth. If there was no genetic link, it would be easier for the commissioning parents to abandon the child. Creation of this bond was designed to protect the best interest of the child yet to be born.²⁵²

If the process of surrogacy allowed for a surrogate (whom the child may never get to know) and two anonymous donors of sperm and egg,²⁵³ there would be too many unknown people in the creation of the child, which would not be in the best interest of the child.

The majority criticises the finding of the high court, which stated that the Minister of Social Development and the Centre for Child Law had failed to produce credible data to demonstrate that the presence or absence of a genetic link in the context of surrogacy will have adverse effects on the child.²⁵⁴ In this way, the high court had elevated empirical research above the purposive construction of the challenged provision.²⁵⁵ The high court had overemphasised the interests of the commissioning parents and had overlooked the best interest of the child.²⁵⁶

3.5.3 (b) Discrimination

At para 300 of the judgment the court comes to the conclusion that chapter 19 favours commissioning parents as well as the surrogate and gives effect to the best interest of the child. It therefore does not disqualify due to infertility, it affords the person a chance to

²⁵¹ AB (2017) para 287.

²⁵² AB (2017) para 287.

²⁵³ The child would then never get to know the identity of the donors due to section 41(2) of the Children's Act.

²⁵⁴ AB (2017) para 291.

²⁵⁵ AB (2017) para 291.

²⁵⁶ AB (2017) para 293.

have a child of their own.²⁵⁷ The court states that it is ABs personal choice, which disqualifies her,²⁵⁸ and that she could fall in the ambit of section 294 if she concluded a relationship with someone who could donate gametes. Furthermore, the alleged ground of discrimination is not based on the attributes and characteristics of AB; the section neither creates nor compounds infertility,²⁵⁹ in essence, it favours infertile commissioning parents.²⁶⁰

3.5.3 (c) Limitation of reproductive autonomy

The majority once more reiterates that section 294 merely regulates the conclusion of a valid surrogacy agreement²⁶¹; the section therefore merely regulates choices that are open to the applicant. With regard to the right to reproductive autonomy the court looked at comparable jurisdictions and at section 12(2) (a) of the Constitution and finds that such right cannot extend to the body of another person.²⁶² To interpret section 12(2) (a) of the Constitution in such a manner would unduly strain the interpretation.²⁶³

The Constitutional Court does not go into detail regarding a child's right to identity and how one should approach the issue when it is in conflict with other human rights. The Justices merely assert that a child's genetic origin should be protected as it is in the best interest of the child to do so. No analysis of how to apply the best interest of the child in surrogacy is given. The court merely asserts that there is no right to conclude a lawful surrogacy agreement and that section 294 merely regulates the option of surrogacy.²⁶⁴ Hence, section 294 in the Children's Act has survived Constitutional scrutiny and, although not expressly stated, the child's right to know her genetic origins is indirectly protected.

3.5.4 Minority decision analysis

The key points of the minority decision can be summarised as follows:

²⁵⁷ AB (2017) para 302.

²⁵⁸ AB (2017) para 303.

²⁵⁹ AB (2017) para 301.

²⁶⁰ AB (2017) para 302.

²⁶¹ AB (2017) para 306.

²⁶² AB (2017) para 314.

²⁶³ AB (2017) para 314.

²⁶⁴ AB (2017) para 316.

The minority at para 93 of the judgment finds that section 294 of the Children's Act takes away the option of having a child through the process of surrogacy for infertile single parents. The minority decision criticizes the majority finding that the case is about the validity of section 294 and not about the genetic link requirement in that section which has relevance to the legal conception of the family.²⁶⁵ The minority indicates that one cannot separate the two, especially in terms of; to what extent one kind of family life is privileged over the other.²⁶⁶ The minority states that section 294 affects the psychological integrity of AB²⁶⁷ and that it limits her rights.²⁶⁸ According to the minority section 294 violates AB's Constitutional rights specifically section 12(2) (a) - by limiting her right to psychological integrity by preventing her to make decisions concerning reproduction.²⁶⁹

A further conclusion by the minority is that the real purpose of the section is to discourage the use of surrogacy where other sufficiently similar avenues are available.²⁷⁰ The minority suggest that the section puts genetic origin above any other interest.²⁷¹

