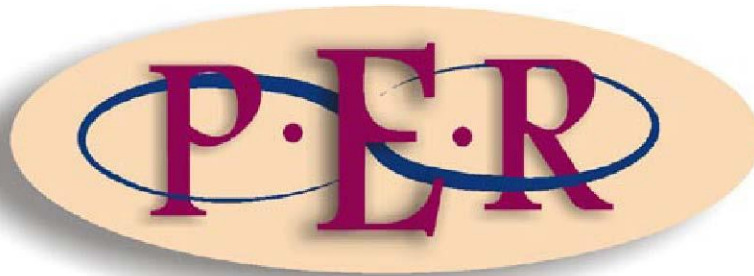


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**SECTION 294 OF THE *CHILDREN'S ACT*: DO ROOTS  
REALLY MATTER?**

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**SECTION 294 OF THE *CHILDREN'S ACT*: DO ROOTS REALLY MATTER?****C van Niekerk\*****1 Introduction**

During the past few decades, infertility<sup>1</sup> has been on the rise. This reality has been confirmed by a recent study conducted by the World Health Organisation (WHO), which indicates that infertility currently affects 10.5% of individuals globally.<sup>2</sup> On a national scale it is estimated that 15-20% of the population struggles with infertility.<sup>3</sup> The implication of this is that 10.5% of the world's population may never be able to procreate;<sup>4</sup> that is, unless recourse is had to assisted reproductive technology (ART)<sup>5</sup> to facilitate reproduction.

One form of ART that is more commonly being used to overcome infertility is surrogacy. Surrogacy makes use of a gestational carrier as a conduit for reproduction. This process itself and its reliance on a third party in the reproductive process have been met with severe criticism for a number of reasons.<sup>6</sup> Despite the opposition to the practice, individuals who now pursue this option do so either because their attempts at adoption – a proposed alternative way of acquiring a child – have proved

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<sup>1</sup> Infertility (or subfertility as it is also known as) is defined as "the inability to achieve pregnancy after one year of adequate sexual exposure". Kruger and Botha *Clinical Gynaecology* 337.

<sup>2</sup> Mascarenhas *et al* 2012 *PLOS Medicine* 1. Kruger and Botha *Clinical Gynaecology* 337 note that 15-20% of the South African population struggles with infertility, which according to them includes "one in every five to six couples".

<sup>3</sup> Kruger and Botha *Clinical Gynaecology* 337. These statistics indicate that "one in every five to six couples" is infertile.

<sup>4</sup> The current world population has been estimated at 7 billion people. This means that approximately 735 000 000 will never be able to reproduce. See Population Matters 2015 <http://www.populationmatters.org>.

<sup>5</sup> ART is also referred to as collaborative reproduction or asexual reproduction. Kindregan 2008 *J Am Acad Matrimonial Law* 2.

<sup>6</sup> Herring *Family Law* 341-345.

unsuccessful<sup>7</sup> or because there is a need for an offspring that bears a genetic link with the commissioning parent(s).<sup>8</sup>

Regardless of the reasons why surrogacy is utilised, up until recently the legal regulation of surrogacy in South Africa has been shrouded in much uncertainty.<sup>9</sup> It was only with the promulgation of Chapter 19 of the *Children's Act*<sup>10</sup> that some clarity<sup>11</sup> was provided on the issue of surrogacy under South African law and the conditions under which surrogacy may be undertaken and surrogate motherhood agreements (SMA) may be entered into.<sup>12</sup> However, despite the benefits that this chapter holds, it is not without pitfalls.<sup>13</sup>

Section 294 is one such pitfall.<sup>14</sup> It provides that surrogacy agreements are invalid in situations where the child born lacks a genetic link with the commissioning parent(s). In an era where infertility is more common,<sup>15</sup> this section raises a number of concerns: some constitutional<sup>16</sup> and others ethical and moral. The response to this criticism has been a suggestion that the parties concerned consider adoption as an alternative.<sup>17</sup> This suggestion assumes that adoption is an alternative to surrogacy.

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<sup>7</sup> This lack of success may be attributed to a decrease in the number of children available for adoption due to the availability of contraceptives and legislation which permits the termination of unwanted pregnancies. See Louw "Chapter 19: Surrogate Motherhood" fn 4.

<sup>8</sup> Although there are individuals who utilise surrogacy who have no desire to adopt a child or who do not require a genetic link. Instead their desire is for a child whom they will raise from birth, which may not be possible in the case of adoption, as the number of adoptable children has been on the decline in recent years. See Jackman 2013 <http://goo.gl/ejOQsq>.

<sup>9</sup> Mills 2010 *Stell LR* 429-430.

<sup>10</sup> *Children's Act* 38 of 2005.

<sup>11</sup> I say some, as the recent case law suggests that there is no complete certainty. See *Ex parte MS* 2014 JDR 0102 (GNP) and Louw 2014 *De Jure* 110-118 for a discussion of *Ex parte MS* 2014 JDR 0102 (GNP), where the courts had to consider the validity of a SMA concluded after artificial fertilisation had taken place.

<sup>12</sup> Prior to the promulgation of ch 19 of the *Children's Act* 38 of 2005 there was much legal uncertainty regarding surrogacy. For a discussion of the legal position prior to the promulgation of the *Children's Act*, see Nicholson and Bauling 2013 *De Jure* 512-516; Mills 2010 *Stell LR* 430-431.

<sup>13</sup> See amongst others: Nicholson and Bauling 2013 *De Jure* 510-538; Nöthling-Slabbert 2012 *SAJBL* 27-32.

<sup>14</sup> It should be noted that the *Children's 3<sup>rd</sup> Amendment Bill* will eliminate this requirement, once passed by Parliament.

<sup>15</sup> Clark 1993 *SALJ* 771 notes that there is an increase in the number of couples struggling with infertility. Louw "Chapter 19: Surrogate Motherhood" fn 4 also notes that "[t]he increased use of surrogacy, as another assisted reproductive method, was anticipated as a result of, *inter alia*, the increasing number of women who are or become infertile".

