

**UNIVERSITY OF THE WESTERN CAPE**

**FACULTY OF LAW**



UNIVERSITY of the  
WESTERN CAPE

**A SURROGATE MOTHER'S POST-BIRTH CONTACT WITH THE FAMILY  
FORMED THROUGH SURROGACY: A MISSED OPPORTUNITY FOR  
SOUTH AFRICA OR OPENING PANDORA'S BOX?**

By

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**Mini-thesis in partial fulfilment of the requirements for the LLM degree**

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## DECLARATION

I, *Fatima Ebrahim*, declare that this dissertation is my own work, that it has not been submitted before for any degree or examination at any other university, and that all ideas and sources I have quoted or used have been acknowledged in my referencing.



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Signed 25 May 2023



## Summary

This dissertation assesses the suitability of South Africa's current framework on post-birth contact in surrogacy law and explores whether it adequately protects the interests of all parties to the surrogacy agreement. This assessment reviewed the current legislative and practical framework, and then compared it to the Verona Principles' best practices and the position in the United Kingdom, United States and Canada where post-birth contact practices occur.

The assessment found that the current framework has several deficiencies. Its law as contained in section 297(1)(d) of the Children's Act erroneously creates a default position that excludes post-birth contact between the surrogate and her family and the child born through surrogacy, unless provision is made for its inclusion in the surrogacy agreement. Its practices were found to give precedence to the interests of commissioning parents by largely excluding post-birth contact for previously unknown surrogates and limiting the autonomy of previously known surrogates to determine the terms of such contact. This position persists as inadequate discussions appear to occur between the parties on their post-birth contact expectations due to beliefs that this contact is not permitted or it is discouraged for unknown surrogates. High courts also do not appear to probe post-birth contact provisions in surrogacy agreements or the lack thereof. This assessment also raised concerns about the perception of bias and conflict of interests due to one attorney representing and one psychologist assessing all the parties to the surrogacy agreement.

South Africa's framework was also found to be inconsistent with the child-focused right to post-birth contact and relationship-building which the Verona Principles promotes, which compels parties to surrogacy agreements to have such contact and only retain autonomy on the terms of this contact. It was also inconsistent with the post-birth contact practices of the three countries surveyed.

The findings of deficiencies in the current framework resulted in two broad recommendations being made. The first recommendation is for the legislature to remedy the defect in the law and in doing so to make an informed decision that includes the lived views of surrogates, commissioning parents and children born through surrogacy; and to obtain input from specialist surrogacy attorneys and psychologists regarding their experiences and practices on post-birth contact. This consultation process should include securing background information on the considerations that led to the post-birth contact provisions being inserted in the Verona Principles and discussions on whether South Africa's current practice of one psychologist assessing all the parties is adequate. Legislative amendment is required to make provision for

independent legal representation for the surrogate in accordance with the best practices of some of the countries surveyed and the Verona Principles.

The second recommendation entails prompt amendment of high court guidelines for surrogacy applications to require the surrogate to be provided with separate legal representation, and to probe post-birth contact provisions in surrogacy agreements or the lack thereof. This is aimed at mitigating the continued effect of the deficiencies in the current framework by ensuring that these agreements reflect the informed choices of both parties to surrogacy agreements and that adequate provision is made for management of contact when this is chosen.



## **Opsomming**

Hierdie proefskrif beoordeel die geskiktheid van Suid-Afrika se huidige raamwerk oor na-geboorte kontak in surrogaatskapreg en ondersoek of dit die belange van alle partye tot die surrogaatskapooreenkoms voldoende beskerm. Hierdie assessering het die huidige wetgewende en praktiese raamwerk hersien, en dit vergelyk met die Verona Beginsels se beste praktyke en die posisie in die Verenigde Koninkryk, Verenigde State van Amerika en Kanada waar na-geboorte kontakpraktyke voorkom.