With respect to the findings of the minority, one must not forget to evaluate section 294 of the Children's Act in conjunction with the whole of chapter 19 of the Children's Act; one cannot look at the section in isolation. Section 294 simply regulates surrogacy and the option of surrogacy is only available to irreversibly infertile people. The purpose of the section is not to elevate genetics above anything else. Surrogacy was legalised and regulated as a way for people to have a child genetically related to them. If one does not want or cannot have a child genetically related to you then adoption or IVF is an alternative option. Although the processes are not the same and are markedly different, the option is still there. There exists no right to surrogacy, as this option is not open to everyone; financial implications would exclude a large amount of people as not everyone can afford it. The section creates a balance between conflicting rights of all parties involved and regulates the option of surrogacy fairly in order to protect the best interest of the child. It protects an inherent right that all people are born with, which is a part of who they are. The section

²⁶⁵ AB (2017) para 116.

²⁶⁶ AB (2017) para 116.

²⁶⁷ AB (2017) para 92.

²⁶⁸ AB (2017) para 93.

²⁶⁹ AB (2017) para 97.

²⁷⁰ AB (2017) para 173.

²⁷¹ AB (2017) para 194.

therefore strikes an appropriate balance. Surrogacy was regulated and enacted to fulfil the need to have a child of your own. If one looks at the para 181 and 182 of the minority judgment it appears that the minority seems to view becoming a parent through surrogacy a better option than adoption. This is exactly what the legislature is trying to prevent - circumvention of adoption, an argument raised by the Minister of Social Development in the high court. That removal of the genetic link requirement would make adoption a less viable option for people and further more encourage 'designer' babies.

3.5.5 Conclusion

Section 294 of the Children's Act has survived Constitutional scrutiny. Although an analysis of how the standard of best interest of the child in the context of surrogacy was not given by the court, the child's right to identity and more specifically to genetic identity has been preserved and the Constitutional Court has declared that this right is in the best interest of the child. The next chapter will argue that in order for the identity rights of the child to be fully protected, there must be recognition that the identity rights is inclusive of the right to know biological origins. The chapter will show that the right to know biological origins is the mechanism through which the identity rights of the child can be realised.

Chapter 4 The child's right to know her biological origins

4.1 Introduction

In this chapter I will be laying the basis for an argument alluded to in chapter 3; that the preservation of the identity rights of a child conceived through the means of ART and specifically surrogacy is only possible by recognising the child's right to know her biological origins. I will look at specific sections within the Children's Act, which may defeat the purpose of section 294 of the Children's Act. I will argue that in order for a child's genetic origin and specifically the right to identity to be protected, the child has a right to know the circumstances surrounding her birth. Furthermore, this chapter will look at the questions posed by the SALRC Issue Paper 32 relevant to surrogacy in an attempt to answer those

questions. Subsidiary issues related to the realisation of identity rights will be discussed: issues like when disclosure of the circumstances of the birth should be made, the appropriate age of disclosure and by whom disclosure should be made. Enforcement mechanisms and possible legislative implementations will be suggested. This chapter will also look at the rights regarding the privacy of parties to the surrogacy agreement that may be impacted.

4.2 The child's right to know her biological origins

The question whether children should be informed about their biological origins is a contentious issue.²⁷² '[I]nformational interest represents a constitutional legal value for the person concerned having regard to the child's (progressive autonomy)... and 'informational self-determination' may become empty constitutional shells as long as the concerned individual remains ignorant of the underlying disparity'.²⁷³ In other words based on the decision of the *AB* case, if the best interests of the child dictates that there be a genetic link between the child and one of the commissioning parents, in order to protect the child's right to identity, those same interests would dictate that there be a corresponding duty to inform the child of his genetic origins.²⁷⁴ The rights protected are only realisable once the child is born therefore they cannot fully serve their purpose if the protection starts and ends at the pre-conception stage. The realisation of the right to know will only occur if the donor-conceived child has a legal right to be informed that she was conceived through surrogacy.²⁷⁵ This is however not possible under the current regulatory scheme in South Africa. As previously mentioned in chapter one, the SALRC embarked on an investigation in 2016, to determine if the child has a legal right to know her biological origins.²⁷⁶ According to

²⁷² Ilioi E, Blake L & Jadv V et al 'The role of age disclosure of biological origins in the psychological wellbeing of adolescents conceived by reproductive donation: A longitudinal study' (2017) 58 *Journal of Child Psychology and Psychiatry* 315.

²⁷³ Blauwhoff RJ 'Tracing down the historical development of the legal concept of the right to know one's origins. Has 'to know or not to know' ever been the legal question?' (2008) 4 *Utrecht Law Review* 103.