<sup>16</sup> Carnelley and Soni 2008 *Speculum Juris* 36.

<sup>17</sup> PMG 1999 [http://goo.gl/Ottiot\\_15-16](http://goo.gl/Ottiot_15-16).

This article thus aims to critically analyse section 294 and the issues it raises. It further considers whether adoption is an alternative to surrogacy in the light of the assumption made. Of necessity the discussion considers the importance of a genetic link in acquiring a child, and alternatives thereto. In conclusion, recommendations are made for a way forward.

## 2 The mechanics of surrogacy

Before embarking on a discussion of the constitutionality – or otherwise – of section 294, it is first necessary to briefly illustrate the ways in which surrogacy can arise.

A distinction is made between gestational or full surrogacy and traditional or partial surrogacy.<sup>18</sup> Gestational or full surrogacy describes those circumstances in which use is made of a surrogate mother but without recourse to her gametes.<sup>19</sup> In this instance she is merely the vessel that carries the foetus from conception to birth. In contrast, traditional or partial surrogacy occurs where the surrogate provides both her gametes and her body as a conduit in the reproductive process.<sup>20</sup> While gestational or full surrogacy is more often preferred,<sup>21</sup> traditional or partial surrogacy is more commonly used.<sup>22</sup>

Depending on the type of surrogacy used, parenthood could be achieved in a number of different ways. In respect of traditional or partial surrogacy gametes could be supplied as follows:

- a) Husband's sperm<sup>23</sup> + surrogate's egg(s). Here the wife is unable to produce gametes and the surrogate is both a gamete provider and conduit.
- b) Donor sperm + surrogate's egg(s). In this instance the commissioning parents (ie the husband and wife) have no genetic link with the child born.

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<sup>18</sup> Kindregan and McBrien *Assisted Reproductive Technology* 152.

<sup>19</sup> Kindregan and McBrien *Assisted Reproductive Technology* 153.

<sup>20</sup> Kindregan and McBrien *Assisted Reproductive Technology* 152.

<sup>21</sup> As the surrogate then has no biological link to the child conceived.

<sup>22</sup> The reason for this was because often the female commissioning parent could not provide the gametes or the womb to carry a pregnancy to term. Recourse would then be had to a surrogate who would provide the necessary. See Kindregan and McBrien *Assisted Reproductive Technology* 153.

<sup>23</sup> Assuming that the commissioning parents are married.

In cases of gestational or full surrogacy gametes are provided in one of the following ways:

- a) Husband's sperm + wife's egg(s) with the surrogate as a conduit. In this instance the wife is able to produce her own gametes but may be unable to carry the pregnancy to term due to a defect of some sort.<sup>24</sup>
- b) Donor sperm + donor egg(s) with the surrogate as a conduit.
- c) Donor sperm + wife's egg(s) with the surrogate as a conduit. Here the wife is unable to carry the pregnancy to term.
- d) Husband's sperm + donor egg(s) with the surrogate as a conduit.

The illustrations proposed do not make provision for those instances where a gamete is the product of more than one donor, as is the case in mitochondrial transfer.<sup>25</sup>

In terms of the scenarios illustrated above, currently only (a), (c), (e) and (f) are permitted under South African law. While (b) and (d) may result in the birth of a child for an infertile couple/person, these scenarios lack the genetic link required by section 294 and are thus not permitted by law.

This raises a number of questions regarding the constitutionality of section 294, which will be discussed below.

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<sup>24</sup> For example an anatomical defect or as a result of infections or surgery. See Kruger and Botha *Clinical Gynaecology* 339.

<sup>25</sup> Mitochondrial transfer occurs where an "affected mitochondria is replaced by mitochondria from a donor that is free of any DNA disorder. The intention is that these techniques would prevent the transfer of serious mitochondrial disease from mother to child whilst allowing the mother to have her own genetically related child". See UK Department of Health 2014 <https://goo.gl/n7XoQa>. This procedure is currently banned in many countries, although the UK has recently passed legislation permitting research in this area. It is unlikely, however, that this process will be used in cases of surrogacy, as the child will then have three genetic parents instead of two. Surrogacy, as is, is already complicated with the introduction of a third, fourth and fifth party to the reproductive process without adding the complication of one gamete having two genetic providers. However, strictly speaking this may become possible in future in instances where a husband or wife is infertile, the other spouse is not, yet is a carrier of a life-threatening disease which he or she would prefer not to transfer to the offspring. In these instances mitochondrial transfer of either the surrogate or a donor may provide the answer to producing a child that is at least partly connected to one of the commissioning parents.

### 3 The legalities of section 294 ("the genetic link requirement")

Section 294 provides that:

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 ideal situation contemplated in this section is that of full or traditional surrogacy where the surrogate is merely a conduit in the reproductive process and has no genetic link to the child. The reason for this preference was highlighted in the report of the *Ad Hoc* Parliamentary Committee in its investigation into surrogacy<sup>26</sup> prior to the promulgation of the *Children's Act*. It was noted that if "the surrogate is genetically linked to the child or children, she will always be a factor to be considered in the commissioning parents' relationship with the child or children",<sup>27</sup> and this was to be avoided as far as possible. Partial surrogacy was then envisaged as an alternative solution in situations only where infertility was present in one of the commissioning parents.<sup>28</sup>

The wording of this section thus indicates that surrogacy arrangements are reserved for instances where one or both of the commissioning parents have a biological link to the child.<sup>29</sup> The implication of this is that "it is not possible to conclude a valid surrogacy agreement involving a single commissioning parent if he or she is incapable of providing donor gametes".<sup>30</sup>

According to Schäfer this requirement prevents parties from relying on surrogacy as a means of convenience to avoid pregnancy and the effects thereof, or as a way of

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<sup>26</sup> In 1993 the South African Law Reform Commission (SALC) completed its report on Surrogate Motherhood after launching an investigation which commenced in 1987. However, a parliamentary *ad hoc* committee was established by resolution of the National Assembly on 26 August 1994 "to enquire into and report on the SALC report on Surrogate motherhood". This committee was required to conduct additional research, as the SALC had amongst other defects been "inappropriately constituted in terms of gender and race". PMG 2005 <http://goo.gl/g4mf91> 1.