Daar is vasgestel dat die huidige raamwerk verskeie tekortkominge het. Artikel 297(1)(d) van die Kinderwet skep verkeerdelik 'n verstekposisie wat na-geboorte kontak tussen die surrogaat en haar gesin en die kind wat deur surrogaatskap gebore is uitsluit, tensy voorsiening gemaak word vir die insluiting daarvan in die surrogaatskapooreenkoms. Daar is gevind dat die praktyke daarvan voorrang gee aan die belange van opdraggewende ouers deur nageboortekontak vir voorheen onbekende surrogate grootliks uit te sluit en die outonomie van voorheen bekende surrogate te beperk om die bepalinge van sodanige kontak te bepaal. Hierdie posisie bly voortduur aangesien onvoldoende gesprekke tussen die partye plaasvind oor hul na-geboorte kontakverwagtinge as gevolg van oortuigings dat hierdie kontak nie toegelaat word nie of dit word bloot afgeraai vir onbekende surrogate. Dit blyk ook nie asof hooggeregshowe na-geboorte-kontakbepalinge in surrogaat-ooreenkomste of die gebrek daaraan ondersoek nie. Hierdie assessering het ook kommer ontstaan oor die persepsie van vooroordeel en konflik van belange as gevolg van een prokureur wat die partye verteenwoordig en slegs een sielkundige wat al die partye by die surrogaatskapooreenkoms assessee.

Daar is ook bevind dat die Suid-Afrikaanse raamwerk teenstrydig is met die kinder-gefokusde reg op na-geboorte kontak en verhoudingsbou wat die Verona Beginsels bevorder, wat partye tot surrogaatskapooreenkomste verplig om sulke kontak te hê en slegs outonomie te behou op die voorwaardes van hierdie kontak. Dit was ook teenstrydig met die na-geboorte kontakpraktyke van die drie lande wat bespreek is.

Die bevindinge van tekortkominge in die huidige raamwerk het daartoe gelei dat twee breë aanbevelings gemaak is. Die eerste aanbeveling is dat die wetgewer die gebrek in die wet regstel en sodoende 'n ingeligte besluit neem wat die deurleefde sienings van surrogate, opdraggewende ouers en kinders wat deur surrogaatskap gebore is insluit; en om insette van spesialis surrogaatprokureurs en sielkundiges te verkry rakende hul ervarings en praktyke oor na-geboortekontak. Hierdie konsultasieproses moet insluit die verkryging van agtergrondinligting oor die oorwegings wat daartoe gelei het dat die nageboorte-kontakbepalinge in die Verona Beginsels ingevoeg is, en die vraag of Suid-Afrika se huidige

praktyk van een sielkundige wat al die partye assessee voldoende is. Om voorsiening te maak vir onafhanklike regsverteenvoordiging vir die surrogaat, word wetswysiging vereis in ooreenstemming met die beste praktyke van sommige van die lande wat bespreek is asook in die Verona Beginsels.

Die tweede aanbeveling behels spoedige wysiging van hooggeregshofriglyne vir surrogaat-aansoeke om te vereis dat die surrogaat van afsonderlike regsverteenvoordiging voorsien word, en om na-geboorte-kontakbepalings in surrogaat-ooreenkomste of die gebrek daaraan te ondersoek. Die aanbevelings is daarop gemik om die voortgesette effek van die tekortkominge in die huidige raamwerk te versag deur te verseker dat hierdie ooreenkomste die ingeligte keuses van beide partye tot surrogaat-ooreenkomste weerspieël en dat genoegsame voorsiening gemaak word vir die hantering van kontak wanneer daardie keuse gemaak word.



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The logo of the University of the Western Cape, featuring a stylized classical building with columns and a pediment.

