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2013
Juta Law
https://hdl.handle.net/10539/26206
Bonthuys,E. and Broeders,N.2013.Guidelines for the Approval of Surrogate Motherhood Agreements:Ex Parte WH.South African Law Journal.130,pp.485-495.

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Citation:
Elsje Bonthuys; Neil Broeders, Guidelines for the Approval of Surrogate Motherhood Agreements: Ex Parte WH, 130 S. African L.J. 485 (2013)

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Wed Aug 22 05:40:52 2018

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surrogacy law and its potential development in the UK' (2010) 2 *King's Student LR* 37 at 48–9).

In terms of the process we recommend for South Africa, after its review the proposed panel should prepare a psychological and medical report, together with a recommendation regarding confirmation of surrogacy, for submission to court. This would assist by overcoming the problem (noted in *WH*) of slanted evidence. It would also obviate the need to postpone matters due to insufficient evidence as happened in *Three Agreements*. If the panel recommends against confirmation, its evidence should be subject to cross-examination by applicants in court. An advantage of including some neutral evidence is that it creates a more effective function for high court judges. They will no longer be expected to assume the role of *investigators* with inadequate means in realms where they are not appropriately-trained. Rather, they will utilise their legal training along familiar lines as *evaluators* of evidence and arbiters of disputes.

That surrogacy arrangements are sometimes made in situations of no pre-existing relationship between parties and overwhelming desire for a child strengthens the argument for enabling neutral expert evidence from an appropriately trained panel (Anderson op cit at 48). Under the current simplistic chapter 19 procedure, courts have a very difficult task. The fact that they must rely on evidence from sources which are not neutral increases the risk of inappropriate confirmations. The result, of course, may be serious physical, emotional and psychological harm to one or more of those concerned. Involving a panel as we propose would greatly reduce this risk. It would create legitimate expectations, remove uncertainty and ensure greater compliance with surrogacy agreements.

GUIDELINES FOR THE APPROVAL OF SURROGATE MOTHERHOOD AGREEMENTS: *EX PARTE WH*

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INTRODUCTION AND BACKGROUND

In 2011 the North and South Gauteng High Courts were approached to confirm surrogate motherhood agreements in accordance with the provisions of chapter 19 of the Children's Act 38 of 2005. The judgments were reported as *In Re Confirmation of Three Surrogate Motherhood Agreements* 2011 (6) SA 22 (GSJ) and *Ex parte WH* 2011 (6) SA 514 (GNP). This note concerns the latter judgment.

Because the provisions regulating surrogacy first became operative in April 2010, the cases represented an opportunity to provide guidance on the

approach to be followed by courts who are asked to confirm surrogate motherhood agreements. (See also Lize Mills 'Certainty about surrogacy' (2010) 21 *Stellenbosch LR* 429 for a discussion of an unreported decision of the North Gauteng High Court in case no 30972/2009 and of the history of the legal regulation of surrogacy.) The Deputy Judge President specifically instructed the court in *Ex parte WH* to formulate guidelines on how this new area of law should be handled in future, and invited several amici to make submissions in this regard (paras 9 and 10).

Chapter 19 of the Children's Act provides the first statutory regulation of surrogate motherhood — a practice which, it is often said, has existed since biblical times (para 2). The Act sets out the requirements for a valid surrogate motherhood agreement, which include a written surrogacy agreement between the commissioning parent(s) on the one hand, and the proposed surrogate mother and her spouse or partner on the other hand (s 292). This agreement must be confirmed by a high court in accordance with the criteria set out in s 295, which relate to the suitability of the commissioning parents, the suitability of the surrogate, and the best interests of the child to be born from the arrangement. The first substantive part of our discussion relates to the court's discussion of the suitability of the commissioning parents, who were a married gay couple. We argue that, in attempting to treat the commissioning parents the same as it would opposite-sex parents, the court failed adequately to articulate the notion of substantive equality and to show an understanding of the lived realities of same-sex couples.