<sup>27</sup> PMG 1999 <http://goo.gl/Ottiot> 5.

<sup>28</sup> PMG 1999 [http://goo.gl/Ottiot\\_15](http://goo.gl/Ottiot_15).

<sup>29</sup> Nicholson 2013 *SAJHR* 501.

<sup>30</sup> Schäfer *Child Law in South Africa* 270.

commissioning an adoption.<sup>31</sup> His views align with the reasoning supplied by the *Ad Hoc* Parliamentary Committee, which was of the view that if both gametes are provided by a donor, the result would be similar to adoption where the child has no genetic link to the commissioning parents, and there would thus be no need to engage in surrogacy.<sup>32</sup>

The genetic link requirement has further been justified on the bases that a genetic link promotes a bond between the parents and child which will be in the child's best interest; and that requiring such a link will deter prospective parents from shopping around [for donors] with the aim of creating children with particular characteristics and traits.<sup>33</sup>

In its consultative process the South African Law Commission also advocated the need for a genetic link. Its reasoning was that enforcing such a requirement would prevent surrogacy from being a form of child trade.<sup>34</sup> The implication of this is that the presence of a genetic link will prevent the commodification of babies. Whether or not these assertions are correct remain questionable and will be considered below.

### ***3.1 Challenges to the implementation of section 294***

#### *3.1.1 Is section 294 unconstitutional?*

As indicated above, where no genetic link is possible, surrogacy is not an option and alternative forms of founding a family – in particular adoption – must be considered. The implication of this is that in instances where a single commissioning parent or both commissioning parents are infertile they are excluded from pursuing surrogacy as an option. This provision has been "deemed harsh and discriminatory by practising reproductive specialists."<sup>35</sup>

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<sup>31</sup> Schäfer *Child Law in South Africa* 270.

<sup>32</sup> PMG 1999 [http://goo.gl/Ottiot\\_5](http://goo.gl/Ottiot_5).

<sup>33</sup> Louw "Chapter 19: Surrogate Motherhood" 19-13.

<sup>34</sup> Nicholson 2013 *SAJHR* 500.

<sup>35</sup> Nöthling-Slabbert 2012 *SAJBL* 31.

It has also been suggested that section 294 is unconstitutional as it violates an infertile person's right to make decisions regarding reproduction, as well as the person's rights to equality and dignity.<sup>36</sup>

### 3.1.1.1 The right to make decisions regarding reproduction

Making decisions regarding reproduction can be interpreted as deciding to have a child or not to have a child. In the South African context very little has been said about the content of this right.<sup>37</sup> The only decisions on reproductive rights are the *Christian Lawyers Association* cases,<sup>38</sup> which focused on the right to make decisions regarding reproduction in the context of choosing to terminate a pregnancy. To date very little – if anything – has been written about the right to make decisions regarding reproduction in the context of having a child.<sup>39</sup> Thus, whether or not this right permits an individual to choose how to reproduce will undoubtedly generate much debate, particularly where biology has dictated that procreation will not occur by means of natural conception. In other words, is the right enshrined in section 12(2)(a) of the *Constitution* reserved for the fertile or does it extend to the infertile as well?<sup>40</sup> One would think that the answer to this question is obvious, but this is not necessarily the case.

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<sup>36</sup> Louw "Chapter 19: Surrogate Motherhood" 19-13. By necessity this decision includes making a decision to have a child that they could have naturally. Here the emphasis is on the exercise of bodily and psychological integrity as enshrined in s 12(2) of the *Constitution of the Republic of South Africa*, 1996.

<sup>37</sup> Currie and De Waal *Bill of Rights Handbook* 308.

<sup>38</sup> *Christian Lawyers Association of SA v Minister of Health* 1998 4 SA 1113 (T); *Christian Lawyers Association v Minister of Health* 2005 1 SA 509 (T).

<sup>39</sup> In fact on a recent perusal of a 2014 textbook on constitutional law the author was disconcerted to discover that no mention is made of s 12 of the *Constitution* at all. Another textbook dedicated only 5 lines to a discussion on the right to make decisions regarding reproduction – a right which at some time or other will affect almost every individual.

<sup>40</sup> It should be noted that while the South African *Constitution* protects the right to make decisions regarding reproduction, other international human rights instruments protect the right to found a family. Examples are a 16 of the *Universal Declaration on Human Rights* (1948) and a 12 of the *European Convention on Human Rights* (1953). The challenge posed by the wording of s 12 of the *Constitution* is that it arguably raises questions about the availability of this right to persons who are infertile and are thus unable to reproduce naturally. In contrast, the right to found a family is broader as it deals with the idea of founding families in ways that are not restricted to natural conception.



On the one hand it could be argued that legislation permitting access to contraceptives and terminations of pregnancy are available only to individuals who can benefit from their use. By this reasoning, a woman who is thus not pregnant would not need access to a termination, and therefore the *Choice on Termination of Pregnancy Act*<sup>41</sup> would not apply to her. Similarly, the rights enshrined in the Bill of Rights relating to children, citizens and detained persons are not available to everyone. They are available only to those individuals who qualify, namely children, citizens and detained persons. Based on this logic, the right enshrined in section 12(2)(a) does not extend to those who are infertile, but only to those who are fertile.

On the other hand, section 12(2)(a) provides that **everyone** [emphasis added] has the right to make decisions regarding reproduction. This section is in no way qualified to suggest that it is restricted to fertile individuals. This presumably suggests – in the absence of evidence to the contrary – that everyone can make decisions regarding reproduction regardless of whether they are fertile or not. Such an interpretation seems most tenable in the light of the fact that individuals may not be entirely infertile, but may suffer from varying degrees of subfertility.<sup>42</sup>

Adopting the approach that section 12(2)(a) confers the right to make decisions regarding reproduction to both the fertile and infertile, the author is of the opinion that the content of "the right to decide" includes the right to make use of natural conception or conception by assisted means.<sup>43</sup> This entails deciding whether to make use of one's own gametes or those of a gamete donor and whether recourse will be had to a surrogate mother or not.