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WESTERN CAPE

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## KEYWORDS

Surrogate mother

Commissioning parents

Surrogate motherhood agreement

Surrogacy

Post-birth contact

Section 297(1)(d) of the Children's Act

Best interests of the child

Right to be heard

Identity formation

Right to know your origins



## LIST OF ABBREVIATIONS

<b>CRC</b>	United Nations Convention on the Rights of the Child
<b>SA</b>	South Africa
<b>SALC</b>	South African Law Commission
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>US</b>	United States



## **CHAPTER 1**

### **INTRODUCTION**

#### **1.1. INTRODUCTION AND BACKGROUND**

Surrogacy is an alternative pathway to parenthood. It is essentially the process whereby a surrogate carries a child<sup>1</sup> for another person or persons who is or are unable to do so themselves. It challenges the laws of biology and provides an avenue for infertile persons, same-sex couples and single persons<sup>2</sup> to have a child to whom they have a genetic link. Much has been written about other aspects of surrogacy, such as the evils of commercial surrogacy,<sup>3</sup> the genetic link requirement,<sup>4</sup> international surrogacy and statelessness.<sup>5</sup> What has, however, received less attention, particularly in the South African context, is the relationships that are or could be formed during the surrogacy process and thereafter.

Surrogacy has been described as a forced friendship.<sup>6</sup> This relationship is created when the commissioning parents<sup>7</sup> and surrogate<sup>8</sup> are unknown to each other prior to the surrogacy arrangement,<sup>9</sup> although instances arise where the surrogate is known to the commissioning parents.<sup>10</sup> Surrogacy can then impact on the existing relationship between the parties. There are three stages to the surrogacy process where the surrogate and commissioning parents' relationship are impacted. First, when the surrogate motherhood agreement ("agreement")<sup>11</sup>

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<sup>1</sup> There could be more than one child.

<sup>2</sup> Hague Conference on Private International Law 'A preliminary report on the issues arising from international surrogacy arrangements' available at <http://www.hcch.net> (accessed 29 December 2021) 7-8.

<sup>3</sup> Hovav A 'Producing moral palatability in the Mexican surrogacy market' (2019) 33 *Gender and Society* 273. Commercial surrogacy is where the surrogate is remunerated for her services as a surrogate, in addition to her expenses associated with the surrogacy.

<sup>4</sup> *AB v Minister of Social Development* 2016 (2) SA 27 (GP).

<sup>5</sup> HCCH 'The Parentage/Surrogacy Project' available at <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (accessed 28 February 2023). The current focus of the Hague Conference on Private International Law (HCCH) on surrogacy is to secure certainty in respect of the parentage and nationality of children born through surrogacy, particularly in the case of transnational surrogacy.

<sup>6</sup> MacCallum F, Lycett E, Murray C *et al* 'Surrogacy: The experience of commissioning couples' (2003) 18 *Human Reproduction* 1334 (hereafter MacCallum *et al* (2003)).

<sup>7</sup> Persons who request a surrogate mother to carry and give birth to a child for them in terms of a surrogacy agreement.

<sup>8</sup> The woman who agrees to carry and give birth to a child for the commissioning parents in terms of a surrogacy agreement.

<sup>9</sup> This surrogate will be referred to as an unknown surrogate.

<sup>10</sup> They can be family members, friends or acquaintances. This surrogate will be referred to as a known surrogate.

<sup>11</sup> The Children's Act 38 of 2005 ("the Children's Act") defines a surrogate motherhood agreement as: an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such child to the commissioning parent upon its birth,

is concluded. Secondly, the period between fertilisation and birth. Thirdly, after the surrogate gives birth and hands over or relinquishes the child to the commissioning parents. The focus of this dissertation will largely be on the third stage.<sup>12</sup>

Section 297(1)(d) of the Children's Act<sup>13</sup> excludes any right of contact<sup>14</sup> between the surrogate, her relatives and the child born through surrogacy<sup>15</sup> once a valid agreement is concluded, unless the parties provide for this in the agreement. No dispute has arisen in the reported cases regarding this provision as yet. However, a recent case dealt with the issue of contact between a sperm donor and his mother and the child born through assisted reproductive technology,<sup>16</sup> where the sperm donor had agreed to have no contact with the child prior to fertilisation taking place. This case highlighted that these contracts and arrangements are not simply as black and white as they seem in respect of contact when emotions become involved.<sup>17</sup> It also highlighted whether a sperm donor can truly grant informed consent at the pre-conception stage (for the sake of certainty) to exclude post-birth contact with the child. It also brought to the fore the complications that can arise when contact is granted and is not well managed.<sup>18</sup>