Also important for the purposes of this note is the statutory requirement that the court confirming the surrogacy agreement must be satisfied that the surrogate 'is not using surrogacy as a source of income' (s 295*(c)*(iv)). Further, s 301(2) prohibits commercial surrogacy by providing that no compensation may be paid to the surrogate mother, apart from expenses relating to fertilisation and other medical expenses for pregnancy and birth, 'loss of earnings suffered by the surrogate mother as a result of the surrogate motherhood agreement', and health, death and disability insurance related to the surrogacy. Compensation may also be paid to professionals who provide bona fide medical or other services in relation to the surrogacy (s 295(3)). These provisions limiting commercial surrogacy must be read together with s 60(4)*(a)* of the National Health Act 61 of 2003, which renders it a criminal offence to trade in gametes, and decrees that a person may not receive compensation for a gamete, except for reimbursements of reasonable costs incurred in the process of donation. What the Children's Act allows, therefore, is altruistic surrogacy — undertaken for compassionate reasons — while clearly prohibiting surrogacy undertaken for commercial reasons. The second substantive part of our discussion deals with the treatment of commercial surrogacy in *Ex parte WH*. Our argument is that the court failed to deal decisively with the strong indications of commercial surrogacy which arise from the facts of the case, instead simply assuming that this was a case of altruistic surrogacy. This failure contradicts the clear purpose of the legislation and sets a precedent which could open the door for widespread commercial surrogacy in future.

Our note is not concerned with the question whether commercial surrogacy should, as a matter of policy, be permitted. There are strong arguments to be made both for allowing and for prohibiting commercial surrogacy, which could be considered in a different contribution. However, for the purposes of this note, it is sufficient to recognise that these arguments were considered by the South African Law Reform Commission (e g South African Law Commission Project 65 *Report on Surrogate Motherhood* (1993) and South African Law Commission Project 110 *Report on the Review of the Child Care Act* (2002) and by Parliament in its debates about the Children's Bill, and that the resulting policy is embodied in the Children's Act. Our argument is the limited proposition that the judgment in *Ex parte WH* undermines the provisions of the Children's Act which expressly prohibit commercial surrogacy, or at least fails to pursue this policy with sufficient rigour.

THE JUDGMENT IN *EX PARTE WH*

Ex parte WH concerned an application for the confirmation of a surrogacy agreement. The commissioning parents were a married gay couple. The surrogate mother and her life partner were joined as parties. The parties were introduced to one another by an agency, baby2mom. The presence of an agency led the court to require additional affidavits on the process followed by and the compensation paid to the agency, in order to ensure that the surrogacy was not of a commercial nature (para 12). In response, the founder of baby2mom filed a supplementary affidavit, stating that she was fully aware of the prohibition of commercial surrogacy and that the agency's only source of income was derived from egg-donation services (paras 12, 18 and 24). The commissioning couple also supplied additional information, including the estimated payments to the surrogate mother.

In ascertaining the suitability of the commissioning couple to become parents, the court noted that they had no children of their own, and that 'both being male persons are incapable of having children that are genetically related to them except via the process of surrogacy' (para 16). The couple had entered into a surrogate agreement prior to the one which formed the subject of this application, which was also confirmed by the court, but the first surrogacy agreement did not result in a pregnancy because the surrogate mother became ill.

FORMAL AND SUBSTANTIVE EQUALITY

The first fundamental constitutional right which is relevant to this judgment is the right to equality and the concomitant right not to be discriminated against on the basis of sexual orientation, sex or gender (s 9(3) of the Constitution of the Republic of South Africa, 1996).

The apparently straightforward concept of equality is conceptually complex when applied in law (Rikki Holtmaat 'The concept of discrimination' 2. Unpublished paper presented at the 2004 Academy of European Law

Conference, Trier, Germany, available at *http://www.era.int/web/en/resources/5_1095_2953_file_en.4193.pdf*). For the purpose of our critique of the judgment in *Ex parte WH*, the crucial distinction is that between formal and substantive equality. Formal equality entails treating all people the same, regardless of social or economic circumstances, while substantive equality aims to achieve equal outcomes and results by taking account of social and other contexts in which people live (I Currie & J de Waal (eds) *The Bill of Rights Handbook* 5 ed (2005) 233.) The jurisprudence of the Constitutional Court on sexual orientation has been particularly influential in articulating the significance of social context, the continued effects of past discriminatory practices and the influence of negative stereotypes upon the achievement of substantive equality. Indeed, the court in *Ex parte WH* referred to a number of these cases in support of its approach towards equality (para 54.1 and fn 19). However, in the application of substantive equality to the facts of this case, we argue, the court can be found lacking.

Two paragraphs in *Ex parte WH* illustrate the court's approach to equality in relation to sexual orientation. In paragraph 54.1 the court held:

> 'As South African law recognises heterosexual as well as same sex civil marriages, and in the light of the fact that no discrimination on grounds of sexual orientation is allowed, same sex couples must be treated *in exactly the same manner* as any heterosexual couples, and any deviation from that will be unconstitutional. This has already been confirmed in numerous cases.' (Emphasis supplied.)

