

Six years ago the Children's Act came into force, defining the legal requirements for surrogacy in South Africa.

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SURROGACY A NEW POSSIBILITY

By Shereen Volks

Our law only allows for "ethical" surrogacy. Commissioning parents may not pay for the service of a surrogate (also known as commercial surrogacy), and there are various requirements that must be strictly fulfilled.

The surrogate parenthood agreement is only valid if it is confirmed by a court and the court will not do so unless the agreement complies fully with all of the requirements of Chapter 19 of the Children's Act, no. 38 of 2005.

South African law also requires a genetic link between the commissioning parent and the baby due to be born through the surrogate mother. Section 294 of the Children's Act states that no surrogate motherhood agreement is valid (and therefore cannot be confirmed by any court) unless the conception occurs by using the gametes (the male or female reproductive cells, ie sperm or ovum) of both commissioning parents, or, if biological, medical or other valid reasons prevent this, at least one of the commissioning parents. Where the commissioning parent is a single person, the gamete of that person is required for a lawful surrogate pregnancy.

The genetic link requirement was recently successfully challenged in the Pretoria High Court. Judge Anneli Basson presided in a hard-hitting debate regarding the ethics of allowing for surrogate parenthood without a genetic link.

The First Applicant, who chose to remain anonymous, has a specific medical condition which renders her biologically unable to give birth to a child. Her condition is permanent and irreversible and she is also unable to donate her own gametes.

She is a prospective single parent, does not have a partner, and is not involved in a sexual relationship with a person who is able to make such a contribution. As such, she is completely unable to comply with the genetic link requirement. She was joined in her challenge by a second Applicant, the Surrogacy Advisory Group. The case was opposed by the Government in the person of the Minister of Social Development.

The traditional values on which the genetic link requirement was based, assumed that it was important

for a child's psychological wellbeing to be genetically related to a parent. The Government argued that it is against public policy to allow a child to be created without any such link and that a parent could more easily walk away from such a child.

The main thrust of the Applicants' argument concerned the values which are enshrined in South African's Constitution, in particular the right to equality, dignity, autonomy, privacy and reproductive healthcare.

The Applicants further argued that, not only does empirical data and modern psychological opinion confirm that a genetic link between a parent and child is no longer central to the concept of a family, but limiting surrogacy to those where it is possible for a genetic link to be in place also amounts to unfair discrimination. It leaves those prospective parents without any method of becoming parents, other than adoption.

Judge Basson ruled that the genetic link requirement is inconsistent with the Constitution and is therefore invalid.

However, in order for a constitutional finding of a High Court to be implemented, it has to be confirmed by the Constitutional Court. The application was made to the Constitutional Court last month and further vigorous debate ensued.

Judgement has been reserved and is eagerly awaited.