Section 297(1)(d) of the Children's Act appears to advocate exclusion of post-birth contact in the agreement unless the parties decide to include this. It is unclear whether many agreements do include contact, particularly when the surrogate was previously unknown to the commissioning parents.<sup>19</sup> These agreements are drafted by attorneys and filed at the high court as part of the ex parte application for confirmation of such agreements. Attorneys who regularly draft these agreements<sup>20</sup> do not disclose the general terms thereof. A radio interview

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or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.

<sup>12</sup> This is the stage when the gestational connection which was created is severed and may leave the parties with unresolved feelings. This is also the stage where the child's life is directly impacted by the agreement between the parties.

<sup>13</sup> This section states that the effect of a valid agreement is that the surrogate mother, her husband, partner or relatives will have no right of contact with the child unless this is provided for in the agreement between the parties.

<sup>14</sup> Contact is defined in the Children's Act as communication on a regular basis with a child, including visiting or being visited by the child or communication on a regular basis with the child in any other manner including through the post or telephone or any other form of electronic communication.

<sup>15</sup> The child born through surrogacy will hereafter be referred to as the child.

<sup>16</sup> *QG and Another v CS and Another* (2021) ZAGPPHC 366 (hereafter *QG* case).

<sup>17</sup> *QG* case para 69.

<sup>18</sup> *QG* case para 69-79.

<sup>19</sup> Sloth-Nielsen J 'Surrogacy in South Africa' in Scherpe JM, Fenton-Glynn C and Kaan T (ed) *Eastern and Western perspectives on Surrogacy* (2019) 186 (hereafter Sloth-Nielsen (2019)). There are no records of such agreements, unless a search is conducted at each high court for such documents.

<sup>20</sup> Robynne Friedman Attorneys, Andrew Martin of Fertility Law and Adele van der Walt Inc.

with one of these attorneys indicated that the surrogate is usually a family member of the commissioning parents and such relationship is often comfortable and there is post-birth contact, with the latter determining the terms of such contact.<sup>21</sup> However, when the surrogate is not from their social or family circle, then the commissioning parents want more strict boundaries and no post-birth contact.<sup>22</sup> These surrogates appear not to be consulted regarding their expectations on having contact with the child. Instead, social workers and psychologists prepare them for having no relationship with the child.<sup>23</sup> The surrogate is described as only the house that carries the child during the pregnancy and her role in the surrogacy process is to relinquish the child and walk away after birth.<sup>24</sup>

In five instances, the surrogates had no contact with the child at all. The case of *Ex Parte HPP and Others*<sup>25</sup> involved two surrogacy agreements, where the court order reflected that the two surrogates would have no rights of contact with the children born through surrogacy. In *MIA v State Information Technology Agency (Pty) Ltd*,<sup>26</sup> the child was taken straight from the surrogate and given to the commissioning parent without the surrogate having sight of the child. The agreement in that case also provided for no contact with the child after birth and handover of the child.<sup>27</sup> In the fourth instance, nearly five years after the birth of the child, the surrogate only had occasional contact with the commissioning parents, who intermittently sent her pictures of the child.<sup>28</sup> It appears that surrogates are expected to enter into the agreement and once the contract is fulfilled, i.e. when the child is relinquished, the parties' relationship largely ends, with any contact thereafter such as receiving photographs or being invited to the child's baptism<sup>29</sup> being an added bonus for the surrogate. In the fifth instance, the surrogate also had no contact with the children born from two surrogacy agreements.<sup>30</sup> The reported

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<sup>21</sup> Van der Walt A 'Radio Pretoria - medical law and surrogacy' available at <http://www.surrogacyagreements.co.za> (accessed 3 September 2021) (hereafter Van der Walt Radio Pretoria interview).