²⁷⁴ SALRC Issue Paper (2017) para 1.44

²⁷⁵ Blauwhoff RJ (2008) 104.

²⁷⁶ See SALRC Issue Paper 2017.

the investigations of the SALRC, it is clear that the current legal position of South Africa prohibits disclosure.²⁷⁷

4.3 Other applicable legislation

The NHA of South Africa read with regulation 19 of the IVF Regulations also contains barriers to the realisation of the child's right to know her biological origins. The relevant regulation, which creates a barrier to the child's right to know her biological origins states the following:

'No person shall disclose the identity of any person who donated a gamete or received a gamete, or any matter related to the artificial fertilisation of such gametes, or reproduction resulting from such artificial fertilisation'.²⁷⁸

The regulations go further to make it a criminal offence if there is no compliance with any of the regulations:

'Any person who contravenes or fails to comply with any provision of these regulations commits an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 10 years, or to both such fine and imprisonment'.²⁷⁹

It is clear that the NHA read with the applicable regulations impedes a child's right to identity and further the right to know the story of her origins.

As concluded in chapter 2, the quest for the right to identity is based on the child's right to privacy or respect for private life, to autonomy and freedom of expression.²⁸⁰ The right to know one's origins is encapsulated in the right to identity and has been held to be an essential part of the right to respect for one's private life.²⁸¹ This was confirmed by the

²⁷⁷ See SALRC Issue Paper (2017) para 1.24 & 2.9

²⁷⁸ Regulation 19 of GN 1165 GG 35099 of 30 September 2016.

²⁷⁹ Regulation 21 of GN 175 GG 35099 of 30 September 2016.

²⁸⁰ Kothari J 'The child's right to identity: Do adopted children have the right to know their parentage?' available at www.cry.org/resources/pdf/NCRRF/NCRRF_ReportBy_Jayna.pdf (accessed 5 August 2017).

²⁸¹ Kothari J 'The child's right to identity: Do adopted children have the right to know their parentage?' available at www.cry.org/resources/pdf/NCRRF/NCRRF_ReportBy_Jayna.pdf (accessed 5 August 2017).

dissenting judgement in *Odievre* that the right to identity constitutes ‘the inner core of the right to respect for one’s private life’.²⁸² Anne Hartman stated:

‘There is no better way to subjugate human beings than to silence them. There is nothing more oppressive than denying another’s reality’.²⁸³

Surrogacy is a lived reality for a child, whether or not the child knows about the surrogacy. Non-disclosure will not change the circumstances of the child’s birth therefore, disclosure is important in all families. Children tend to want to know their story as they grow up; they want to be told about their story plus the stories of the lives of their parents, grandparents and extended families.²⁸⁴ These stories form the history or narrative of the child’s life and is needed by children to enable their understanding of their place in the broader extended family and the wider community.²⁸⁵ The next section will look more closely at disclosure

4.4 Disclosure

‘I seem to have a compelling need to know my own story. It is a story that I should not be excluded from since it is at least partly mine and it seems vaguely tragic and somehow unjust that it remains unknown to me’.²⁸⁶

The right to identity cannot be realised without fulfilling the right to know your genetic origins. The child cannot fully realise her identity rights without knowing all the aspects that influences her identity. Therefore, there is a need for disclosure. This disclosure should come from the parents. ‘It has been suggested that ‘parents’ whether socio-legal parents or biological, hold ‘procreational responsibility’ to tell children about their parentage’.²⁸⁷ What this means is that because the parents ultimately chose to utilise the ART services and they are responsible for the child during her lifetime, they bear the responsibility of ensuring that

²⁸² Chan PCW ‘No, it is not just a phase: An adolescent’s right to sexual minority identity under the UNCRC’ (2006) 10 *The International Journal of Human Rights* 164.

²⁸³ Hartman A ‘Out of the closet: Revolution and Backlash’ (1993) 38 *Social Work* 245.

²⁸⁴ Midford S ‘Disclosure: How, why and when to tell your child about their origins?’ Australian Conference 26-27 May 2012 1 available at perthpsychology.com.au/wp-content/uploads/DisclosureSurrogacy.Midford.pdf (accessed 5 August 2017).

²⁸⁵ Midford S (2012) 1.

²⁸⁶ Anderson RS ‘Why Adoptees search: Motives and more’ (1988) 67 *Child Welfare* 15-19.