And in paragraph 54.2:

> '[I]n our view care should be taken that different tests are not applied to same sex couples which could be discriminatory, for example, in some of the cases same sex couples were required to show that there would be so-called "maternal influences" the child would be subjected to.' (Emphasis supplied.)

These dicta appear to be contradictory. On the one hand the first quotation seems to require formal equality between same-sex and opposite-sex commissioning parents in the sense that they should be treated in 'exactly the same manner'. This interpretation is confirmed by the warning, in the second quotation, that different tests should not apply to same-sex and opposite-sex commissioning parents. On the other hand, the realisation that requiring maternal influences from a gay couple would effectively preclude them from becoming surrogate parents indicates an awareness of the different contexts applying to gay couples who wish to become parents. This would require substantive, rather than formal, equality between same-sex and opposite-sex commissioning couples.

A commitment to substantive equality does not, however, translate into a legal duty to treat same-sex couples either the same as, or different from, opposite-sex couples. Instead, it requires close attention to context and that courts should question and transcend heteronormative legal and social assumptions. According to Sachs J,

> [e]quality . . . does not imply a levelling or homogenisation of behaviour but an acknowledgement and acceptance of difference. At the very least, it affirms that

> difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society.' (*NCGLE v Minister of Justice* 1998 (12) BCLR 1517 (CC) para 132, emphasis supplied.)

The court's refusal, in *Ex parte WH*, to require that a gay couple demonstrate the availability of 'maternal influences' indicates that it is applying a substantive concept of equality, despite expressing a preference for formal equality. We argue that this inability to articulate its own understanding of equality is disappointing and, rather than providing clarity to future courts, it may in fact be the cause of further confusion.

In addition to this somewhat theoretical point of criticism, we also find the court's application of equality problematic, particularly as found in its assumptions about same-sex couples. In para 36 Tolmay and Kollapen JJ observe that '[g]ay and lesbian people in a relationship also have little choice other than to enter into a surrogacy arrangement if they should wish to have a child genetically linked to either of them'. This statement illustrates the court's assumptions, first, that the reproductive circumstances of all same-sex couples are the same and, secondly, that these circumstances always resemble those of certain gay couples. This is simply inaccurate. For instance, lesbians of childbearing age usually do not need surrogacy in order to have a family; they just require a sperm donor (Francie Hornstein *Children by Donor Insemination: A New Choice for Lesbians* (1984) 421).

Of the commissioning parents, the court remarked that they 'do not have children of their own and both being male persons are incapable of having children that are genetically related to them except via the process of surrogacy' (para 16). Although possibly true of this particular couple, this remark is an oversimplification and shows lack of understanding of the lives of all-male couples in general. It is well-known that men who have relationships with other men may either have simultaneous relationships with women or may have had heterosexual relationships in the past (see generally S O Murray & W Roscoe (eds) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (1989); S Arnfred (ed) *Re-Thinking Sexualities in Africa* (2004)). Bisexual and transsexual men are also likely to have been involved in opposite sex relationships in the past, and children may have been born from these. Surrogacy is therefore not the only way for men to have biological children when they are involved in relationships with other men.

The court's assumptions indicate a lack of knowledge of the social and other contexts which affect the reproductive lives of same-sex couples. If substantive equality requires us to engage seriously and respectfully with people's lived realities in order to eradicate stigma and promote an inclusive society, the judgment in *Ex parte WH* signals the opposite: while paying lip-service to the need for treating same-sex couples equally it regards what it perceives as the realities of one sub-group to be the realities of all such couples and, adding insult to injury, fails accurately to understand the realities of all-male couples. Perhaps intervention by an amicus curiae representing

lesbian, gay, bisexual, transgender and intersex ('LGBTI') persons would have assisted the court.

COMMERCIAL SURROGACY

Two of the considerations underlying the South African prohibition on commercial surrogacy are the need to protect surrogate mothers' constitutional right to dignity and the principle that the best interests of the child must be paramount in all matters concerning the child (Constitution, ss 10 and 28(2)). The emphatic prohibition on commercial surrogacy in the Children's Act is expressed as a prohibition on payment for the surrogate mother beyond reimbursement for specified categories of expenses and loss of earnings (ss 295*(c)*(iv) and 301). In addition, medical and other personnel — which would probably include agencies — may receive 'reasonable compensation' for their services in relation to surrogacy (s 301(3)).