<sup>22</sup> Van der Walt Radio Pretoria interview.

<sup>23</sup> Van der Walt Radio Pretoria interview.

<sup>24</sup> Sarie 'Die van surrogaatskap' available at <http://www.surrogacyagreements.co.za> (accessed 3 September 2021) (hereafter Sarie (2015)). This article was published in the August 2015 issue of Sarie magazine.

<sup>25</sup> (2017) ZAGPPHC 70 (hereafter *Ex Parte HPP*).

<sup>26</sup> 2015 (6) SA 250 (LC) (hereafter *MIA* case).

<sup>27</sup> Para 6 of the judgement.

<sup>28</sup> Whitfield N 'Diane's story: I was a surrogate – after having twins via artificial insemination' available at [https://www.news24.com/parent/fertility/trying\\_to\\_conceive/treatment/Dianes-story-I-was-a-surrogate-after-having-twins-via-artificial-insemination-20150904](https://www.news24.com/parent/fertility/trying_to_conceive/treatment/Dianes-story-I-was-a-surrogate-after-having-twins-via-artificial-insemination-20150904) (accessed 31 January 2022) (hereafter Whitfield (2015)).

<sup>29</sup> Sarie (2015).

<sup>30</sup> Javan M '#Whatsitlike: The fascinating world of Surrogacy in South Africa' available at <https://www.spotlightnsp.co.za/2020/04/13/whatsitlike-the-fascinating-world-of-surrogacy-in-south-africa/amp/> (accessed 31 January 2022) (hereafter Javan (2020)).

cases on surrogacy do not probe post-birth contact arrangements, or the lack thereof. The high court recently considered the emotional aspects of surrogacy, but this has not extended to a probe on post-birth contact.<sup>31</sup> It begs the question whether the high court, as the upper guardian of minors, should be doing so to ensure that the interests of the unborn child, i.e. the “sleeping partner”<sup>32</sup> to the agreement, is adequately catered for. South Africa’s approach to post-birth contact in surrogacy arrangements appears to cater to the needs of the commissioning parents with firm boundaries being set to exclude contact for unknown surrogates. This is not what was envisaged when provisions on post-birth contact were considered, prior to the enactment of Section 297(1)(d).<sup>33</sup>

## 1.2. RESEARCH PROBLEM

The history of section 297(1)(d) can be traced back to the ad hoc Committee on the report of the SA Law Commission (SALC) on Surrogate Motherhood.<sup>34</sup> The SALC had recommended no contact between the surrogate and child.<sup>35</sup> The ad hoc Committee was tasked with conducting more extensive consultations into the matter, which included consultations in four of South Africa’s provinces and abroad.<sup>36</sup> They stated that most South African commentators were of the view that visitation rights<sup>37</sup> should be left to the parties to the agreement, with the best interests of the child at heart and with regard to the provisions of the Constitution.<sup>38</sup> The position in the US and UK at the time was to ensure that parties to the surrogacy agreement were a suitable match<sup>39</sup> and to leave contact arrangements to the choice of the parties but to encourage relationship-building and contact between them.<sup>40</sup> The ad hoc Committee then recommended that the agreement should make provision for contact arrangements with the child.<sup>41</sup> It is unclear why the ultimate recommendation of the ad hoc Committee was phrased to exclude contact unless the parties agreed otherwise,<sup>42</sup> which then went on to form the basis

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<sup>31</sup> *Ex Parte JCR and Others* (2022) ZAGPPHC 209 (hereafter *Ex Parte JCR*). At para 36, the court requested that the impact of the surrogacy agreement on the surrogate, her children and the existing children of the commissioning parents be investigated so that it could be taken into account in its decision on whether to confirm the agreement.