²⁸⁷ Blauwhoff RJ (2008) 103.

the child be told. Viewed therefore from the point of the right to know, they need to ensure that the information is available.²⁸⁸

Currently in South Africa, in the field of surrogacy and other assisted reproductive technologies, disclosure regarding the circumstances of birth is not allowed. The legislature goes as far as to make it a criminal offence to publish any such details. Surrogates and donors enjoy a cloak of anonymity. It is the recommendation of this research paper that in order for the child to enjoy the full protection of the right to identity, not only should the child's genetic link to one of her commissioning parent's be protected but, that her right to know her biological origins should be part of that protection. This is needed so that she can enjoy her right to identity as stated in the CRC as well as her constitutional right, that her best interest should at all times be of paramount importance.

'If children are not told about the means of their conception, the right to know and identity is effectively useless to them'.²⁸⁹ The case that offspring have a right to the truth about their conception and origins has developed over many years. John Triseliotis has argued that 'truth is always better than deception [and] that no one has the right to erase part of yourself, even if it is only a minor part'.²⁹⁰ Family therapy practitioners have claimed that truthfulness and transparency is preferable, and that basing family life on deception and secrecy can cause turmoil within the family.²⁹¹ Mary Warnock insists that there is an ethical imperative to tell, even while saying:

'I cannot argue that children, who are told of their origins, if they are AID [artificial insemination donor] children, are necessarily happier, or better off in any way that can be estimated. But I do believe that if they are not told they are being wrongly treated'.²⁹²

The main reason for telling the child the circumstances surrounding her conception, is to provide her with the option of seeking information about her gamete donor, or surrogate, if

²⁸⁸ Blauwhoff RJ (2008) 103.

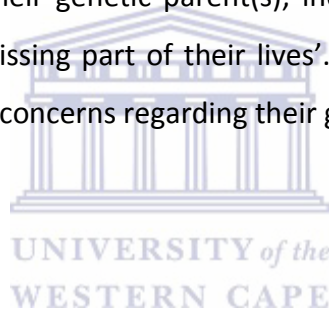
²⁸⁹ Firth L 'Gamete donation, identity and the offspring's right to know' (2007) 9 *American Medical Association Journal of Ethics* 644.

²⁹⁰ Firth L (2007) 644.

²⁹¹ Firth L (2007) 644.

²⁹² Warnock M 'The good of the child' (1987) 1 *Bioethics*.

she so desires.²⁹³ The child should be given the option of whether or not to request identifying information of the donor or surrogate. This decision should not be made on her behalf. As it is her right to identity, which is at stake and by disclosing, the child's right to identity is therefore preserved. Most of the evidence about harm caused by not knowing one's biological origin has been extracted from research conducted in the field of adoption.²⁹⁴ It is questionable whether this is an accurate comparison.²⁹⁵ Children conceived via surrogacy or IVF differs within their respective families, from that of adoptive children—their biological parents have not abandoned them and they are often biologically related to one member of the couple.²⁹⁶ As Susan Golombok says, 'Genetic unrelatedness has a different meaning for children conceived by gamete donation than for children in adoptive families or in stepfamilies'.²⁹⁷ Still, one can infer that donor- conceived children have just as much interest in knowing about their biological origins, as adoptees have. 'The absence of information about their genetic parent(s), including the lack of knowledge of their identity can represent a missing part of their lives'.²⁹⁸ Even though the process may differ, both children have similar concerns regarding their genetic identities.²⁹⁹



4.5 Age of disclosure

The truth regarding the circumstances surrounding a child's conception may be revealed from sources outside the family.³⁰⁰ Lack of information regarding biological origins has significant implications for the development of identity and maturation process for the child.³⁰¹ 'If that origin is incorrect or significantly incomplete, the child faces personal identity risks'.³⁰² These risks can originate when the parent is unable for any reason to speak of the circumstances surrounding the child's birth and the child in this situation most commonly assumes that the parents discomfort is a reflection of shame associated with

²⁹³ Firth L (2007) 644.

²⁹⁴ SALRC Issue Paper 32 (2017) para 1.5.

²⁹⁵ SALRC Issue Paper 32 (2017) para 1.5.

²⁹⁶ Firth L (2007) 645.

²⁹⁷ Golombok S 'New families, old values: Considering the welfare of the child' (1998) 13 *Human Reproduction*.

²⁹⁸ Firth L (2007) 645.

