V. ADOPTION AND SURROGACY

This chapter focuses on issues of parental responsibilities and rights and the protection of children's best interests through the recognition of the non-traditional forms of family. Firstly, the recognition of the parental rights and responsibilities of unmarried fathers of children born out of wedlock remains a contested issue in some African countries, due to the customary law approach and legislative provisions that generally exclude these fathers from the lives of their children. For example, In the Kenyan case of *RM & another v. Attorney General* ([2006] eKLR) the Court refused to declare provisions of the Children's Act of 2001, which did not give an unmarried father parental responsibility in relation his child, as being discriminatory.

The African Charter on the Rights and Welfare of the Child enjoins countries to move from this discriminatory approach and to focus on the right that a child has to know and have a relationship with both his/her parents regardless of their marital status. Some courts have embraced this need to move towards a child-centred approach to parental responsibilities and rights, including the recognition of unmarried fathers' right to consent to adoption and, separately, their obligation to paym maintenance for their children. For example, in the South African case of *Fraser v. Children's Court, Pretoria North (*1997 (2) SA 264 (CC)*),* an unmarried father successfully challenged the constitutionality of Section 18(4)(d)4 of the Child Care Act 74 of 1983, which did not recognise unmarried fathers' rights and only required the mother of a child of unmarried parents to consent to an adoption. The maintenance requirement is illustrated in *JGM v. CNW [2008] eKLR,* wherein the Kenyan High Court recognised parental responsibilities of an unmarried father who denied parental responsibility based on the non-existence of a marriage between himself and the mother of the children and ordered him to pay child support. The case of *GK v. BOK, CGLK, MT and the Attorney General* [2015] BWHC, MAHGB-000291 from Botswana recognising an unmarried father's right to consent to the adoption of his child is a further welcome development.

This chapter will also discuss cases that pertain to surrogate motherhood agreements. In the South African judgment *AB and Surrogacy Advisory Group v. Minister of Social Development* [2015], Section 294 of the Children's Act, which requires that the child to be born from the surrogacy agreement be genetically related to at least one of the commissioning parents was declared unconstitutional. Although the judgment may be hailed for protecting reproductive autonomy of adults, the same cannot necessarily be said from a child-centred approach, as it potentially allows for the conception of children who will never know the identity of their genetic/biological parents. Nonetheless, it still remains to be seen whether the Constitutional Court will confirm the High Court judgment.

In the case of *Ex Parte MS and Others* [2014], the South African High Court confirmed a surrogate motherhood agreement where artificial insemination had already taken place. Section 292 of the Children's Act (38 of 2005) requires that a surrogate motherhood agreement be confirmed by the High Court prior to artificial insemination, making artificial insemination prior to court confirmation an offence. Despite this, the High Court found that it was in the best interests of the child who was about to be born to confirm the surrogate motherhood agreement and avoid uncertainty about the parentage of the child. In Kenya, where surrogate motherhood agreements are not regulated by law,

the Court found in *JLN and 2 Others v. Director of Children's Services and 4 Others* [2014] that the commissioning parents should be recognised as the parents of the children as this was in the best interests of the children and protected the right to dignity of the commissioning parents.

This chapter will also discuss the case of *MIA v. State Information Technology* (Pty) Ltd [2015] from the South African Labour Court in which the Court recognised "maternity" leave for a commissioning parent of a child born through a surrogate motherhood agreement. The Labour Court found that the applicant had been unfairly discriminated against, and was entitled to paid leave.

ADOPTION

GK v. BOK, CGLK, MT and the Attorney General
[2015] BWHC 1, MAHGB-000291-14
Botswana, High Court

COURT HOLDING

The Court held that Section 4(2)(d)(i) of the Adoption of Children Act Cap 28:01 is unconstitutional to the extent that it does not require the consent of the father in the adoption of his child born out of wedlock in all cases, on the grounds that such differentiation on the basis of gender and marital status cannot be shown to serve any legitimate purpose or interest.

Summary of Facts

The applicant and first respondent conceived a child who was born out of wedlock. The applicant and first respondent were never married, although the applicant provided financial and other support for the child from her birth. The child had lived with the applicant for some 12 months, during which time the first respondent became involved in a relationship with the third respondent. At the conclusion of this 12-month period, the third respondent attempted to adopt the child, which adoption was consented to by the first respondent, the child's mother. Because the child was born out of wedlock, the applicant's consent to this adoption was not required pursuant to the relevant provision of the Adoption of Children Act (the "Act") (Section 4(2)(d)(i)). The applicant sought relief from the Court that the Act discriminates on the basis of marital status and gender, and as such should be declared unconstitutional as inconsistent with the constitutional protection against discrimination on the basis of certain protected classes secured under Section 15 of the Constitution of Botswana 1966 (the "Constitution").

Issues

The issues put before the Court were the following:

1. Whether gender and marital status were vulnerable categories that are protected from discrimination under Section 15 of the Constitution of Botswana; and

2. Whether there were exclusions of certain legislative areas from the protections of Section 15

of the Constitution (whether the exclusions appearing in Section 15(4) permit discrimination on the basis of protected classes within these legislative areas (including adoption and personal law)).

