IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 155/15

In the matter between:

AB	First Applicant
SURROGACY ADVISORY GROUP	Second Applicant

and

THE MINISTER OF SOCIAL DEVELOPMENT	Respondent

and

CENTRE FOR CHILD LAW	*Amicus Curiae*

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PRACTICE NOTE

A. Nature of proceedings

Application for confirmation and variation under section 172(2) of the Constitution.

B. The issues to be argued

The constitutionality of section 294 of the Children's Act 38 of 2005.

C. Portions of the record that are necessary for the argument

As indicated by the parties.

D. Estimate of the duration of oral argument

1 day.

E. Summary of argument

- The CCL submits that the purpose of section 294 of the Children's Act is to regulate surrogacy agreements in order to protect the rights of the child to be born. The heading speaks of genetic origin – and that this is something that belongs to the child.

- CCL submits that Chapter 19 (the Surrogacy Chapter) of the Children's Act is enacted to protect the best interests of the child to be born of the surrogate motherhood agreement and this is evident from the provision of section 295(e) which provides that the agreement can only be confirmed after giving consideration to the best interests of the child to be born.

- In the absence of South African legal provisions that allows people who are conceived by donor assisted reproductive

technologies to access identifying details of their donors, the requirement that a child should be able to know the identity of at least one parent protects the child's right to know their origin and identity. This is what section 294 of the Children's Act aims to achieve.

F. Authorities on which particular reliance will be placed

Acts

- The Children's Act 38 of 2005
- The Constitution, section 28(2) and 12(2)

Case law

- *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC)
- *Natal Joint Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA)
- *Phumelela Gaming & Leisure Ltd v Grundlingh & Others* 2007 (6) 350 (CC)
- *S v Jordan* 2002 (2) SACR 499 (CC)

- *V v V* 1998 (4) SA 169 (C)

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- Cowden M “No Harm, No Foul: A Child’s Right to know their Genetic Parents” *International Journal of Law, Policy and the Family* (2012) 26(1) p 102

- Daniels K et al “Parental information sharing with donor insemination conceived offspring: a follow-up study” *Human Reproduction* (2009) Vol 24 p 1099

- Frith L “Gamete donation and anonymity: The ethical and legal debate” *Human Reproduction* (2001) Vol 16, No. 5 p 818-824

- Isaksson S et al “Two decades after legislation on identifiable donors in Sweden: are recipient couples ready to be open about using gamete donation?” *Human Reproduction* Vol. 26 p 853

- Jadva V et al “ The experiences of adolescents and adults conceived by sperm donation: comparisons by age of disclosure and family type” *Human Reproduction* (2009) Vol 24 p 1909

- Landau R et al “A child of ‘hers’: older single mothers and their children conceived through IVF with both egg and sperm donation” *Fertility and Sterility* Vol. 90 No. 3 September 2008

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- Roslom R et al “Disclosure patterns of mode of conception among mothers and fathers - 5 year follow-up of the Copenhagen Multi-centre Psychosocial Infertility (COMPI) cohort” *Human Reproduction* (2010) Vol 25 p 2006

- Söderström-Anttila V et al “Increasing openness in oocyte donation families regarding disclosure over 15 years” *Human Reproduction* (2010) Vol 25 p 2534

- Van Niekerk C “Section 294 of the Children’s Act: Do roots really matter? *PER/PELJ* (2015)

Reports

SALRC Review of the Child Care Act (Project 110) 2002

Karabo Ozah

Pretoria

12 February 2016

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CENTRE FOR CHILD LAW *Amicus curiae*

AMICUS CURIAE SUBMISSIONS

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A SCHEME OF THESE SUBMISSIONS

1. These submissions will consider:

    1.1 The purposive interpretation of the impugned provision by the court *a quo* and an alternative child-centred interpretation;

    1.2 The importance of the genetic origin of the child and best interests of the child;

    1.3 The Trends towards openness and children's right to identity in donor artificial reproduction technologies;

    1.4 Limitation on reproductive autonomy; and

    1.5 Conclusion.

B PURPOSIVE INTERPRETATION

2. The court *a quo* determined that the legislative intention of chapter 19 of the Children's Act 38 of 2005 ('Children's Act') is to allow commissioning parents to acquire parental rights without being required to go through an adoption.