²⁹⁹ Firth L (2007) 645.

³⁰⁰ Issue Paper 32 (2017) para 2.20

³⁰¹ Midford S (2012) 2. See fn 236 above. See also SALRC Issue Paper 32 (2017) para 2.18

³⁰² Midford S (2012) 2.

their origins.³⁰³ The parent may be unwilling to discuss the details of the child's birth due to their personal feelings, pain and sadness remembering the process.³⁰⁴ This may inspire the belief in the child that she is bad.³⁰⁵ Therefore, parents who can speak and who are more willing and open about the process of the child's beginning provide the child with confidence of their own self-worth.³⁰⁶ The child will accept the parent's story without concern especially when young.³⁰⁷

Children under the age of 5 years have limited understanding of complex relationships.³⁰⁸ They are very literal in their thinking (they focus on the here and now) and understanding of biological relationships usually develop between the ages of 7-9 years.³⁰⁹ Between the age of 5-9 years children become involved with people outside the family and at this stage, they need to feel safe and understand their role in the family.³¹⁰ Between the ages of 7-9, children are ready to understand the reality of their own biology and the difference between biological and non-biological parents.³¹¹

During adolescence two major processes takes place, namely identity formation and puberty.³¹² Adolescence is a difficult time for children and during this period, the child begins to have a greater understanding of human relationships and similarities and differences between people.³¹³ The reality is that only a small percentage of children will be born via surrogacy so it is extremely hard and rare to find someone with a common experience.³¹⁴

Literature would suggest that 10 is a noteworthy age, therefore it is recommended to tell the child about her biological origins before the age of 10.³¹⁵ Before the age of 10, the child

³⁰³ Midford (2012) 3.

³⁰⁴ Midford(2012)3.

³⁰⁵ Midford S (2012) 3.

³⁰⁶ Midford S (2012) 3.

³⁰⁷ Midford S (2012) 3.

³⁰⁸ Midford S (2012) 3. See also Lagattuta KH 'Linking past, present and future: Children's ability to connect mental states and emotions across time' (2014) 8 *Child Development Perspectives* 93.

³⁰⁹ Midford S (2012) 3.

³¹⁰ Midford S (2012) 4.

³¹¹ Midford S (2012) 4. See also Lagattuta KH (2014) 91.

³¹² Midford S (2012) 4.

³¹³ Midford (2012) 4.

³¹⁴ Midford S (2012) 4.

³¹⁵ Van Bueren G *International Rights of the Child* (2006) 36. See also Lagattuta KH (2014) 94.

will accommodate things more easily than later.³¹⁶ After the age of 10 years, children enter the stage of forming their own identity and processing new information becomes more complex.³¹⁷ A study has found that telling donor-conceived children before the young age of 7 years results in more positive family relationships and higher levels of adolescent well-being.³¹⁸ Furthermore, studies have shown that the age of disclosure is important and that children told before adolescence have more positive experiences regarding their mode of conception.³¹⁹ 'Research on children's developing understanding of biological inheritance has shown that children have an implicit understanding of biological inheritance of physical characteristics by age 4.³²⁰ It is not until age 7 that they are able to explain this concept and understand the role of genetic mechanisms'.³²¹ During adolescence, the child will be processing what she has already been told about her family and how that intersects with her evolving identity.³²² It is an easier task to already know about the surrogacy and if applicable, the gamete donation, before adolescence begins.³²³ If a child receives information which require her to review the identity she has already developed, the child will discard the identity already developed and will create a new one.³²⁴

Children informed from an early childhood and with the opportunity to grow their understanding as they mature, are most likely to manage the information well.³²⁵ This is because they have a story; a narrative to make sense of their own story.³²⁶ It is best to think of disclosure not as a single event but as an on-going conversation with opportunities to fine tune and build.³²⁷ Therefore, disclosure should be done over a period of time and not a once off informational session. Children need to be informed over time about the origins and circumstances of birth so that it creates an open dialogue between parent and child.

³¹⁶ Van Bueren G (2006) 36. See also Lagattuta KH (2014) 91.

³¹⁷ Van Bueren G (2006) 36. See also Lagattuta KH (2014) 94.

³¹⁸ Ilioi E, Blake L & Jadv V et al (2017) 315.

³¹⁹ Jadv V, Freeman T & Kramer W et al 'The experiences of adolescents and adults conceived by sperm donation: Comparisons by age of disclosure and family type' (2009) 24 *Human Reproduction* 1917.