Court's Analysis

The Court reviewed the concepts of formal and informal equality in the context of the Constitution, finding that informal equality before the law is the core principle of Section 3 of the Constitution. The Court also found that Section 3 of the Constitution should be read as an umbrella provision that informs related sections of the Constitution, including Section 15 (protection from discrimination). The Court reviewed the state of constitutional interpretation in Botswana and strongly favoured a dynamic approach that views the constitution as a living document, embodying values to be interpreted in the context of contemporary norms (citing *Attorney General v. Dow 1992 BLR 119 (CA)*.

On the basis of this approach to constitutional interpretation, the Court found that the Constitution requires that a law that promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and that legitimate purpose.

The Court undertook a thorough review of the jurisprudence regarding adoption and the rights of children in Europe, North America, and South Africa, finding that the preponderance of the jurisprudence indicates that the rights of fathers to consent to or veto the adoption of their children is based on the degree to which the father has established a familial relationship with the child, and should not be entirely informed by the marital status of the father at the time when the child was born. Accordingly, biological fathers accrue parent-like rights to direct important decisions relating to the child as they demonstrate the responsibilities of parenthood. The Court cited the South African case of *Fraser v. Children's Court Pretoria North and Others* ([1997] ZACC 1), as well as the United States case of *Caban v. Mohammed,* (441 US 380-Supreme Court 1979). The Court noted the paramount importance of the rights of the child in the consideration of all matters relating to children. The Court found that the applicant had established, on evidence, his strong familial relationship with his daughter (the second respondent).

The Court noted that gender, health status and disability are not amongst the grounds listed in the Constitution upon which discrimination is constitutionally protected. The Court cited Amissah JP in *Attorney General v. Dow, supra*, extensively, for the proposition that the protected grounds listed in the Constitution are not exhaustive, but rather examples of the classes that are protected from discrimination under the constitution. The Court also cited *Diau v. Botswana Building Society 2003*((2) BLR 409 (IC)) for the proposition that the Constitution "outlaw[s] discrimination on grounds that are offensive to human dignity."

The Court found that the customary laws which dictate that a child born out of wedlock belongs to the mother's family "offends any notion of fairness, equality and good conscience when measured against contemporary norms," citing *Dow*, *supra*, for the proposition that the Constitution trumps customary laws to the extent of any inconsistency.

Finally, the Court addressed the exclusions of certain legislative areas in Section 15 of the Constitution, including laws relating to adoption and other matters of personal law. The Court found that the protective provisions of Section 15 (including the exclusion referenced in the preceding sentence) should be read in light of the overarching "umbrella" concepts of equality embodied in Section 3 of the Constitution. Citing *Dow, supra*, and *Ramantele v. Mmusi and Others* (CACGB-104-12) [2013] BWCA 1, the Court found that the exclusions in Section 15(4) should be interpreted narrowly where their impact would be to cause discrimination that is not rational or justifiable in the public interest. In other words, the exclusions in 15(4) of the Constitution should not be read as permitting discrimination based on protected grounds in the context of certain legislative areas, including adoption and personal matters. Rather, courts should consider the public interest (including the preservation of customary law if not antithetical to the objects of the Constitution) if discrimination based on a protected ground is established in the context of one of these excluded legislative areas.

Conclusion

The Court found that it is unfair gender discrimination to require consent of a mother, but not of a father, for adoption of a child born out of wedlock. This distinction has the potential to impair the fundamental dignity of fathers, and hence is impermissible under Sections 3 and 15 of the Constitution. The Court therefore held that the Adoption of Children Act Section 4(2)(d)(i) was unconstitutional because it has the effect of discriminating on the basis of marital status and that the discrimination did not serve any legitimate purpose or interest permissible under the Constitution.

Significance

According to Botswana customary law, which is similar to customs and traditions of many other African societies, a child born out of wedlock is considered illegitimate. As such, the father had no rights over the child. This had several implications, including that the burden of taking care of the child was shifted to the woman, who in most cases was blamed for bearing the child "illegitimately." Importantly, it also cut the child off from the care and support of the father. Unfortunately, colonial laws also regarded a child born out of wedlock as illegitimate, so that colonial and customary law acting in synergy created a chasm between biological fathers and their children born out of wedlock. This has produced negative social consequences because such children were denied their biological father's care. It also encouraged fathers not to take responsibility for their biological children.

Therefore, apart from the rights of the biological father being infringed upon, the best interests of the child are at stake when fathers are discouraged from taking responsibility to care for their children. Promoting the father-child relationship contributes toward the realisation of the rights of the child guaranteed by human rights treaties especially the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, and is reinforced by the Court's decision in this case.

HIGHLIGHT

ADOPTION AND SURROGACY

The traditional forms of families have been altered by the recognition of adoption and now, very recently on the African continent, surrogacy, to account for the rights of individuals who want to become parents and are dependent on adoption or surrogacy..

Although adoption has been recognised and regulated for some time now in most African countries, the same cannot be said for surrogacy, which is still considered a novelty. Surrogacy has actually been traced to Biblical times, albeit that it was not by means of artificial insemination.[64]

The crucial distinction that needs to be drawn between adoption and surrogacy is that the aim of adoption is to provide a home for a child who maybe orphaned or abandoned or whose parents are incapable of caring for him or her, whereas in the case of surrogacy, the law is making it possible for commissioning parent(s) who are not able to conceive and carry a child to term, to have donor gametes implanted into a third person ("surrogate") in order to enable them to have a child. This distinction is very important as in the case of surrogacy, one of the questions from the *AB and Another v. Minister of Social Development* judgment concerned the difference between adoption and a surrogacy arrangement where the child has no genetic link to the commissioning parent(s).