3. The Centre for Child Law ('CCL'), posits a different purpose, namely to regulate surrogacy agreements in order to protect the rights of the child to be born.

4. In fact, parental responsibilities and rights are as much children's rights as they are parent's rights – this is central the shift we have witnessed in South African law from parental power to parental responsibilities and rights, which pre-dated the Children's Act,[1] but was cemented by it.

5. The wording of the provisions contained in Chapter 19 is helpful in identifying its purpose – keeping in mind that the inevitable departure point for interpretation is the provision itself.[2]

6. Chapter 19 regulates surrogacy – this is plain from the opening words of most of the provisions within it:

   6.1 Section 292 'No surrogate motherhood agreement may….' ; and

   6.2 Section 295 'A court may not confirm a surrogate motherhood agreement unless….'; and

   6.3 Section 296 'No artificial fertilisation of the surrogate mother may take place before ….'.

[1] *V v V* 1998 (4) SA 169 (C).
[2] *Natal Joint Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) para 18.

7. The impugned provision itself, section 294, is no exception. It begins with the words 'No surrogate motherhood agreement is valid unless….'.

8. It is important to note the heading of section 294 which is **Genetic origin of the child**. Although throughout these papers the parties (and the court *a quo*) refer to this section as 'the genetic-link' it is significant that the heading speaks of genetic origin – and that this is something that belongs to the child.

9. Although the court found that it is true that clarity regarding origin can impact upon the self-identity and self-respect of the child, the court went on to find that the fact that this is not required in the context of IVF where double-donation is permitted, it is should not be required in the context of surrogacy.[3]

10. This logic is, with respect, difficult to follow. Risk to children's self-identity and self-respect (their dignity and best interests) is surely all important. The fact that these rights are placed at similar risk in another context is hardly a reason to find their protection irrelevant here.

11. In addition, in the case of IVF, there is a gestational link between the mother and the child. The gestational link is considered emotionally significant as it allows the woman to feel that the child is "hers" and that

[3] Para 85.

she is a "normal" mother who conceived "naturally". Furthermore, the child is said from the additional bond of being gestated in its mother's womb.[4]

12. Viewed from a child rights perspective within the purposive interpretation offered by CCL (ie that the purpose of the law is to regulate surrogacy for the protection of the rights of children to be born),[5] the limitation of commissioning parents' rights is rationally connected to the purpose of ensuring that children may know their genetic origin.

[4] Landau R et al "A child of 'hers': older single mothers and their children conceived through IVF with both egg and sperm donation" Fertility and Sterility Vol. 90 No. 3 September 2008 p582.

[5] The purposive interpretation of the provision must promote the spirit purport and object of the rights in the Bill of Rights (ie the children's rights as well as those of the adults): *Phumelela Gaming & Leisure Ltd v Grundlingh & Others* 2007 (6) 350 (CC) at paras 26 – 27; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at paras 22 – 23.

C THE BEST INTERESTS OF THE CHILD

13. The Second Applicant attempts to dispose of the concern for the issue of the best interest of the child in its Heads of Argument.[6] In particular, the submission is made that leading psychologists have proven that there is no nexus between the best interests of the child and the genetic link requirement. The CCL disagrees with this contention and points out the quote from the Second Applicant's own expert evidence which reads as follows:

> *"The presence or absence of a genetic link between a parent and a child in the context of surrogacy <u>does not appear to</u> have an effect on the child's psychological well-being." (*Our emphasis)

14. We submit that the proposition by the Second Applicant's expert is incomplete, even by her own admission. The reason for this is that the studies pertaining to the impact of the absence of a genetic link between commissioning parents and their children born from a surrogate motherhood agreement are continuing and have not reached a point of conclusion regarding what impact of the lack of a genetic link will have on the child.[7]

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[6] Para [71]-[102].