<sup>32</sup> *Ex parte: MS & Others* (2014) ZAGPPHC 457 (hereafter *Ex Parte MS*) para 53.

<sup>33</sup> Section 297(1)(d) makes provision for the parties to include contact if they agree to do so.

<sup>34</sup> Report of the ad hoc Committee on report of SA Law Commission on surrogate motherhood (1999) (hereafter ad hoc Committee’s report).

<sup>35</sup> Para A4(8).

<sup>36</sup> In United Kingdom (UK) and United States (US).

<sup>37</sup> Visitation rights was later changed to contact in the Children’s Act.

<sup>38</sup> Para E4(4)(d).

<sup>39</sup> Para E7(6).

<sup>40</sup> Para E9(4)(b).

<sup>41</sup> Para F7(4)(h).

<sup>42</sup> Para F9(1)(c).



of section 297(1)(d). It is also unclear why surrogates and commissioning parents are led to believe that the surrogate's role is to give birth to the child and then have no further contact with the family formed through surrogacy,<sup>43</sup> rather than that they have a choice in relation to post-birth contact and that this can be negotiated with the commissioning parents. The ad hoc Committee's report envisaged a dialogue between the parties.<sup>44</sup>

The Verona Principles,<sup>45</sup> which were drafted by a group of experts in international law and human rights, was adopted during early 2021. They were drafted after extensive consultation, both nationally and abroad. These principles identify the most problematic areas of surrogacy and formulate requirements to ensure the protection of children born through surrogacy. They are intended to provide a framework that safeguards the rights and best interests of these children.<sup>46</sup> For example, Principles 5.4<sup>47</sup> and 5.5<sup>48</sup> require that the pre-surrogacy arrangements include ascertaining during the counselling process the parties' expectations regarding their future relationship. Principles 8.3<sup>49</sup> and 11.5<sup>50</sup> further encourage ongoing contact as being of benefit to the child. This is deemed to be important to the child in relation to his<sup>51</sup> access to his origins and identity formation. Whilst South Africa (SA) has already adopted many of the principles evident in the Verona Principles in its domestic law, there is a disparity between the provisions which deal with post-birth contact between the surrogate and the family formed through surrogacy.

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<sup>43</sup> Van der Walt Radio interview and Martin A 'Surrogacy in South Africa – Legal Framework' available at [myivyfanswers.com/video/surrogacy-south-africa-law-costs/](http://myivyfanswers.com/video/surrogacy-south-africa-law-costs/) (accessed 18 December 2021) (hereafter Martin webinar).

<sup>44</sup> Para F7(4)(h).

<sup>45</sup> Principles for the protection of the rights of the child born through surrogacy (Verona Principles) (2021).

<sup>46</sup> Preamble.

<sup>47</sup> It reads:

5.4 Pre-surrogacy arrangements for surrogate mothers should include psycho-social suitability assessment and ongoing supportive counselling from independent and qualified practitioners, which should include but not be limited to: ...e. ascertain expectations regarding selection of intending parent(s) and future relationships with intending parent(s) and the child.

<sup>48</sup> It reads:

5.5 Pre-surrogacy arrangements for intending parent(s) should include a psycho-social suitability assessment and counselling from an independent and qualified practitioners, which should include but not be limited to: ...h. expectations and intentions concerning future relationships with the surrogate mother, and persons providing human reproductive material.

<sup>49</sup> This reads "8.3 Intending parents and the child should have appropriate opportunities to know the surrogate mother, her immediate family and community for the benefit of the child."

<sup>50</sup> This reads:

11.5 In instances where children are born through surrogacy, open surrogacy arrangements should be encouraged, in order to provide a safeguard for protection of identity rights and access to origins. States should therefore encourage education about the benefits of post birth contact between the child born through surrogacy, surrogate mother, intending parent(s) and extended family, persons providing reproductive material where such opportunities exist.

<sup>51</sup> Reference to "his" will include "her" as well.