Arguably this right to decide – as an expression of bodily and psychological integrity – could include deciding to procreate by means of a surrogate even in circumstances where the person exercising this right is fertile and capable of reproducing personally

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<sup>41</sup> *Choice on Termination of Pregnancy Act* 92 of 1996.

<sup>42</sup> If this right had been qualified, individuals' rights would have been severely and unduly restricted if they were subfertile and not allowed to make decisions regarding reproduction.

<sup>43</sup> As the content of the right to decide has not been clarified, it could presumably include any exercise of choice pertaining to reproduction.

and without assistance, but chooses not to do so.<sup>44</sup> However, this issue is too complex to discuss here and does not fall within the scope of this article.

For the purposes of this article, the author is of the opinion that infertile individuals have the right to decide whether to procreate using their own gametes or those of donors, or to use a surrogate.<sup>45</sup> Section 294 of the *Children's Act*, however, denies infertile individuals, at least those who cannot provide a genetic link, the right to resort to surrogacy and in so doing denies them their rights under section 12(2)(a) of the *Constitution*. The denial of this right amounts to a limitation of the right.

#### 3.1.1.1.1 A justifiable limitation of the right to make decisions regarding reproduction

No right in the *Constitution* is absolute. Instead, rights may be limited. It is thus necessary to decide whether the operation of section 294, which limits an infertile person's right to make decisions regarding reproduction, is justifiable in terms of section 36 of the *Constitution*.

Section 36 provides that:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- a) The nature of the right;
- b) The importance of the purpose of the limitation;
- c) The nature and extent of the limitation;
- d) The relation between the limitation and its purpose; and
- e) Less restrictive ways to achieve the purpose.

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<sup>44</sup> For example, a female who opts to focus on her career and decides to make use of a surrogate to procreate when she in fact is biologically capable of doing so.

<sup>45</sup> This view appears to be in line with that expressed by Lewis *Constitutional and Contractual Implications* 4 who interprets s 12(2) as including choosing to have a child "that they would not ordinarily be able to have" presumably by whatever means available, ie either adoption or assisted reproduction.

When called upon to interpret the meaning of section 36 (or section 33 as it then was under the *Interim Constitution*<sup>46</sup>) the Constitutional Court held:<sup>47</sup>

The criteria prescribed by section 33(1) for any limitation of the rights contained in section ... are that the limitation must be justifiable in an open and democratic society based on freedom and equality, it must be both reasonable and necessary and it must not negate the essential content of the right.

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

Section 294 qualifies as a law of general application<sup>48</sup> as it is prescribed by the *Children's Act*. It does not appear to apply arbitrarily. Whether the limitation of the rights of those negatively affected by section 294 is reasonable and justifiable is questionable. The *Ad Hoc* Committee responsible for the report on surrogacy maintained that the limitation was reasonable and justifiable as the wording of section 294 aims to prevent child trade and the commodification of babies, and it protects the best interests of the child by promoting a genetic link.<sup>49</sup> While this appears to be a noble purpose, no evidence has been presented to prove that allowing infertile couples who are incapable of providing a genetic link to take advantage of surrogacy would

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<sup>46</sup> *Constitution of the Republic of South Africa* 200 of 1993 (*Interim Constitution*).

<sup>47</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 103. Footnotes omitted.

<sup>48</sup> Lewis *Constitutional and Contractual Implications* 91.

<sup>49</sup> Louw "Chapter 19: Surrogate Motherhood" 19-13.

result in child trade or the commodification of babies. Persons who are able to meet the genetic link requirement are as capable of child trade and treating their babies as commodities as those who are unable to do so. It thus seems unreasonable to suggest that the presence of a genetic link will guarantee freedom from exploitation for any child. As for the suggestion that the presence of a genetic link promotes the best interest of the child, Fretwell Wilson notes that there are studies that have shown a "compelling link between infertility and the best interests of resulting children".<sup>50</sup>

Furthermore the nature and the extent of the limitation are quite severe,<sup>51</sup> given the importance of procreation for ensuring the survival of the species and the value placed socially and culturally on an individual's ability to procreate.<sup>52</sup> This ability is often tied to identity and worth in a society, and the inability to procreate has negative repercussions for an individual's sense of self-worth.

It can therefore be concluded that the justification behind this limitation is not as sound as it should be. In fact, it could be argued that there are less restrictive means to achieve the same purpose. Courts play an integral role in authorising surrogacy arrangements before artificial fertilisation can take place.<sup>53</sup> They are the guardians of what could potentially be an exploitative process and are required to vet any applicants seeking to utilise this procedure. If the courts can vet the motives of applicants who are able to provide a genetic link, then presumably they are equally equipped to do so in instances where no genetic link exists. In doing so, they would be able to root out improper motives before surrogacy agreements were sanctioned. The presence or absence of a genetic link on the part of the commissioning parents should be immaterial.

Furthermore, the purpose of the limitation seeks to disadvantage only infertile persons, who are already in a weaker position as far as reproduction is concerned, by

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<sup>50</sup> Fretwell Wilson 2003 *AJLM* 353.

<sup>51</sup> Individuals who are incapable of procreating may experience feelings of failure, and the denial of an otherwise available opportunity for them to procreate may negatively impact on them.

<sup>52</sup> Pillai 2010 *International Research Journal* 98.

<sup>53</sup> See generally *Ex parte MS* 2014 JDR 0102 (GNP).

differentiating between those who can provide gametes compared with those who cannot. Such a distinction does not appear to promote human dignity, equality and freedom in an open and democratic society.