[7] See in the context of sperm donation: Jadva V et al " The experiences of adolescents and adults conceived by sperm donation: comparisons by age of disclosure and family type" Human Reproduction (2009) Vol 24 No. 8 p 1909.

15. The current expert evidence has two shortcomings:

15.1 It is based on the commissioning parents' views and feelings towards the child who is not genetically linked to them; and

15.2 It does not indicate or address whether the children themselves have been informed of the absence of a genetic link between them and the commissioning parents and how this impacts on their relationships.

16. In their Supplementary Heads of Argument the Second Applicant insists that there is a distinction between adoption and a non-genetic link surrogacy agreement. The CCL submits that this is true, however, that the difference calls for more caution in the latter case than the former. In the case of adoption, the aim is to provide a home for a child that already exists and who may be abandoned or orphaned, whereas in the case of non-genetic linked surrogacy it entails the intentional creation of a child who will never be able to find out the identity of either of his/her biological parents.

17. In terms of section 41 of the Children's Act a child born as a result of artificial fertilisation or surrogacy is only entitled to medical information concerning the child's genetic parents and any other information

concerning his/her genetic parents upon turning 18 years.[8] Section 41(2) provides that the information that is revealed may not reveal the identity of the person whose gamete or gametes were used or that of the surrogate mother.

18. In terms of section 41, the identity of donors of gametes will never be revealed to the child. This in turn means that the child is not provided a right similar to that provided for adopted children in section 248 of the Children's Act to access all the information in their adoption files and adoption register. The CCL submits that the retention of the genetic–link requirement at least cures this problem in respect of surrogacy agreements.

19. The CCL submits further that, the constitutional injunction encompassed in section 28(2) that the bests interests of the child is of paramount consideration in any matter that concerns the child enjoins law makers and the courts to take measures that will enhance the interests of the child and not diminish them.

20. In this regard, the CCL submits that Chapter 19 (the Surrogacy Chapter) of the Children's Act is enacted to protect the best interests of the child to

[8] This was contrary to the original intention of the committee that drafted the Children's Act at the SALRC: See SALRC Review of the Child Care Act (Project 110) 2002 page 57: 'The Commission recommends that, similar to children born of **artificial insemination**, children born of **surrogacy** should have access to medical **and biographical information concerning their genetic parents**' (own emphasis).

be born of the surrogate motherhood agreement and this is evident from the provision of section 295(e) which provides that the agreement can only be confirmed after:

> *" in general, having regard to the personal circumstances and family situations of all the parties concerned, <u>but above all the interests of the child that is to be born</u>……."* (Our emphasis)

D TRENDS TOWARDS OPENNESS AND CHILDREN'S RIGHT TO INDENTITY IN DONOR ARTIFICIAL REPRODUCTION TECHNOLOGIES

21. It has been argued that the article 8 of the United Nations Convention on the Rights and Welfare of the Child[9] supports the approach that donor-conceived children have a right to know their genetic parents.[10]

22. Legal developments across the world indicate a move towards openness and the disclosure of identifying information of donors to donor-conceived children where ART is used.

23. In particular, research[11] shows that the following countries have provisions that require that the identity of donors be revealed to children:

[9] Art 8(1) 'States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference'. Art 8(2) 'Where a child is illegally deprived of some or all of the elements of the his or her identity, states Parties shall provide appropriate assistance and protections, with a view to re-establishing speedily his or her identity'.

[10] Cowden M "No Harm, No Foul: A Child's Right to know their Genetic Parents" International Journal of Law, Policy and the Family (2012) 26(1) 102 at 106.