### 1.3. RESEARCH QUESTION

In light of the afore-mentioned discussion, the principal research question is this: in what ways does the current framework on post-birth contact in South African surrogacy law protect the interests of the parties to surrogacy agreements and promote the best interests of the child?

To answer this question, several sub-questions will be considered:

1. What does the right to post-birth contact entail?
2. What benefits and risks does this right hold for the various parties?
3. To what extent can consent be given prior to conception to exclude post-birth contact?
4. What is the current position on post-birth contact in SA and does it adequately protect the rights of the parties concerned, in particular, the best interests of the child?
5. What lessons, if any, can be learnt from the approaches on post-birth contact in the UK, US and Canada?

### 1.4. SIGNIFICANCE OF THE RESEARCH

Relationship-building between the surrogate and the family formed through surrogacy appears to be a “softer” issue of surrogacy as the safety and security of the child is not threatened in the short term.<sup>52</sup> It was deemed to be significant enough to be placed alongside more hard-hitting principles in the Verona Principles, based on it furthering the best interests of the child from a long-term perspective.

South Africa’s position on contact is based on investigations and consultations performed shortly before the turn of the millennium, which already indicated emerging trends to encourage contact and relationship-building.<sup>53</sup> More than twenty years on, this aspect has evolved to where children’s rights and views are more entrenched. The ad hoc Committee did not secure the views of children born through surrogacy as children’s views being taken into account in decision-making and draft legislation was still in its infancy stage.<sup>54</sup> The preamble

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<sup>52</sup> Another soft issue of surrogacy relates to the child’s right to know his origins and maintaining and preservation of records related thereto.

<sup>53</sup> Ad hoc Committee’s report.

<sup>54</sup> Sloth-Nielsen J ‘Seen and heard? New frontiers in child participation in family law proceedings in South Africa’ 2009 (2) *Speculum Juris* 3. Article 12(1) of United Nations (UN) Convention on the Rights of the Child, 1989 (hereafter CRC) reads:

to the Verona Principles require States, when implementing these principles, to “consult broadly and in particular ... take into account the views and experiences of children born through surrogacy”. The United Nations heard the lived views of foreign children born through surrogacy and donor conception in more recent times, who all felt that having contact with the surrogate and donor were important towards their identity formation and their right to know their origins and family.<sup>55</sup> These children wanted contact with all their families, including their biological and gestational families.<sup>56</sup> South Africa’s current legal position does not make provision for this and may need to be amended.

This research aims to analyse whether South Africa’s conservative and exclusionary approach to post-birth contact should be maintained given the risks of granting contact which has emerged lately.<sup>57</sup> It will also consider whether this approach is outdated and contrary to the best interests of the child principle and should be reconsidered in accordance with some international positions and Verona Principles and, if so, how this should be reconsidered. It will also consider whether this latter approach is suitable in the South African context or whether this is creating an unrealistic utopia for children born through surrogacy.<sup>58</sup>

### **1.5. LIMITATIONS OF THE STUDY**

This dissertation will not focus on the relationships formed between sperm or egg donors and the child born as a result of their sperm or eggs being used during the artificial fertilisation process, except insofar as it is a relevant comparative to the relationships formed as a result of surrogacy agreements. The international comparative perspective on contact between the surrogate and the family formed through surrogacy will be limited to the US, UK and Canada. Informal surrogacy practices in SA that fall outside the scope of chapter 19 of the Children’s Act will be excluded.<sup>59</sup>

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State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

<sup>55</sup> Donor kinderen ‘Donor-conceived and surrogate born people heard for the first time at the UN during the 30<sup>th</sup> anniversary Convention on the Rights of the child’ available at [donorkinderen.com/united-nations-2019](http://donorkinderen.com/united-nations-2019) (accessed 11 September 2021) (hereafter Donor kinderen article).

<sup>56</sup> Donor kinderen article.

<sup>57</sup> For example in the *QG* case.