In summary, section 294 limits an infertile person's right to make decisions regarding reproduction in the context of surrogacy where the person is incapable of providing a genetic link. The limitation of such a person's right is unreasonable and unjustifiable given the nature and extent of the limitation, the fact that the relationship between the limitation and its purpose is tenuous at best, and the fact that there are less restrictive ways to accomplish the purpose behind the limitation.

This view is supported by Lewis, who is of the opinion that the limitation caused by section 294 is unjustifiable and without a constitutionally acceptable purpose, as this provision denies infertile persons the right to make decisions regarding reproduction.<sup>54</sup> This provision is thus unconstitutional.

#### 3.1.1.2 The right to equality

It has been suggested that section 294 also infringes the affected individuals' right to equality,<sup>55</sup> which is protected under section 9 of the *Constitution*.<sup>56</sup> According to this provision, a law which differentiates between groups of individuals amounts to discrimination if it is on a ground listed in section 9(3). In this case the listed ground in question is disability. Individuals who are unable to provide the genetic material required by section 294 find themselves in this position as a result of a biological abnormality or inability. Section 294 differentiates between those who are able to

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<sup>54</sup> See Lewis *Constitutional and Contractual Implications* 88-93 for a discussion of the constitutionality of s 294 of the *Children's Act*.

<sup>55</sup> Louw "Chapter 19: Surrogate Motherhood" 19-13.

<sup>56</sup> S 9 of the *Constitution* provides:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) ...
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) ...
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

provide genetic material for surrogacy and those who cannot, which constitutes discrimination.

Section 9(3) of the *Constitution* further provides that if the discrimination is on a listed ground, then the discrimination is presumed to be unfair. Section 294 thus unfairly discriminates against this group. This view is in line with that expressed by Carnelley and Soni,<sup>57</sup> who are of the opinion that the differentiation caused by section 294 amounts to discrimination on the basis of disability, which then constitutes unfair discrimination.

Alternatively, if an inability to provide gametes is not viewed as a listed ground, the differentiation on this basis does not automatically amount to discrimination. According to the court in *Harksen v Lane*, where the differentiation is not on a listed ground but on an analogous ground, the differentiation will constitute discrimination if:<sup>58</sup>

- a) the differentiation relates to other attributes or characteristics attaching to the persons; and
- b) the differentiation has the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.

Section 294 differentiates between individuals who are able to provide gametes and those who are not. This is a characteristic or an attribute attaching to the person. It further has the effect of impacting on the person in a serious manner compared to those who are able to provide genetic material. The differentiation is thus on an analogous ground and amounts to discrimination. In the case of discrimination on an analogous ground, the discrimination will be presumed to be unfair only if regard is had to the position of the complainants in society, the nature of the provision and the

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<sup>57</sup> Carnelley and Soni 2008 *Speculum Juris* 42. In *Harksen v Lane* 1998 1 SA 300 (CC) para 49 the court acknowledged that the specified grounds listed in s 9(3) of the *Constitution* may "relate to immutable biological attributes or characteristics".

<sup>58</sup> *Harksen v Lane* 1998 1 SA 300 (CC) para 46.

purpose sought to be achieved by it and the extent to which the discrimination has impacted on the human dignity of the persons concerned.<sup>59</sup>

The infertile have historically often been stigmatised for their inability to procreate. While the purpose behind section 294 is noble, the nature of the infringement suffered by a particular group of infertile individuals serves only to intensify their feelings of inadequacy at being unable to procreate. This then has the effect of impairing their human dignity and amounts to an impairment of a "comparably serious manner".

Section 294 thus unfairly discriminates against a particular group of individuals, which discrimination is unconstitutional.

It is worth noting the recent cases of *Mennesson v France* and *Labassee v France*<sup>60</sup> decided by the European Court of Human Rights (ECHR), where the court was called upon to determine whether French law which failed to recognise the legal relationship between the commissioning parents and the offspring born from surrogacy arrangements concluded abroad amounted to violations of their rights to respect for private and family life and their right to equality. Surprisingly, while the court found that the law did not amount to a violation of the parents' rights to respect for family life, it did amount to a violation of the children's right to respect for their private lives.<sup>61</sup> In the light of these findings the court found it unnecessary to pronounce on whether the law violated the applicants' rights to equality.<sup>62</sup> Regrettably, South Africa does not have a comparable provision in its Constitution. However, this right may find protection under section 10 of the Constitution according to *Dawood v Minister of Home Affairs*,<sup>63</sup> which will be referred to later.

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<sup>59</sup> *Harksen v Lane* 1998 1 SA 300 (CC) para 50.

<sup>60</sup> *Mennesson v France* (Application No 65192/11 of 26 June 2014); *Labassee v France* (Application No 65941/11 of 26 June 2014).

<sup>61</sup> *Mennesson v France* (Application No 65192/11 of 26 June 2014); *Labassee v France* (Application No 65941/11 of 26 June 2014) para 102.

<sup>62</sup> ECHR 2014 <http://goo.gl/1UNfD0> 4.

<sup>63</sup> *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC).

### 3.1.1.2.1 A justifiable limitation

If the approach of the ECHR were to be adopted then it would not be necessary to consider whether or not section 294 of the *Children's Act* constitutes a justifiable limitation on the affected individuals' right to equality. However, it is necessary to do so for the sake of completeness.

As determined above, the infringement of section 12(2)(a) of the *Constitution* is neither reasonable nor justifiable. The same conclusion can be reached in respect of the violation of section 9 of the *Constitution*. Under the circumstances, section 294 can only be found to be unconstitutional.

### 3.1.1.3 The right to dignity

The right to dignity is protected under section 10 of the *Constitution*, which provides that: "Everyone has inherent dignity and the right to have their dignity respected and protected."