The right of adopted children to know the identity of their biological parents is recognised by most adoption laws and this enables adopted children, upon reaching majority, to trace their biological parents. Furthermore, *GK v. BOK, CGLK, MT and the Attorney General* highlights the fact that the law cannot exclude a biological parent, particularly fathers of children born out of wedlock, from consenting to an adoption, where such an adoption is not the best interests of the child.

In some instances of surrogacy, anonymous donors contribute gametes in the South African context, and the law does not allow for identifying details, beyond basic health information, of such donors to be revealed. Therefore, if the Constitutional Court confirms the judgment in *AB and Another v Minister of Social Development*, this could open the door to the conception and birth of children who will never know the identities of their genetic/biological parents.

In the case of *J.L.N & 2 Others v. Director of Children's Services and 4 Others,* the recognition of the commissioning parents also provided certainty in relation to the identity and origin of the children, despite the lack of legislation, by recognising the genetically related commissioning parents as the legal parents of the children.

HIGHLIGHT continued...

Although the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child do not explicitly provide for the right of children to know the identity of their genetic/biological parents, some commentators have suggested that such a right is implicit in several provisions of these instruments,[65] and that the recognition and regulation of alternative forms of procreation, such as surrogacy, should be done with due regard to the rights of children to be born from such arrangements to find out the identity of their genetic/biological parents. Although treaty monitoring bodies have not begun to explore this in detail, in 2002, The UN Committee on the Rights of the Child expressed this interpretation in its "Concluding observations" on a report submitted by the United Kingdom:

> The Committee is concerned that children . . . born in the context of a medically assisted fertilisation do not have the right to know the identity of their biological parents.
>
> **In light of articles 3 and 7 of the Convention, the Committee recommends that the State party take all necessary measures to allow all children, irrespective of the circumstances of their birth, and adopted children to obtain information on the identity of their parents, to the extent possible**. [Emphasis in original][66]

Judicial opinions on this issue vary. In 2012, the Canadian Court of Appeals of British Columbia disfavoured this interpretation when it reviewed Articles 3, 7 and 8 of the CRC and this Committee's observations, and declined to recognise a right for children conceived by medically assisted reproduction to know their "biological origin."[67] More recently, The US Supreme Court decision in *Adoptive Couple v. Baby Girl*[68] highlighted the wide range of judicial opinion about whether children have a right to know their biological origins.

SURROGACY

AB and Surrogacy Advisory Group v. Minister of Social Development
[2015] ZAGPPHC 580
South Africa, High Court

COURT HOLDING

Section 294 of the Children's Act 38 of 2005, which requires that a genetic link exist between the commissioning parents and prospective child in a surrogacy agreement, is inconsistent with the Constitution for violating the rights to equality, privacy, dignity, bodily and psychological integrity, and to health care for parents who are unable to contribute a gamete or gametes in the surrogacy arrangement.

Summary of Facts

Chapter 19, Sections 292-303, of the Children's Act 38 of 2005 (the "Act") regulate surrogacy in South Africa. The application was to challenge the constitutional validity of Section 294 of the Act that provides as follows:

> Genetic origin of child. —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.

The effect of Section 294 is to invalidate a surrogacy agreement when a commissioning parent does not have a genetic link with the contemplated child. In other words, a surrogacy agreement requires that the commissioning parent or parents, as the case may be, provide the gametes or gamete, meaning either of the two generative cells necessary for reproduction.

This requirement affected the first applicant because, due to a pre-existing medical condition, she could neither biologically give birth to a child, nor donate a viable gamete. Further, she was single, and could not rely upon a second prospective parent to comply with the genetic link requirement. The only avenue open to her was to get gametes from two donors, but this was barred by the impugned Section 294 of the Act.

The applicants challenged Section 294 on the grounds that the genetic link requirement violated the first applicant's right to equality, dignity, reproductive health care, autonomy and privacy.

The second applicant brought the matter by reference to Section 36(c) and 36(d) of the Constitution, and represented the class of persons whose rights are infringed by the operation of Section 294 of the Act.

The applicants challenged the genetic link requirement for a surrogacy arrangement because it was not required for an In Vitro Fertilisation (IVF) procedure. In fact, the first applicant had previously

tried the IVF procedure using gametes from two donors (double donor gametes), and only when this failed, did she opt for surrogacy, only to realise that the law did not allow double donor gametes for surrogacy. The applicants therefore argued that persons who opt for surrogacy should be accorded the same choice that persons who are using IVF have.

The applicants argued that the regulatory regime on surrogate motherhood must be aligned with constitutional rights and must not be arbitrary, discriminatory, or contrary to human dignity.

The applicants also submitted that genetic lineage should not be a relevant factor in conceptualising families. They argued that families without genetic lineage are just as valuable as families with genetic lineage.

The respondent argued to retain the genetic link requirement because it had rational purposes, including the best interests of the child, prevention of commodification and trafficking of children, prevention of commercial surrogacy, prevention of exploitation of surrogate mothers, and prevention of circumvention of the adoption law.

Issue

The issue for the Court's determination was whether Section 294 of the Act was inconsistent with the Constitution for requiring that there be a genetic link between the commissioning parent or parents and the contemplated child in a surrogacy agreement.