In their affidavits, the commissioning parents indicated that they had made the following payments to the surrogate mother: health insurance at R20 400 per year; life insurance at R6 000 per year; and R20 000 for the '[s]urrogate's various expenditure (transport, maternity, clothes etc)' (para 28). The commissioning parents and the agency, baby2mom, both stated that no fees were paid to the agency 'in contravention of the Act' (para 18) for introducing the commissioning parents to the surrogate, nor were fees paid to the agency for any egg donation (paras 25–7). It should be mentioned here that the eggs of the surrogate mother would not be used for the fertilisation (para 22), but that the court documents did not reveal the source of the eggs which would be used. The court held that the origin of the eggs was not important to the outcome of the case (ibid).

In its judgment the court made much of the dangers posed by commercial surrogacy, both to the particular surrogate mother and because 'in countries such as ours with deep socioeconomic disparities and the prevalence of poverty, the possibility of abuse of underprivileged women is a real and ever present danger' (para 64). The court noted that no specific details had been provided about the payment of the R20 000 and that

> 'there may be a danger that generic payments for expenditure without specificity may well run the risk of disguising the payment of compensation . . . . [A]s a general proposition and in the main to avoid commercial surrogacy (either directly or indirectly) the court should, in all instances where an agency is involved, be fully apprised of all the facts and circumstances relating to the modus operandi of the agency, the relationship between the agency and the commissioning parents, as well as the agency and the surrogate mother.' (Paras 29–30.)

It furthermore warned that '[c]ommercial surrogacy can quite easily be disguised and payments in contravention of the law can just as easily be included under the guise of legal and legitimate payments' (para 64). For these reasons courts who are approached to approve surrogacy agreements should obtain sufficient information to ensure that the agency does not

receive payment in contravention of the Act and to ensure that the surrogacy is indeed undertaken from altruistic rather than commercial motives (paras 66, 67, 72 and 73).

The factual findings of the court do not, however, reflect a similar degree of caution about the dangers of commercial surrogacy. The judgment gives no explanation of the surrogate mother's motivation for undertaking the surrogacy, and mentions that she contacted the agency as a result of an internet advertisement (para 26). The court also noted that the surrogate mother 'may not be as privileged as the commissioning parents' (para 21). The high payments to the surrogate mother, especially the R20 000 reimbursements for 'transport, maternity clothes, etc', seem not to have been questioned at all. There were no indications that the surrogate lived very far away or needed maternity clothes of such luxuriousness as R20 000 would cover. In the light of these payments and the fact that she did not previously know the commissioning parents, we would argue that the court should have been more vigilant. These circumstances raise a possibility that the surrogate was motivated more by financial gain than by a selfless wish to benefit two strangers — a possibility which should have been thoroughly investigated. Instead, the court blandly concluded that the agreement was concluded for altruistic reasons (para 79). This conclusion is questionable in the light of the facts which appear from the judgment.

Moreover, the court also accepted that the head of the agency engaged in this process, not for profit, but for altruistic motives and merely 'as an extension of her core business, being egg donation' (para 25), while 'she did not receive nor was promised any form of compensation from the applicants regarding the surrogacy, introduction and/or for any egg donation *with regard to this application*' (para 27, our emphasis). In short, the court found, on a balance of probabilities, that both the surrogate and the agency performed this rather onerous service for people unknown to them at no gain to themselves beyond the reasonable compensation for expenses and professional services allowed for by the law. While such praiseworthy instances of altruism may indeed occur, the facts of this particular case and the careful phrasing of the agencies' information about payment renders it possible (or even likely) that the agency may already have been compensated for the previous, failed attempt at surrogacy. Despite its dire warnings about the dangers of commercial surrogacy, this possibility was not canvassed by the judgment.

In any event, the fact that the agency has not paid the surrogate for her services does not prove that she has not been remunerated at all. Agencies can (and have been known to) leave the remuneration of the surrogate to be agreed between the commissioning parents and the surrogate, while charging the commissioning parents for the administrative services of introducing them to a suitable surrogate and for eggs. The literature on the fertility industry in the United States suggests that this is a strong possibility (see for instance Susan Ince 'Inside the surrogate industry' in Rita Arditti, Renate Duelli Klein & Shelley Minder (eds) *Test Tube Women, What Future for*

Motherhood? (1984) 99 at 105–113 and Mary Gibson 'Contract motherhood: Social practice in social context' in Alison M Jaggar *Living with Contradictions: Controversies in Feminist Social Ethics* 9 ed (1994) 402–19).