This right was also interpreted in *Law v Canada* in the following terms:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context of their differences. Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within society.<sup>64</sup>

From the dictum above, it would appear that the application of section 294 has the effect of treating individuals who are able to meet the genetic link requirement differently from those who cannot – and, I dare say, stigmatises the latter as being less capable and lesser human beings. This differentiation is based on personal traits attaching to the infertile individuals in question. Their human dignity is thus violated by this provision, as it ignores and/or marginalises those individuals who are incapable

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<sup>64</sup> *Law v Canada* 1 SCR 497 (1999) para 53.



of providing the gametes needed for a valid surrogacy arrangement, and in so doing offends their sense of self-worth.

The Constitutional Court further confirmed that legislation which "impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance" amounts to a violation of that individual's human dignity.<sup>65</sup> The desire to have children is as old as time. It is what sustains the human race – this biological urge to procreate.<sup>66</sup> Legislation which thus prevents certain individuals from achieving this goal amounts to a violation of their right to have their dignity respected and protected.

### 3.1.1.3.1 A limitation of the right to dignity

In *S v Makwanyane*<sup>67</sup> the Constitutional Court held that the right to dignity "can only be limited by legislation which passes the stringent test of being 'necessary'".

This raises the question whether the requirement in section 294 is necessary. The term "necessary" is defined as that which is essential.<sup>68</sup> Presumably, the necessity of this provision must be determined with reference to the government purpose behind the provision. It has been suggested that this provision will prevent child trade and the commodification of babies, and promote a bond between the parents and child which will be in the child's best interests. In my opinion, this provision is not necessary to achieve the stated government purpose. As previously stated, there are other, less restrictive means of achieving the same goal. The limitation of the right to dignity is therefore not justified and is thus unconstitutional.<sup>69</sup>

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<sup>65</sup> *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 37.

<sup>66</sup> Pillai 2010 *International Research Journal* 98.

<sup>67</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 58.

<sup>68</sup> Oxford Dictionaries 2015 <http://goo.gl/HpfhaI>.

<sup>69</sup> This view is confirmed by Lewis *Constitutional and Contractual Implications* 88-93. Lewis expresses the opinion that: "the limitation which arises out of the application of section 294 on would-be infertile commissioning parents is unjustifiable and does not serve a constitutionally acceptable purpose. The Act expressly discriminates against infertile persons and such discrimination is unfair. As a result of the operation of section 294 of the Act, infertile persons are not permitted to exercise their right to make decisions regarding reproduction and the dignity of these persons is further impaired because they are not permitted to resort to surrogacy as a form of assisted reproduction. The author agrees that the protection of all the parties to the agreement interests must be

### 3.1.1.4 From unjustifiable limitations to declarations of invalidity?

Where a law or conduct infringes the rights of a person or persons, the said law or conduct is unconstitutional and must be declared invalid. Section 294 infringes the rights of a particular group of infertile individuals and should be declared invalid. However, declarations of invalidity are not made overnight. Unless Parliament intervenes and amends this provision *mero motu* – which is the ideal solution in this case – it may take some time before the courts are called upon to pronounce on the constitutionality of section 294.

In the interim, this leaves those individuals who are unable to access surrogacy as a means of assisted reproduction without any options unless recourse is had to adoption. It has been suggested by numerous bodies that adoption is an alternative to surrogacy for those who do not meet the requirements of section 294. What follows is an assessment of adoption and whether it can truly be viewed as an alternative to surrogacy.

## 4 Can adoption be an alternative to surrogacy?

It was suggested by the *Ad Hoc* Parliamentary Committee that couples who cannot meet the requirements of section 294 consider adoption as an alternative. The Committee maintained that:

[i]n instances where both the male and the female gametes used in the creation of the embryo are donor gametes, it would result in a situation similar to adoption as the child or children would not be genetically linked to the commissioning parent or parents. This would obviate the need for surrogacy as the couple could adopt a child.<sup>70</sup>

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considered, but without conclusive evidence to show that when the child born of the agreement is genetically related to the commissioning parent that the surrogate mother will be less likely to refuse to hand over the child upon birth, the author cannot submit that the inclusion of section 294, and the restrictive effect that it imposes on infertile persons is warranted and is proportionate to the benefit which [it] aims to achieve". See Lewis *Constitutional and Contractual Implications* 93.

<sup>70</sup> PMG 1999 [http://goo.gl/Ottiot\\_15-16](http://goo.gl/Ottiot_15-16).

Before considering the veracity of this statement, it is first necessary to consider the meaning of the word "alternative". The Oxford Dictionary defines an alternative as "(of one or more things) available as another possibility or choice".<sup>71</sup>

The premise made by the *Ad Hoc* Parliamentary Committee suggests that those who are unable to comply with section 294 resort to adoption as an alternative; however, this presupposes that the parties concerned have the choice or option of pursuing adoption.

The adoption process has limitations of its own, which may exclude certain individuals from becoming parents.<sup>72</sup> This already suggests that adoption may not provide another possibility for infertile persons.

Furthermore, the adoption process is very different from surrogacy. Surrogacy arrangements commence prior to the child's birth, whereas adoption in most cases occurs thereafter.<sup>73</sup>

Adoption sometimes produces a different outcome from surrogacy. In surrogacy the commissioning parents are guaranteed a child(ren) whom they will care for from birth, whereas in adoption a new-born child is not a guarantee. Further, the issue arising in adoption is very different from the issue in surrogacy cases, namely "how best to care for [the adoptive child] now that the birth family cannot" as opposed to "how best to bring [a child] into the world and into a family that desires a child".<sup>74</sup>

In this respect Fretwell Wilson argues that "the strength of the analogy between ... adoption and ... surrogacy is unclear",<sup>75</sup> with which view the author is inclined to agree. Given the differences between surrogacy and adoption, the notion that one is an alternative for the other is a huge misconception. The two are vastly dissimilar.

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<sup>71</sup> Oxford Dictionaries 2015 <http://goo.gl/xX4vzG>.

<sup>72</sup> For example age or medical conditions.

<sup>73</sup> Louw "Chapter 19: Surrogate Motherhood" 19-13.

<sup>74</sup> Fretwell Wilson 2003 *AJLM* 342.