Court's Analysis

The Court first identified the class and subclass of persons affected by Section 294 of the Act. It described the "class" as comprising parents who were medically or biologically unable to carry a child (i.e. *pregnancy-infertile*). Parents of this class could still contribute their gametes or gamete to conception. However, there existed a subclass that was *pregnancy-infertile* but could not contribute their gametes or gamete because they were biologically unable to do so. These were *conception-infertile*. This subclass was affected by the genetic link requirement.

The Court also recognised that some persons who were *pregnancy-infertile* but could provide gametes or a gamete for conception might not want to do so for reasons such as to avoid passing on a genetic trait. These too would be barred by the genetic requirement link if they opted for surrogacy through double donor gametes.

The Court appreciated that the applicants and respondents differed on their point of view regarding surrogacy. The applicants understood surrogacy to mean that persons had an opportunity to have children even if they could not give birth themselves regardless of whether they were genetically linked to the child or not. On the other hand, the respondents regarded surrogacy as an opportunity for persons who could not themselves give birth to have genetically linked children.

The Court reviewed the historical background to the development of the law, and found that the rationale for requiring a genetic link, as stated in the 1992 report of the South African Law Commission (the "SALC"), was to promote the bond between parent and child, and it was therefore envisaged to be in the best interests of the child. Further, it would prevent shopping around with the view to creating children with particular characteristics.

A further inquiry revealed that a report of a Parliamentary Ad Hoc Committee of 1999 had recommended that the genetic requirement be retained; otherwise the situation would be similar to adoption.

The Court observed that the Parliamentary Ad Hoc Committee allowed same-sex parents, and to the Court this was a demonstration that legislation takes cognisance of and integrates constantly evolving social norms and practices. It also observed that the SALC recognised the right of persons to make certain decisions about reproduction and that it considered a limitation on these rights as a violation of the person's dignity and privacy.

The Court examined the legislative intent of Chapter 19 of the Act. It referenced the decision in *Ex Parte MS and Others* (2014 (3) SA 415 (High Court of South Africa) to confirm that the overriding legislative intent was to regulate surrogacy and to ensure sufficient protection of the rights and interests of the parties to surrogacy arrangements, and to enable commissioning parents to acquire parental rights without going through an adoption process. The Court then raised the question whether the genetic link requirement infringed on the rights of prospective parents who were *conception-infertile* or could not meet this requirement. Related to this, it also examined the applicants' question on the relevance of genetic lineage to the legal concept of the family.

The Court was persuaded by the applicants' argument that family should not be defined with reference to whether there is a genetic link between the parents and children of families. It took into account the decision in *Satchwell v. President of the Republic of South Africa and Another* (2002 (6) SA 1 CC), in which the South African Constitutional Court questioned the traditional view of family and expressed the opinion that although family meant different things to different people, all of the meanings were equally valid.

The Court examined comparative legislation in other jurisdictions and appreciated various perspectives in regulating surrogacy before turning to the South African constitutional framework. It highlighted that the Constitution promotes open and democratic values, which includes amongst other things, the rule of law. It referenced the South Africa Constitutional Court decision in *New National Party v. Government of the Republic of South Africa and Others* (1999 (3) SA 191 (CC) to restate the principle that there ought to be a rational connection between measures that the government takes, including legislative measures, and a legitimate governmental purpose. If the rational connection did not exist, the measures would be found unconstitutional. It therefore put the requirement of the genetic link to this test. It took into account the purported purposes of the genetic link that the respondents identified, and also the rejection by the applicants that there was any rational connection.

The Court accepted the applicants' argument that autonomy is a value that ought to be taken into account in determining the matter. It examined the applicants' arguments that the genetic link requirement caused a class or sub-class to be treated differentially and excluded them from enjoying equal protection and benefit of the law. The Court pointed out that Section 9(1) of the Constitution provides that everyone is equal before the law and should enjoy equal protection and benefit of the law.

The Court expressed the opinion that the right to equality was important in the determination of the matter, and that equality was a foundational right as confirmed in *S v. Makwanyane and Another* (1995 (3) SA 391 (Constitutional Court of South Africa)). The applicants alleged discrimination on

the ground of infertility because the genetic link excluded infertile persons from parenthood through surrogacy arrangements. The Court had recourse to the decision in *Harksen v. Lane* (1991 (1) SA 300 (Constitutional Court of South Africa)), which laid out a test for determining whether a ground that is not a listed distinction under Section 9(3) of the Constitution could nevertheless be a ground for discrimination. The Court found that infertility objectively has the potential to impair human dignity, and that differential treatment based on infertility would therefore constitute discrimination. The Court held that excluding members of a subclass from surrogacy infringed on their right to dignity as it prohibits them from exercising their autonomy. Further, the differential treatment imposed by the genetic link reinforces the negative effects that infertility has on persons, so that this constituted discrimination prohibited under Section 9 of the Constitution.

The Court was not persuaded by the respondent's argument that there was a rational connection between the differentiation and a legitimate governmental purpose. The Court was of the opinion that the purpose of regulating surrogacy is for commissioning parents to have a child, which is also the purpose of legislation for IVF. Requiring that a genetic link should exist between a commissioning parent and the child in the context of surrogacy but not for IVF defeated the purpose. In the absence of governmental purpose, the Court was of the view that the offending legislation should be struck down.

The Court agreed with the applicants that the decision to have a child through a surrogacy arrangement fell under the constitutional right to bodily and psychological integrity recognised under Section 12(2) of the Constitution. The Court held that the genetic link requirement infringed on the right of individuals to make decisions about reproduction.