23.1 Sweden: Law 1140 of 1984 allows the child to find the identity of his/her sperm donor "parent" when the child is sufficiently mature. This is interpreted to mean at attainment of majority;

23.2 The United Kingdom: The Disclosure of Donor Information Regulations of 2004 provide that children conceived in clinics are able to access identifying details about their donor when reaching maturity;

23.3 Switzerland: Article 24 novies of the Constitution guarantees the child access to data concerning his lineage. Thereby allowing the child to receive identifying information about his/her donor;

23.4 Austria: The Medically Assisted Procreation Act of 1992 incorporated article 8 of the European Convention on Human Rights. It provides that the right to respect family life means that sperm donation should not be anonymous;

23.5 New Zealand: The Human Assisted Technology Act of 2004 provides that donor offspring should be made aware of their genetic origins and be able to access information about those origins;

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[11] Frith L "Gamete donation and anonymity: The ethical and legal debate" Human Reproduction (2001) Vol 16, No. 5 p 818-824; Nordqvist P "The Drive for Openness in Donor Conception: Disclosure and the Trouble with Real Life" International Journal of Law, Policy and the Family (2014) 28, 321 at 322.

23.6 Iceland: The 1996 legislation on Technical Fertilisation provides donors with the choice to remain anonymous or to be identified;

23.7 Australia

23.7.1 Victoria: The Infertility Treatment Act of 1995 allows children access to the identity of their gamete donor.

23.7.2 Western Australia: The Human Reproductive Technology Act provides that children must, at the age of 16 years, be allowed to access to donor identifying information.

23.7.3 South Australia: The legislation does not explicitly state that a child has a right to know, but the National Health and Medical Research Council Guidelines specify that persons conceived using ART procedures are entitled to know their genetic parents.

23.7.4 New South Wales: The Assisted Reproductive Technology Act of 2007 allows donor-conceived individuals aged 18 years and over to access identifying information regarding their donor.

23.8 Holland: The legislation provides that only non-anonymous sperm donation is allowed and all sperm banks are obliged to recruit non-anonymous donors.

24. The reasons advanced for the developments towards openness and the right to know one's genetic origins include:

24.1 That it is essential to human well-being;

24.2 That people have a right to the truth about their origins;

24.3 That children who are aware that they are donor conceived suffer psychologically when they are denied information about their origins and identity.[12]

25. There is significant evidence of a trend towards openness and allowing the child to know his or her origin. The absence of conclusive evidence on whether or not a child is harmed by not knowing their biological origins does not diminish the child's right to the truth about their conception and origins.[13]

26. The State has a duty to ensure that children are guaranteed rights, including the right to know their genetic origins. As one author puts it:

> *"Finally, and perhaps most importantly, the claim is distinct and of greater significance than other children's claims to disclosure, because of the involvement of the state. Unlike the examples of private individuals who conceive a child and then conceal its paternity (or maternity), the state is involved in the creation and conception of donor-conceived children……..The state's*

[12] Frith (2001); Cowden (2012) 26(1) at 103.
[13] Frith (2001) p 821.

involvement causes it to acquire duties towards them that it does not hold to children at large."[14]

27. The state has the duty to use legislative power to ensure that donor-conceived children are aware of their status and nature of their conception; and the state should allow donor-conceived children access to identifying information regarding their donor.[15]

28. Research suggests that parents of donor-conceived children are influenced by various factors and do not all necessarily follow the law in respect of disclosure of the child's origin.[16] In some countries the majority of parents of donor conceived children do not disclose to the children.[17] Whereas, recent research in Sweden indicates an improvement and a move towards openness.[18] One of the shortcomings of legislation providing for disclosure is that the process of disclosing must still be formalised in policy. This is considered essential to ensure that the child's

[14] Cowden M (2012) at p 120.
[15] Ibid at p 121.
[16] Söderström-Anttila V et al "Increasing openness in oocyte donation families regarding disclosure over 15 years" Human Reproduction (2010) Vol 25, No. 10 p 2534; Roslom R et al "Disclosure patterns of mode of conception among mothers and fathers-5 year follow-up of the Copenhagen Multi-centre Psychosocial Infertility (COMPI) cohort" Human Reproduction (2010) Vol 25, No. 8 p 2006; Daniels K et al "Parental information sharing with donor insemination conceived offspring: a follow-up study" Human Reproduction (2009) Vol 24, No. 5 p 1099; Freeman T et al "Gamete donation: parents' experiences of searching for their child's donor siblings and donor" Human Reproduction (2009) Vol 24, No. 3 p 505.
[17] Ibid.
[18] Isaksson S et al "Two decades after legislation on identifiable donors in Sweden: are recipient couples ready to be open about using gamete donation?" Human Reproduction Vol. 26, No. 4 p 853 at p 855.