³²⁰ Ilioi E, Blake L & Jadv V et al (2017) 316.

³²¹ Ilioi E, Blake L & Jadv V et al (2017) 316.

³²² Midford S (2012) 7.

³²³ Midford S (2012) 7.

³²⁴ Midford S (2012) 7.

³²⁵ Midford S (2012) 7. See also Lagattuta KH (2014) 91.

³²⁶ Midford S (2012) 7.

³²⁷ Midford S (2012) 3.

4.6 Parents' and Donors' Right to Privacy

An issue to consider is whether the child's right to identifying information about the donor negatively affects the privacy rights of the parents and the donor. If the duty to tell donor-conceived children the circumstances surrounding their conception is left entirely to the parents, then it can be argued that it is the parent's right to privacy, rather than the child's right to know, that is considered paramount. However, it is suggested that the Department of Social Development also be tasked to follow up on the well-being of children born via surrogacy and to ensure that parents have started the process of disclosure.³²⁸ Similarly, the privacy rights of donors could be threatened by a policy of non-anonymous gamete donation. It is recommended that donors should give informed consent to the donation and be aware of the future risk that, the resultant child could seek to identify them. If they do not wish to contribute their gametes, it is their own choice not to do so.³²⁹

One major problem with a programme of non-anonymous gamete donation is that it could cause a decline in the numbers of people willing to donate their gametes, an argument routinely raised against establishing such a policy.³³⁰ However, two counter arguments prevail against this assertion. In 2005, legislation in the UK banned anonymous donation and allowed for disclosure of identifiable information to donor-conceived children once they turned 18 years of age.³³¹ A later study of past UK gamete donors' views on how a policy of non-anonymous gamete donation would affect their future donation did not firmly validate that the new policy would cause a decline in gamete donation.³³² It is also unclear that the decline in donations in countries that have recently removed gamete donor anonymity (i.e., countries such as the UK, New Zealand, and the Netherlands) is solely due to this change in policy.³³³

Secondly, if non-anonymous donation is the ethically right way of organising gamete donation, then the low donor numbers is the price that has to be paid for an ethically sound

³²⁸ Firth L (2007) 645.

³²⁹ Firth L (2007) 645.

³³⁰ Firth L (2007) 646.

³³¹ Firth L (2007) 646.

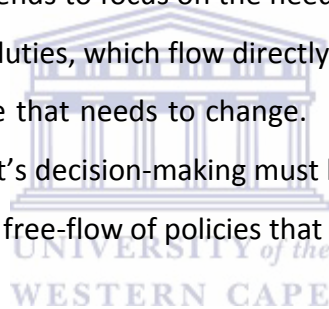
³³² Firth L (2007) 646.

³³³ Firth L (2007) 646. See also Van Bueren G (2006) 35.

system.³³⁴ It should be noted that children conceived by means of assisted reproductive technologies in whatever form are the only group of children who are legally prevented from knowing their biological parentage. Donor offspring should not be the only group of people legally precluded from finding out identifying information about their biological parentage.³³⁵

Children born through surrogacy and anonymous donation are at risk of extreme social challenges. In most cases, they are unable to trace or preserve their genetic identities. There is no legislation that offers any protection, or enforcement mechanisms in South Africa for a donor- conceived child to obtain identifiable information regarding her genetic origins or parents.

In the context of ART, the state tends to focus on the needs and desires of parents to create children and fails to consider its duties, which flow directly to those children.³³⁶ Society is slowly moving into an era where that needs to change. Even when children have parents with good intentions, such parent's decision-making must be assisted by a state government that encourages the free-flow of policies that promote children's rights.³³⁷



4.7 Enforcement

It is the recommendation of this research paper that the right to identity can only be properly realised by the enforcement of this right. Therefore, in order to access his identity rights, the child has a right to know the details of her origins. She is therefore entitled to the information regarding the circumstances of her birth as the SALRC found based on the interpretation of the arguments raised by Cowden.³³⁸ Such information needs to be disclosed by a parent or parents before the age of 10.³³⁹ This will enable a child to process

³³⁴ Firth L (2007) 646.

³³⁵ Firth I (2007) 646. See also Van Bueren G (2006) 36.

³³⁶ Davis DS 'Genetic dilemmas and the child's right to an open future' (1997) 27 *Hastings Center Report* 9.