The Court also agreed with the applicants that the genetic link requirement infringed on the right to privacy as it interfered with the commissioning parent's or parents' decision to use gametes for conception of their prospective child.

The Court also found that the genetic link requirement infringed the right to health care protected under Section 27 of the Constitution. It affirmed that surrogacy is recognised as a form of reproductive health care in South Africa.

The Court therefore held that Section 294 was inconsistent with the Constitution because it violates the constitutional rights to non-discrimination, dignity, privacy, health care, and bodily and psychological integrity.

Conclusion

The Court concluded that the only way to align Chapter 19 of the Act with the Constitution was to strike down the genetic link requirement. It therefore declared Section 294 invalid to the extent of its inconsistency with the Constitution.

Significance

South Africa is one of the few countries in Africa that regulates surrogacy. Other countries do not have a clear regulatory framework on surrogacy. Indeed, when the Court explored comparable regulatory frameworks in other jurisdictions, no African country featured. In *J.L.N. and Two Others v. Director of Children's Services and Four Others* [2014] eKLR, Petition No. 78 of 2014, the High Court of Kenya

recognised that surrogacy was not regulated by any specific provisions in Kenyan law, and therefore surrogacy-related issues had to be decided on a case-by-case basis.

The South African case's views on the concept of the family is potentially notable for other jurisdictions. Genetic lineage is one of the important defining features of the family for many in Africa, and it is no wonder the SALC and the Parliamentary Committee that reviewed the law also considered it necessary to retain the genetic link. However, when the Court tested this requirement against constitutional rights, it found that this could not hold. Families should not be valued because of genetic links, though for some, it would be an important consideration. Rather, family should be based on intention of the parties and not physical attributes of the individuals as envisaged by the genetic link.

Despite most of Africa not having regulatory frameworks on surrogacy, the South African decision is still a beacon on how to think through issues of surrogacy in relation to human rights.

Ex Parte: MS and Others
[2014] ZAGPPHC 457
South Africa, High Court

COURT HOLDING

The Court could confirm a surrogacy agreement after the surrogate mother was already fertilised, because such an interpretation of the provisions of chapter 19 of the Children's Act, 38 of 2005 accorded with the Constitution of the Republic of South Africa, 1996, and promoted constitutional rights of the parties to the agreement.

Summary of Facts

The applicants were parties to a surrogacy agreement, namely the commissioning parents and the surrogate mother. They made the application to confirm a surrogacy agreement as required under Section 292 as read with Section 295 of the Children's Act, 38 of 2005 (the Act). According to Section 292, in order for a surrogacy agreement to be valid, it must be written and signed by all parties and confirmed by the High Court. The Act therefore envisages entering into a valid agreement before implementing its requirements. Section 296(1)(a) of the Act provides that no artificial insemination may take place before the surrogate agreement in confirmed by the Court. Section 303(1) renders it an offence to fertilise or assist in fertilising a woman before a surrogacy agreement is confirmed by the Court.

In this case, however, the parties entered into a verbal surrogacy agreement and proceeded to implement artificial fertilisation before the agreement was confirmed by the High Court. At the time of the application, the surrogate mother was 33 weeks into the pregnancy.

This case therefore raised a novel issue, as the Court had never addressed a situation where parties applied to confirm a surrogacy agreement when it had already been implemented.

Issues

The Court isolated two questions it would address:

1. Whether it is competent for a court to confirm a surrogacy agreement when artificial fertilisation of the surrogate mother has resulted in the conception of a child in the absence of a pre-existing valid surrogacy agreement; and

2. What approach a court should take to confirm a surrogacy agreement after conception.

Court's Analysis

The Court noted that the Act does not provide a clear direction on whether courts could confirm a surrogacy agreement after conception. While the Act envisaged confirmation of a surrogacy agreement before conception, it did not provide any guidance on the consequences of non-compliance for the validity of a written agreement subsequently entered into between the parties. It also was silent on whether courts could still validate such an agreement.

The Court reminded itself of the common law principle that an agreement to commit an unlawful act would not be enforceable. In this case, it was unlawful to fertilise the surrogate mother before validating the surrogacy agreement. The Court said that, normally, courts should not interpret a statute to condone unlawfulness.

The Court, however, was of the view that a surrogacy contract was a special kind of contract that should not be determined by common law principles, but rather the Court would be mindful of the human rights implication for the parties, and especially that it involved the rights of children who would be born out of the agreement. The Court observed that the surrogacy agreement aimed at advancing constitutional rights including the right to dignity, the right to make decisions concerning reproduction, and the surrogate mother's right to security in and control over her body.

The Court was cognisant of Section 39(2) of the Constitution, which mandated courts to interpret legislation in a manner that would promote the spirit, purport, and objects of the Bill of Rights. It said that courts would even interpret legislation to grant the court discretionary power where there was lack of express grant of such power if it was necessary to comply with Section 39(2) of the Constitution.

The Court examined the reason behind requiring confirmation of a surrogacy agreement and found that it was to protect the interests of the parties, including the child to be born. The Court therefore envisaged an interpretation of the provisions of the Act to include the discretion of the court to confirm a surrogacy agreement after the child has been conceived, if it was to promote the rights of the child.