right to know their biological origin is guaranteed and not left to the discretion of the parents.[19]

29. The CCL submits that the fact that South African laws have not yet formalised the realisation of the right to know one's genetic parents, is one of the reasons why section 294 is constitutionally defensible. The requirement that a child should be able to know the identity of at least one parent provides a measure of protection of the child's right to know his or her identity.

E LIMITATIONS ON REPRODUCTIVE AUTONOMY

30. One of the Applicants' central arguments is that section 294 of the Children's Act limits the rights to dignity, privacy and reproductive autonomy. It should be noted that in *S v Jordan*[20] the appellants grouped together dignity, privacy and freedom of the person under the concept of autonomy. The judgment by Sachs J and O'Regan J rejected this approach, finding that autonomy is not a right in the Constitution, and that the applicants should have identified rights that had been infringed.

31. The CCL empathises with the impact of infertility on adults wishing to have children as elaborated in the Applicants papers. However, the CCL

[19] Frith p 822.
[20] 2002 (2) SACR 499 (CC) para 52.

submits that the Applicants' premise assumes that infertile persons have a right to reproduce.

32. The right to reproductive autonomy is yet to be given content in the South African legal context.[21] The wording of section 12(2)(a) of the Constitution places in question whether infertile persons who are not able to reproduce naturally have an unfettered right to bring about the creation of a child through artificial means, without regulation such as that provided by section 294.[22]

33. The CCL submits that the right in section 12(2) of the Constitution, like any other right in the Constitution can be limited by a law of general application.

34. The CCL submits further that, in order to establish that the right in section 12(2) has been limited, it needs to be given content first taking into account other relevant interests.

35. In this regard, the CCL submits that the enactment of provisions to regulate surrogacy agreements serve to balance the interests of the

[21] Pickles, CMS "Addressing the tension between female reproductive autonomy and foetal interests during pregnancy and birth" (unpublished LLD thesis, University of Pretoria, 2014) at page 159: "The term 'reproductive autonomy' seems problematic because research indicates that this term does not appear in any South African case law".

[22] Van Niekerk C "Section 294 of the Children's Act: Do roots really matter? PER/PELJ (2015) 18(2) p 404 fnt 39 and 40. Van Niekerk argues (at page 405) that the section 12(2) wording of "everyone has the right to make decisions regarding reproduction" is not qualified in a manner that limits its application to fertile individuals. The unqualified nature of the clause encompasses those individuals who may not be entirely infertile, but may suffer from varying degrees of subfertility

commissioning parents, the surrogate mother and more important, those of the child to be born.

F CONCLUSION

36. The CCL argues for a purposive interpretation of section 294 (within the broader purpose of Chapter 19 of the Act) which creates space for the balancing of the rights of commissioning parents, surrogate mothers and the child to be born.

37. The best interests and the right of the child to be born to know his or her identity are reasonable and justifiable limitations on commissioning parents' rights to dignity and privacy.

38. The trend towards openness and the provision for a right to access identifying details of donors by donor-conceived children underscores the importance of the genetic origins. Therefore, section 294 of the Children's Act is protective of the right to know one's origins.

39. In light of the above, the CCL submits that the order of the court a quo should be set aside, and that the constitutionality of section 294 should be upheld.

Karabo Ozah

Counsel for the *Amicus Curiae*

12 February 2016

Pretoria

TABLE OF AUTHORITIES

Acts

The Children's Act 38 of 2005

The Constitution, section 28(2) and 12(2)

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Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 (1) SA 545 (CC)

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