Other factors strengthen our argument, amongst them the information posted on the internet sites for baby2mom, the agency involved in this case. The websites of other surrogacy agencies are broadly similar. The following information for potential egg donors is posted on the baby2mom website:

> 'Question: Do I get paid to be an egg donor?
>
> Answer: Egg donors do not get paid, they receive a donation. . . . This egg donor donation has been established by the Health Department so well [sic] within the relevant egg donation legislation. . . .
>
> Question: Is it okay if I donate eggs to get the egg donation money?
>
> Answer: Egg donors are angels, so the recipient gladly offers the R5,000 or R6,000 [sic] for the egg donor's inconvenience.' (*baby2mom.boltcms.com/Page/11602/EggDonorFAQ*, accessed 30 May 2012.)

And:

> '2 Egg donors will receive a cash donation of between R5,000 and R6000,00 [sic] on the day of egg retrieval. . . .
>
> 3 In the unfortunate event that the egg donor progam [sic] is cancelled because the egg donor has not responded well to egg retrieval, she is likely to receive less. . . .
>
> 4 In the unfortunate event that no eggs are retrieved on the day of egg retreival, [sic] the egg donor may receive less forher [sic] egg donor help' (*baby2mom.boltcms.com/Page/11597/EggDonors*, accessed 30 May 2012.)

These quotations raise the issue of whether the baby2mom pays egg donors or, as it claims, merely provides a 'donation' as a token of gratitude.

Regulation 11 of the Regulations Relating to the Use of Human Biological Material under the National Health Act 61 of 2003 clearly stipulates that '[a] person from whose body human biological material is withdrawn may only be *reimbursed for reasonable expenses incurred* by him or her in order to effect the donation concerned as defined in section 60(4) of the Act' (Notice R177 *GG* 35099 *Reg Gaz* 9699 of 2 March 2012, our emphasis). We have not been able to trace any regulations or other official information indicating that the National Department of Health has officially sanctioned such generous payments to egg donors — in direct contravention of the regulations.

In terms of contract law, a sale is distinguished from a donation by the fact that in the former the payment of money is reciprocal to delivery of a merx, while a donation does not require a counterperformance by the donee. Moreover, a court will give effect to the real nature of a contract, rather than the label affixed to it by the parties (*Boots Co Ltd v Somerset West Municipality* 1990 (3) SA 216 (C)).

The information on baby2mom's website regarding the 'reduced donation' where no eggs are extracted could be said to indicate that the 'donation', or at least a portion of it, depends on the agency obtaining the eggs. This supports the argument that the payment is of the nature of a pretium, rather than a donation. Nor would these amounts constitute reimbursement for

reasonable expenses, as allowed for by the regulations. The expenses actually incurred by an egg donor would vary according to the circumstances of each donor, for instance travelling and medical costs, time needed off work and so forth. This would generally not be a standard sum as provided for on the baby2mom website. There is therefore a strong possibility that, despite being labelled a 'donation' by the agency, legally speaking the payments to egg donors may amount to payments for contracts of sale — expressly forbidden by the regulations under the National Health Act. In this particular case the agency denied making a 'donation' to the surrogate for eggs, but in general these 'donations' together with profits would be recouped from people who want to use the eggs in order to generate income.

Nothing in the legislation forbids agencies from charging for administrative procedures involved in introducing potential commissioning parents to potential surrogates. Yet, in *Ex parte WH* the agency was at pains to emphasise that they had not received any such payment (paras 25 and 27). Rather than rendering their claims to have acted altruistically more credible, this may indicate that claims of receiving no payment for eggs or administrative services may be overstated. We contend that the court should have probed this aspect more deeply, given its express commitment to preventing commercial surrogacy.

INTERNATIONAL SURROGACY

The internet advertising material for baby2mom hints at another alarming development in South Africa and worldwide. One such advertisement states:

> 'baby2mom offers the world's most affordable egg donation/egg donor programs/egg donation program with worldclass [sic] service and access to available egg donors — . . . affordability but obsessed with service and world-class fertility treatment. South African Egg Donation Solutions offered world-wide.' (*www.ivf.net/ivf/baby2mom-egg-donation-and-surrogacy-programme-o3869. html*, accessed 30 May 2012.)