The Court noted that there was an ambiguity with the provisions of the law, in that Section 295(b)(ii) referred to the interests of a child that is yet to be conceived, while Sections 295(d) and (e) referred to interests of a child that was to be born, which would include a child that had been conceived but was not yet born. The Court was of the opinion that Section 295 therefore covered both the situation where a child had not yet been conceived at the time that confirmation of a surrogacy agreement was sought, and the situation where a child had already been conceived, but was not yet born.

The Court further noted that neither Section 292 nor Section 295 required the court to be satisfied that the surrogate mother had not yet undergone the process of artificial fertilisation and that she was not already pregnant as a result. It therefore was of the opinion that the provisions conferring the power on a court to confirm a surrogacy agreement in and of themselves would not preclude the court from confirming such an agreement when the surrogate mother had already undergone fertilisation.

The Court then inquired whether it was the intention of the legislation to render post-fertilisation surrogacy agreements invalid and incapable of being validated. It observed that Section 296 made it unlawful to fertilise a surrogate mother before a valid surrogacy agreement, but nowhere did a provision expressly state that a court is precluded from confirming a post-fertilisation surrogacy agreement. The Court went on to say that a provision which would preclude a court's power to confirm a surrogacy agreement post-fertilisation might actually infringe on the constitutional rights of the parties. It would impact on parental rights, the right to exercise reproductive choice, and the right to dignity of the commissioning parents. It would impose parental rights on the surrogate mother, and would infringe the right to family or parental care of the child to be born. This would not be in the best interests of the child.

After considering all the facts of the case, the Court was of the opinion that it would be patently contrary to Section 28(2) of the Constitution to hold that a court had no discretion to confirm a surrogacy agreement in circumstances when confirmation is sought post-fertilisation. The Court therefore held that the Act does not preclude a court from confirming a surrogacy agreement subsequent to the artificial fertilisation of the surrogate mother, and in circumstances where she is already pregnant with the child to be born under the agreement.

On how to approach post-fertilisation confirmations, the Court said that these applications must be considered within the framework of the Act, though each case would depend on facts peculiar to it. However, confirming a surrogacy agreement after fertilisation should be considered as an exception to the general rule. Therefore, parties should place sufficient facts before the court explaining why the application was made late. Further, the parties would also have to satisfy the court that the application was not aimed at, or would not have the effect of, permitting the parties to circumvent the objectives of the regulatory scheme. Parties would therefore have to, from the outset, satisfy the court that the arrangement between them fell within the permissible scope of a lawful surrogacy agreement.

The Court expressed the view that evidence of a pre-existing verbal or written agreement between the parties, which would have been a valid surrogacy agreement but for the absence of confirmation of the court, would be a good indicator that the parties are bona fide in their application.

The Court expressed the further view that an application for the validation of an agreement that is post-fertilisation should take place before the child is born. The provisions of the Act on surrogacy were aimed at a child that is not yet born, so that they would not apply where a child is already born.

The Court regarded the most important consideration in confirming surrogacy agreements post-fertilisation to be in the best interests of the child to be born. It noted that this requirement is stated in Section 295(e) of the Act.

Conclusion

After finding that it can validate a surrogacy agreement post-fertilisation, and that the application satisfied the various elements set out by the Court, the Court granted the application and validated the verbal surrogacy agreement which the parties had entered prior to fertilisation.

Significance

This case provides guidance on interpreting legislation to promote constitutional rights and advance the best interests of a child where such legislation does not offer clear directions on how to address situations where parties fail to comply with the proper processes surrounding surrogacy. It took the Court some creativity to save the agreement from collapsing, and it had to reason around the common law principle that prohibits legislation to be interpreted in a manner that condones unlawfulness. It would be prudent for a legislature to address the gap that the case exposed to avoid leaving it to the courts to determine the issue of validating surrogacy agreements post-fertilisation on case-by-case basis.

J.L.N. & 2 Others v. Director of Children's Services & 4 Others
[2014] eKLR, Petition No. 78 of 2014
Kenya, High Court (Constitutional and Human Rights Division)

COURT HOLDING

The Hospital did not violate the petitioners' right to privacy when it divulged information about the surrogacy agreement while seeking the advice of the Director on what to do about the circumstances involving the petitioners and the Hospital.

The Director violated the rights and fundamental freedoms of the petitioners, including their right to dignity, when seizing the children and placing them in a children's home.

Summary of Facts

The 1st petitioner entered into a surrogacy agreement with the 2nd and 3rd petitioners, and gave birth to twins at MP Shah Hospital (the "Hospital"), the 3rd respondent. The 1st petitioner was the surrogate mother of the twins, while the 2nd and 3rd petitioners were the genetic parents. Following delivery, the question arose as to whose name, the surrogate's or the genetic mother's, should be entered in the Acknowledgement of Birth Notification (the "Notification"), as required under the Births and Deaths Registration Act, Cap 149 of the Laws of Kenya (BDRA). The Hospital sought the advice of the Director of Child Services (Director) who decided that the children were in need of care and protection. The children were therefore placed under the care of a children's home. The children were later released to the 1st petitioner, and the Hospital issued the Notification in her name.

The petitioners filed a suit against the Director and others in the Children's Court to prevent the children from being put up for adoption. Pending the hearing and determination of the main suit, the Children's Court ordered that the children be released into the custody of the genetic parents, and

that the surrogate mother be allowed unlimited access for purposes of breastfeeding the children. The Children's Court also ordered that the names of the genetic parents be entered into the birth notifications as well as the birth certificates.