³³⁷ Laufer-Ukeles P 'The lost children: When the right to children conflicts with the rights of children' *Eighth Annual International Human Rights workshop in Intergenerational Justice, Academic center of Law and Business* 2014 34 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2376688 accessed 5 August 2017.

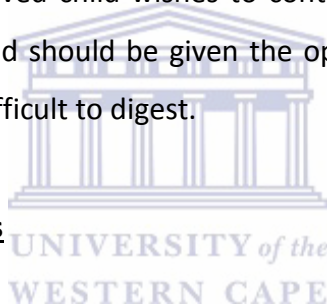
³³⁸ SALRC Issue Paper 32 (2017) para 2.131.

³³⁹ Van Bueren G (2006) 37.

the information needed to form a particular identity. Furthermore, if a parent relays this information, the child may not have negative connotations regarding the information. The child will trust and readily accept the information given by a parent. Enforcement of disclosure should be overseen by the Department of Social Services who has professional social workers who can monitor and assess the child. They can also ensure that the parents do disclose.

Children should have access to identifiable information of the donor. To assist the child to have access to identifiable information, a guardian ad litem should be appointed. This person will then assist the child to access the records kept of donors or surrogate. However in order to balance the privacy rights of the donor and the rights of the child, should the child wish to make contact, consent should be obtained from the donor first. The same rule should apply if the donor-conceived child wishes to contact the surrogate mother. During the period of disclosure, the child should be given the option of undergoing counselling if the child finds the information difficult to digest.

4.8 Legislative recommendations



This research paper recommends the following amendments to the existing regulatory scheme of South Africa, which this paper dealt with.

4.8.1 Children's Act

The recommendation of the AD Hoc Committee was that a statutory body should be constituted to operate as the panel to screen parties wishing to enter into a surrogacy agreement.³⁴⁰ This recommendation should be implemented. The recommendations or concerns of the panel should accompany the high court application to have the surrogacy agreement confirmed. The right to know biological origins and the right to be told about the biological origins should also be inserted in the Children's Act. The conditions of disclosure, the age of the child, as well as the relevant professional bodies who must assist during this

³⁴⁰ See fn 23 & 24.

time must be stipulated. This will require that section 41 and section 302 of the Children's Act be amended. This research paper recommends that these sections only be amended to state that upon application by the child with the assistance of the guardian ad litem, or parents, the identity of the gamete donor and or surrogate be disclosed to the child. If the child wishes to initiate contact with the gamete donor or surrogate, the child should be counselled in the event the gamete donor or surrogate declines the invitation.

4.8.2 National Health Act read with the Regulations Relating to the Artificial Fertilisation of Persons

This paper recommends that a competent person as defined be required to inform any gamete donor or surrogate the fact that their identity will be revealed to the donor-conceived child, upon receipt of such an application to the central data bank. The competent person must also explain the possibility that such a child may wish to make contact. Further that anonymous gamete donation and surrogacy is no longer possible, however that the identifying information will only be disclosed to the donor-conceived child. It is not necessary to amend Regulation 19 of the NHA as it provides for the situation where a law dictates the identity of the donor to be disclosed. Regulation 21 needs to be amended to allow for the disclosure of the identity of the gamete donor and surrogate, upon application of the donor-conceived child. This disclosure would therefore not constitute a criminal offence.

4.9 Conclusion

The right to identity is an integral part of the child's identity formation. This identity right encapsulates the component of the right to know your biological origins. It is evident that the right to biological origins can only be fully realised if a legal mechanism exists to enforce this right. In South Africa, the mechanism best used is the Children's Act. However, the child cannot utilise the legal mechanism if the reason for its existence is not revealed. Therefore, the child of necessity also has a legal right to be told about the circumstances regarding her conception.

This research paper has shown the donor-conceived child indeed has a legal right to know her biological origins. This right can be enforced and furthermore the time has come for South Africa to amend its gamete donation and surrogacy laws.³⁴¹ Failure to do so would be contradictory to the child's best interest and the judgment of the *AB* case.

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³⁴¹ SALRC Issue Paper 32 (2017).

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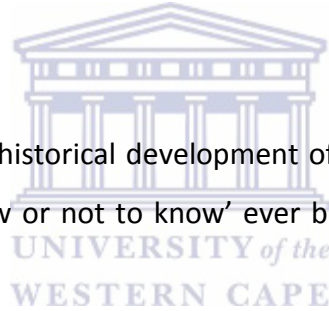
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