<sup>75</sup> Fretwell Wilson 2003 *AJLM* 342.

Added to which the criteria to assess the suitability of prospective parents is very different in these processes. The factors taken into consideration to determine the suitability of commissioning parents are vastly different from those of adoptive parents. In the case of adoptive parents section 231(2) sets out the requirements to determine the suitability of individuals to adopt. Section 295(b)(ii) maintains that the commissioning parents must be "suitable to accept the parenthood of the child that is to be conceived", but no mention is made of how this suitability is to be assessed. Schäfer notes that the *Ad Hoc* Parliamentary Committee interpreted this element as involving "a strict screening process" and "conclusive evidence". He further notes:

Regrettably these proposals were not adopted in the Children's Act 2005 nor, contrary to the expectations, were they addressed in the Regulations. This element then is one of the weakest in Chapter 19.<sup>76</sup>

He further states that:

It is very difficult to see how the High Court could assess the commissioning parents' suitability as prospective parents in any meaningful way. This lack of rigour contrasts unfavourably with the screening process required for adoption: an adoption social worker must assess the suitability and ability of a prospective adoptive parent.<sup>77</sup>

In the absence of criteria to assess suitability, what factors should be taken into account? Is a genetic link determinative of what will be in the best interests of the child?

## **5 The significance of a genetic link**

According to Fretwell Wilson, evidence suggests that there is a greater correlation between infertility and the best interests of resulting children than fertility and the best interests of the resulting children. That said, what is often overlooked by the existence of Chapter 19 of the *Children's Act* is that surrogacy is an option only for couples who are infertile and not for those who are fertile and able to procreate without assistance. The only slight on this chapter is the existence of section 294, which effectively distinguishes between persons suffering from infertility which prevents them from providing genetic material to produce a child and those who are

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<sup>76</sup> Schäfer *Child Law in South Africa* 272.

<sup>77</sup> Schäfer *Child Law in South Africa* 272.

infertile yet able to provide genetic material. In both instances the parties are infertile. It is only the origin of their infertility which distinguishes them.

So, based on the evidence referred to by Fretwell Wilson, whether parents are able to provide genetic material for their prospective offspring or not, the likelihood remains that these offsprings' interests will be better promoted than the interests of their counterparts who are born to fertile parents.

In the event that this argument is not sufficiently compelling, it has been suggested in *S v M*<sup>78</sup> that while the best interests of the child are of vital importance, they are not the only consideration. Moreover, it has been suggested that the application of the principle of the best interests in the context of surrogacy should be considered with caution.<sup>79</sup> This suggests that there are other facts to be considered in deciding who should be permitted to enter into surrogacy agreements. A genetic link is clearly not indicative that the best interests of the child will be protected.

In the absence of a genetic link and absolute certainty regarding the best interests of prospective children, the only other solution would be to consider an alternative basis on which to decide who may enter into surrogacy agreements.

Sattawan and Medhi propose the adoption of an intent-based approach to surrogacy.<sup>80</sup> In their opinion this approach should be "recognised as *one of the bas[e]s* for determining parental ... rights".<sup>81</sup> In terms of this approach parental rights should not be recognised purely on the basis of biology. In instances where commissioning parents are unable to provide a genetic link to their child(ren), the intention to parent should be considered.<sup>82</sup> If such an approach is adopted, then the existence of a genetic link is a possible requirement but not the only one.

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<sup>78</sup> *S v M* 2007 2 SACR 539 (CC) para 107.

<sup>79</sup> Louw 2013 *THRHR* 573; Louw 2014 *De Jure* 118.

<sup>80</sup> Sattawan and Medhi 2007 <http://ssrn.com/abstract=99851> 9.

<sup>81</sup> Sattawan and Medhi 2007 <http://ssrn.com/abstract=99851> 9. Emphasis added.

<sup>82</sup> Intention to parent is a requirement for adoption where the parents in most instances do not have a genetic link to the child.

This approach was applied in *McDonald v McDonald*,<sup>83</sup> where the parties who had been married at the time, conceived by means of in vitro fertilisation using the sperm of the husband and the eggs of a female donor, which were then implanted into the wife's uterus. The couple gave birth to twins but when the marriage broke down the husband sought an order declaring him the only genetic parent of the twins and therefore the only legal parent. The New York Court of Appeals rejected this claim and found that the wife was the legal mother because of her intent to raise the children and create a family.<sup>84</sup>

Similarly, in the majority judgment in *Johnson v Calvert*,<sup>85</sup> the

... California court denied the gestational carrier's claim and held that the wife was the legal mother because "from the outset [she had] intended to be the child's mother" and the child would not have been born but for the couple's desire and actions to create a family.<sup>86</sup>

Both these cases establish intent to parent as a basis for awarding parental rights in the absence of genetic relationships.

## **6 A possible way forward?**

Section 295(a) requires infertility on the part of the commissioning parents while section 294 requires a genetic link with at least one commissioning parent. These two requirements must both be present in order for a surrogacy agreement to be approved by the courts. The question arises, however, as to why there is a need for both requirements and not for one or the other. The presence of a genetic link is not a guarantee that the best interests of the child will be safeguarded at all times. Furthermore, the mere fact that a commissioning parent is infertile is not a guarantee that it will make a good parent to a prospective child.<sup>87</sup>

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<sup>83</sup> *McDonald v McDonald* 196 AD 2d 7 (1994) 12.

<sup>84</sup> Schlesinger date unknown <http://goo.gl/QdnfQu>.

<sup>85</sup> *Johnson v Calvert* 5 Cal 4th 84, 851 P 2d 776 (1993) 782.

<sup>86</sup> Schlesinger date unknown <http://goo.gl/QdnfQu>.

<sup>87</sup> Although Fretwell Wilson 2003 *AJLM* 353 notes there are studies that have shown a "compelling link between infertility and the best interests of resulting children".