The petitioners sought orders to compel the respondents to release the children into their custody and not interfere with the surrogacy agreement, and an order for damages. They also sought declarations that the Hospital's disclosure of the petitioners' medical information to the Director contravened the petitioners' constitutional rights to privacy, and that the Director's decision to seize the children from the surrogate mother contravened both her rights and the constitutional rights of the children.

Issues

The Court adjudicated on the following issues:

1. Whether the Hospital violated the petitioners' right of privacy under Article 31 of the Constitution; and

2. Whether the Director violated the petitioners' rights in taking away the children.

Court's Analysis

The Court affirmed that the BDRA requires that upon birth, a notification of birth be given. It also requires that the persons giving the notification give the particulars of the child including: name of the child, date of birth, sex, type of birth (single or twins), nature of birth (alive or dead), place of birth, name of father, name of mother, and the person to whom the notification is issued.

On the issue of privacy, the Court examined Article 31 of the Constitution, and highlighted proviso (c) which protects the right to privacy of every person not to have information about their family or private affairs "unnecessarily required or revealed." The Court was persuaded by the petitioner's arguments that under certain conditions, the right to privacy may be limited, as was stated by Lord Justice Bingham in the English Court of Appeal decision of *W v. Edgell*. Indeed, it was the Hospital's argument that the disclosure was necessary under the circumstances.

The Court found that the Hospital had a statutory duty to record the details of the children in the Notification under Section 10 of the BDRA. However, the challenge was whose details should be included: the surrogate mother's or the genetic parents. The Court held that the mother referred to in the BDRA was the birth mother, and by virtue of Section 2 of the Children's Act, the surrogate mother had the immediate responsibility to maintain the children and was entitled to their custody. The Court therefore found that the Hospital had made the right decision to give the particulars of the mother. However, since there was no law on surrogacy, nothing prevented the Hospital from registering the names of the genetic parents in the notification.

In its final determination, the Court was ultimately persuaded by the Hospital, which argued that in the absence of a law on surrogacy, and in the face of uncertainty about what to do, it was justified in seeking the guidance of the Director. It said that this was a justifiable limitation on the right to privacy of the petitioners. Further, the Court cited Section 38(1) of the Children's Act which mandated the Director to safeguard the welfare of children.

On the second issue, the Court considered whether the Director had acted in the best interests of the children. The Court found that the children were not in need of care and protection. The Court pointed out that the Director was called upon to guide the Hospital on what to do about the registration and to decide on to whom the children would be released. The Court noted that there was no issue about the mother rejecting them, nor was there any dispute between the surrogate mother and the genetic parents. The Court therefore found that the decision of the Director to seize the children and place them in a children's home was not in the best interests of the children in respect of Article 53(2) of the Constitution and Section 4(2) of the Children's Act. It held that the actions of the Director to seize the children contravened the right to dignity of the petitioners, and caused them embarrassment and distress.

The Court observed that the issues it was asked to adjudicate arose because there was no legislative regime on surrogacy in Kenya. The Court was of the opinion that it was the duty of the state to enact legislation to regulate surrogacy. This duty stemmed from the right to health and health care services, including reproductive health guaranteed under Article 43(1)(a) of the Constitution, but also the right to recognition and protection of the family under Article 45(1). It followed the decision of the High Court of Kenya in *Organisation for National Empowerment v. Principal Registrar of Persons and Other* (Petition No. 289 of 2012 [2013] eKLR), and decided that the details of the genetic parents be registered rather than those of the surrogate mother because the child is entitled to the identity of its genetic parents.

Conclusion

The Court awarded damages to the petitioners as compensation for violation of their right to dignity.

Significance

The head note of an article by Aamera Jiwaji says: "In the absence of clear regulation, the practice of surrogacy in Kenya is growing as an unsupervised industry with no law to fall back on if anything goes wrong during the treatment."[69] A cursory review of countries that have some legislation on surrogacy on the African continent only brings up South Africa as having a law on surrogacy. Umeora *et al.,* writing about the practice of surrogacy in Nigeria could only speculate that surrogacy probably takes place in Nigeria. Surrogacy is not very visible on the African continent,[70] but some may be happening clandestinely.

Surrogacy raises complex ethical, moral, and legal questions. There are a number of interrelated perspectives from which to discuss surrogacy. There is the reproductive rights perspective involving the parties in the surrogacy arrangement. There is the children's rights perspective, which concerns a child or children born out of a surrogacy arrangement. Parental rights are another perspective. Finally, the rights of women, as the ones who must carry the pregnancy and who often predominately shoulder responsibility for childrearing, constitute a fourth perspective of note.

The Court primarily focused on the issue of parental rights and the rights of the child. The Court reasoned that parental rights be accorded to the genetic parents. It held that taking away the child from the surrogate and genetic parents was an infringement of their rights as parents. Of course, the issue would be more complex in a case where there is no genetic link between the commissioning parents and the child.

With regard to the rights of the child, the Court emphasised that the rights of a child born out of a surrogacy arrangement were no different from the rights of any child recognised under national and international law. Other scenarios could be imagined that could complicate the case; for instance, in the case of Baby Gammy, an Australian couple had twins out of a surrogacy arrangement with a woman in Thailand, but decided to leave behind one of the twins because he had Down's Syndrome.[71] This case sparked debate but also revealed that failure to regulate surrogacy may allow loopholes and expose children to human rights violations.