The advertisement suggests that South African fertility clinics and agencies may be targeting the lucrative international market in assisted reproduction. The internationalisation of 'reproductive tourism', of which India seems to be the primary example (see Amrita Pande 'Commercial surrogacy in India: Manufacturing a perfect mother-worker' 2010 (35) *Signs* 969; Rayna Rapp 'Reproductive entanglements: Body, state, and culture in the dys/regulation of childbearing' 2011 (78) *Social Research* 693), has caused concerns about the potential exploitation of third-world women and the use of national resources from poor countries to produce children for people from wealthy countries (see for instance Anne Donchin 'Reproductive tourism and the quest for global gender justice' 2010 (24) *Bioethics* 323).

The Children's Act attempts to guard against international surrogacy by requiring that at least one of the commissioning parents be domiciled in the Republic (s 292(1)*(c)*). In *Ex parte WH* the commissioning parents were of Danish and Dutch origin, and had been living in South Africa for one year

and 17 days when the judgment was handed down. Although they indicated that they were domiciled in the country and 'intend[ed] to stay here permanently' (para 15), they admitted that they had during this year of residence in South Africa already entered into another surrogacy agreement, which had been confirmed by a court, but which was unsuccessful because the surrogate became ill (para 17). To enter into two surrogacy agreements and have them both confirmed by the extremely busy courts within a year of arriving in the country appears remarkable and should have sounded alarm bells to the court. It raises questions about how the commissioning parents established domicile so rapidly and whether, given the existence of two surrogacy agreements in this time, the purpose of their residence was not reproductive tourism. The judgment provides no evidence that the court considered this, to our thinking, not unrealistic possibility. If these issues were indeed addressed in the papers or canvassed with the legal representatives, the judgment would, or at any rate should, have mentioned them.

Lest our concerns about the flouting of the statutory provisions be dismissed as unrealistic and alarmist, we would remind readers of the other 2011 surrogacy judgment in the South Gauteng division, *In Re Confirmation of Three Surrogate Motherhood Agreements* (supra), in which an attorney attempted to get three surrogacy agreements confirmed by unorthodox and 'reprehensible' means (para 13). In that case Wepener J remarked upon the 'numerous unconfirmed reports in the media indicating that monetary considerations are indeed a factor in many cases, contrary to the provisions of s 301 of the Act' (para 22). Given the vulnerability of surrogate mothers and the desperate desires of many childless couples, courts should be alive to the real potential for financial exploitation in these agreements and of their duty to guard against it.

'INFORMAL SURROGACY'

Finally, the court mentions 'informal surrogacy' several times, referring to extra-legal arrangements between family or friends which do not involve lawyers or courts and which do not comply with the statutory provisions of the Children's Act. Particularly, the court mentions that '[t]he Act now provides a mechanism for many who desire a child and for whom informal surrogacy is not an option' (para 3). This sentence and others in the judgment (see paras 31 and 44) create the impression that the Children's Act has created an alternative, legalised route to surrogate reproduction alongside which 'informal' surrogacy remains an option. This clearly contravenes the provisions of the Act to the effect that 'any surrogate motherhood agreement that does not comply with the provisions of this Act is invalid . . .' (s 297(2)). The distinction between informal, unregulated surrogacy and surrogacy in terms of the Children's Act is therefore highly questionable.

CONCLUSION

In *Ex parte WH* the court had the opportunity to provide a legal precedent on how surrogacy agreements could be handled in the future, but failed to do so.

The court too readily accepted the assertions made by the parties and failed to probe the disquieting issues surrounding commercial surrogacy and international reproductive tourism. Moreover, it seems that the court failed to apply the relevant provisions of the Children's Act to the facts of the case. After all, the reason why surrogate agreements should be scrutinised by the courts is for them to protect the interests of vulnerable women and potential children and to implement the very clear statutory prohibition on commercial surrogacy.

Further, in its attempt not to discriminate against same-sex couples, the court confused substantive and formal equality by asserting that same-sex couples should be treated in exactly the same manner as opposite-sex couples. Obviously, the different circumstances of same-sex couples would require that they be treated differently in order to achieve substantive equality. Furthermore, the court appeared to assume that all same-sex couples are men (thus ignoring lesbians, transsexuals, bisexuals and the like) and also showed its lack of understanding of the lived realities of gay men.

Surrogacy agreements have far-reaching social effects, and the court should have not dealt with the matter in such an ineffective way. The decision therefore offers no real guidance for future cases on the approval of surrogacy agreements.