What criterion should then be applied? If roots should not matter, then what should? Koyonda suggests in terms of section 295(b)(ii) that courts should consider the capacity of intended parents to raise a child.<sup>88</sup> This involves an evaluation of their suitability and intention to parent. Individuals who are eager to have children should thus not be denied the use of surrogacy merely because they cannot meet the genetic link requirement.

It may be argued that adopting such an approach condones the commodification of children, but this is not the case. Medical science has made it possible for individuals to reproduce with assistance if they are unable to do so naturally. Surrogacy is one such way. Surrogacy arrangements need to be approved by a court in any event before fertilisation may take place. One of the tasks of the court is to assess the suitability of the surrogate<sup>89</sup> as well as the commissioning parents<sup>90</sup> before approving a SMA. The existence of a genetic link does not make a person a better parent and neither does it guarantee the best interests of the child.

So what is the way forward? Fretwell Wilson has suggested that:

... state legislators and policy-makers should: first, decide what they intend to accomplish by regulating surrogacy arrangements and who are the legislation's intended beneficiaries. Specifically, legislators should decide whether infertility requirements are meant to protect the resulting child. Second, legislators should evaluate whether infertility requirements, as presently constructed, achieve the desired results.<sup>91</sup>

It would seem that surrogacy arrangements – at least in South Africa – are intended to assist the infertile while at the same time preventing the surrogate mother from being exploited. The primary beneficiaries are thus the childless commissioning parent or parents. Requiring a genetic link to the child does not assist these individuals. Instead, the very people that surrogacy is intended to assist are rendered helpless. In an age where access to donor gametes is quite simple, no individual should be denied

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<sup>88</sup> Koyonda 2001 *CILSA* 272-733, 276.

<sup>89</sup> S 295(c)(ii) of the *Children's Act*.

<sup>90</sup> S 295(b)(ii) of the *Children's Act*.

<sup>91</sup> Fretwell Wilson 2003 *AJLM* 353.

the right to make decisions about their reproduction.<sup>92</sup> This right has not been interpreted as referring only to choices regarding contraception and the termination of pregnancy.<sup>93</sup> Instead, it includes the right to make decisions about the manner in which one reproduces, and this includes the right to decide to use a surrogate and donor gametes if necessary.

It is recommended that the way forward for South Africa is to adopt the approach of the American Bar Association, which in 2008 drafted a *Model Act Governing Assisted Reproductive Technology*.<sup>94</sup> Article 7 proposes two ways of dealing with surrogacy arrangements: the first is in the case of no genetic link. In these instances court approval is a necessity. On the other hand, where there is a genetic link, no judicial intervention is necessary.<sup>95</sup>

While it is submitted that court approval should be a prerequisite for every SMA, a distinction should be made in accordance with the *Model Act* between cases with a genetic link and cases with no genetic link. Different criteria could then possibly be applied to cater for the difference in circumstances. It is proposed that a special committee<sup>96</sup> or a special division of the Children's Court be constituted to deal with and consider these cases.

Pillay and Zaal<sup>97</sup> suggest that a specialist body review applications before court confirmation takes place. This approach has been adopted in Australia and Israel and has been quite successful. This body or panel would then need to consider who is eligible to enter into a SMA with or without the need for a biological link.

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<sup>92</sup> Whether the same can be said for women who do not want to ruin their careers or their bodies by an intended pregnancy is a debate left for another time. The focus of this article is the position of the infertile with regard to surrogacy.

<sup>93</sup> Ryan 1997-1998 *Val U L Rev* 756.

<sup>94</sup> It should be noted that the *Model Act* has not yet been adopted.

<sup>95</sup> Maryland Department of Legislative Services 2012 <http://goo.gl/SD9tIo> 14.

<sup>96</sup> Nosarka and Kruger 2005 *SAMJ* 942 have proposed that the special panel include a psychologist, a social worker and a medical practitioner specialising in reproductive health.

<sup>97</sup> Pillay and Zaal 2013 *SALJ* 484.



Nöthling-Slabbert has suggested that "specific regulations relating to surrogate motherhood, issued in terms of the *Children's Act*, are desperately needed, as those relating to artificial fertilisation only regulate the artificial fertilisation process itself".<sup>98</sup>

These regulations could then cater for the two different types of infertility and the requirements that would need to be met in order for surrogacy to be possible.

## **7 Conclusion**

Roots do matter, as a right to know one's genetic origins plays a pivotal role in informing one's identity. However, they do not matter so much as to require genetic material from at least one commissioning parent to facilitate a surrogacy arrangement. What is or should be important is the commissioning parent(s) suitability to parent, which can be gathered from, amongst other evidence, their intention to parent. Biology/genetics provides no guarantee for the welfare of the child. In fact, it has been suggested that the absence of a genetic link may provide a better guarantee of the child's welfare.<sup>99</sup>

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<sup>98</sup> Nöthling-Slabbert 2012 *SAJBL* 29.

<sup>99</sup> Fretwell Wilson 2003 *AJLM* 348.

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## LIST OF ABBREVIATIONS

|                           |  |
|---------------------------|--|
| AJLM                      | American Journal of Law and Medicine                         |
| ART                       | Assisted reproductive technology                             |
| CILSA                     | Comparative and International Law Journal of Southern Africa |
| ECHR                      | European Court of Human Rights                               |
| J Am Acad Matrimonial Law | Journal of the American Academy of Matrimonial Lawyers       |
| PMG                       | Parliamentary Monitoring Group                               |
| SAJBL                     | South African Journal of Bioethics and Law                   |
| SAJHR                     | South African Journal on Human Rights                        |

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|-------------|---|
| SALC        | South African Law Commission                      |
| SALJ        | South African Law Journal                         |
| SAMJ        | South African Medical Journal                     |
| SMA         | Surrogate Motherhood Agreement                    |
| Stell LR    | Stellenbosch Law Review                           |
| THRHR       | Tydskrif vir Hedendaagse Romeins-Hollandse<br>Reg |
| Val U L Rev | Valparaiso University Law Review                  |
| WHO         | World Health Organisation                         |