From a reproductive rights point of view, the starting point could be the concept of the right to sexual and reproductive health, and reproductive rights as articulated at the 1994 International Conference on Population and Development (ICPD) that took place in Cairo. Reproductive rights were defined in the Program of Action (PoA) as "the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so and the right to attain the highest standard of sexual and reproductive health."[72]

However, surrogacy was not on the agenda at the ICPD. Barbara Stark argues that to the extent that surrogacy enables persons to exercise their reproductive goals and to have children, the ICPD PoA supports surrogacy, or in the least would weigh against an outright ban of the practice.[73] Stark's view can be buttressed by the argument that surrogacy arrangements are a realisation of the right to enjoy the benefits of scientific progress[74] for persons who would otherwise not have had the chance to reproduce, and in some instances, have progeny that share their genetic identity.

Commercialisation of surrogacy is an important challenge because of the risk of coercion or undue influence on the surrogate. Global or transnational surrogacy agreements have therefore been criticised because they have usually involved rich prospective parents and poor potential surrogates. Vida Panitch is one thinker who believes that such transnational commercial surrogacy agreements should be criminalised as they involve exploitation of women by violating their reproductive rights to be free from violence and coercion.[75] She emphasises that the exercise of the right to reproductive choice (by the prospective parent or parents) should not result in the infringement of another person's reproductive right to be free from coercion (the surrogate). Yet, this approach could also be critiqued as assuming that individuals who are poor or otherwise marginalised are in all instances unable to exercise agency in deciding whether to become surrogates.

MIA v. State Information Technology Agency (Pty) Ltd.
[2015] ZALCD 20
South Africa, Durban Labour Court

COURT HOLDING

In applying maternity leave policy, an employer must recognise the status of parties to a civil union and recognise the rights of commissioning parents in a surrogacy agreement, including male parents in same-sex unions. The respondent's refusal to grant the Applicant paid maternity leave on the grounds that he was not the biological mother of his child therefore constituted unfair discrimination.

The right to maternity leave as created in the Basic Conditions of Employment Act is an entitlement not linked solely to the welfare and health of the child's mother, but which must also be interpreted to take into account the best interests of the child.

Summary of Facts

The Applicant, a male employee in a same-sex civil union, entered into a surrogacy agreement with a surrogate mother. The applicant asked his employer, the respondent, for paid maternity leave. However, the respondent refused to grant him paid maternity leave as per its policy because it understood "maternity" to apply to females only, and also did not recognise this as applying to commissioning surrogate parents.

The respondent's maternity leave policy mirrors the provisions of Section 25 of the Basic Conditions of Employment Act 1997; an employee is entitled to "paid maternity leave of a maximum of four months," such leave to be taken "four weeks prior to the expected date of birth or at an earlier date". The Applicant was initially offered unpaid "family responsibility leave," and subsequently two months' paid adoption leave and two months' unpaid leave. The Applicant sought an order directing the respondent to (1) refrain from unfair discrimination; (2) recognise the rights of those in the Applicant's position as natural maternal parents; (3) recognise the rights of those in the Applicant's position to receive paid maternity leave; (4) pay the Applicant two months of remuneration; (5) pay damages in the sum of R400,000; and (6) pay costs.

Issue

The issue before the Court was whether the application of the respondent's policy on maternity leave discriminates unfairly against employees who are in civil unions and are commissioning surrogate parents.

Court's Analysis

The Court expressed the view that the right to maternity leave as created in the Basic Conditions of Employment Act must consider the best interests of the child in addition to the welfare and health of the child's mother. This is consistent with the Bill of Rights in the Constitution of the Republic of South Africa and the Children's Act 2005, which specifies that "in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance must be applied."[76]

Surrogacy agreements are regulated by the Children's Act. Pursuant to the terms of the surrogacy agreement entered into by the Applicant, the child was taken straight from the surrogate. Only one commissioning parent is permitted to be present at the birth; it was decided between the Applicant and his spouse that the Applicant would be present and would take immediate responsibility for the child. The Court was of the opinion that there is no reason why an employee in the Applicant's position should not be entitled to maternity leave for the same period and on the same terms as a "natural mother."

The Court therefore held that any policy adopted by an employer should recognise the rights that flow from the Civil Union Act and the Children's Act, so that same-sex parents and surrogate mothers should not be discriminated against.

Conclusion

The Court ordered the respondent to pay an amount equivalent to two months' salary to the Applicant and the Applicant's costs, but damages were denied.

Significance

This case is peculiar to South Africa because it is the only country in Africa that has legislation recognising same-sex marriages (civil unions) and surrogate parents. However, it is jurisprudentially noteworthy for more than these reasons.

The predominant construction of family is that it is a heterosexual institution. Women have thus been socially constructed as "mothers" so that anything to do with maternity is associated with the female species. Over the years, human rights norms have been extended to cover non-traditional family constructs, such as same-sex marriage. There is much resistance to this but, as illustrated in this case, certain boundaries are being extended nevertheless. In this case, the Court interpreted "maternity" to include male "mothers" and therefore that males may also be entitled to maternity benefits. The Court explained that the principle is those who take care of the infant as their "mother" are eligible to maternity benefits, their gender notwithstanding. Further, the Court recognised the principle that the best interests of the child are paramount also applies to the situation, so that concern is not just about who receives maternity coverage, but who also benefits from it.