HIGHLIGHT

ADOPTION AND SURROGACY

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

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

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

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

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

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

HIGHLIGHT continued...

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

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

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