<sup>58</sup> In *Ex parte: WH and Others* (2011) ZAGPPHC 185 (hereafter *Ex Parte WH*), para 54.2, this question was raised.

<sup>59</sup> C8 of the ad hoc Committee’s report refers to informal surrogacy as:

## **1.6. RESEARCH METHODOLOGY**

This study utilises literature review and content analysis of legislation and international principles to explore the extent to which South Africa's current framework on post-birth contact protects parties to surrogacy agreements and promotes the best interests of the child. It reviews section 297(1)(d) of the Children's Act by, inter alia, having regard to the Verona Principles and practices in the UK, US and Canada. The primary and secondary sources that are used for this study include journal articles, case law, international instruments, legislation, reports, textbooks and internet sources.

## **1.7. CHAPTER OUTLINE**

This dissertation is divided into five chapters.

Chapter 1 contains the introduction to the overall study, defines the research problem and provides background information and the research question that will be explored in the dissertation.

The second chapter examines what the right to post-birth contact entails. This chapter also explores what benefits and risks such contact has for the parties to the surrogacy agreement. This necessitates a discussion of the Verona Principles on post-birth contact, the best interests of the child principle and its overlap with the child's right to be heard and express his opinion on issues that impact him, the child's identity formation and right to know his origins.

Chapter 3 provides an overview of the current legal position in SA and its background with regard to post-birth contact between the surrogate and family formed through surrogacy. The current practice on contact between the parties to the agreement during the pre-conception stage, during pregnancy and at the post-birth stage are considered. The extent to which the parties can consent to exclude post-birth contact at the pre-conception stage is examined. Cases that have contemplated contact and the lessons to be learnt from this are discussed. This chapter also analyses whether the current position in SA adequately considers the interests of all the

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the insemination of the surrogate mother with the gametes of the commissioning parent. This is performed privately by the parties according to accepted customary practices without the intervention of medical doctors or clinics. The surrogate mother is both the genetic and the gestational mother.

parties to the surrogacy agreement and, in particular, the best interests of the child to be born as a result of such agreement.

Chapter 4 considers how the UK, US and Canada deal with the issue of contact at the pre-conception stage, during pregnancy and at the post-birth stage. Any lessons that can be learnt from the approaches adopted in these countries and whether such lessons can be applied to the domestic context are discussed.

The final chapter provides a conclusion to the study and make recommendations for the way forward.



## **CHAPTER 2**

### **THE RIGHT TO POST-BIRTH CONTACT**

#### **2.1. INTRODUCTION**

As a first step in assessing the suitability of the post-birth contact framework in South African surrogacy law, the right to post-birth contact will be examined. As already referred to in chapter 1, the Verona Principles promote the right to post-birth contact as it is considered to be in the best interests of the child. These principles, which were drafted by experts in human rights and international law, aimed to produce a universal set of principles that could be utilised as a guide when surrogacy laws and policies were drafted and considered by countries.<sup>1</sup> Several experts in the field of surrogacy were consulted, and the views of children born through surrogacy were also secured.<sup>2</sup> These principles were drafted to address the most challenging aspects of surrogacy, and then providing a best practices guide that aims to safeguard the best interests of children born through surrogacy.<sup>3</sup> These principles have been endorsed by the esteemed UN Committee on the Rights of the Child.<sup>4</sup> This endorsement bolsters the weight to be attached to these principles.

This chapter will first discuss the scope of the right to post-birth contact and its implications for surrogacy arrangements. Secondly, the benefits of post-birth contact will be discussed, which includes upholding the child's best interests and right to be heard. The Verona Principles indicate that post-birth contact also holds benefits for the child's right to know and access his origins and identity rights. The Verona Principles' vision of surrogacy presenting an opportunity for the parties impacted by the surrogacy process to form and maintain relationships will also be discussed. Lastly, this chapter will consider the risks associated with post-birth contact, in relation to the parties' autonomy, privacy and relationships that are formed.

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<sup>1</sup> Page 5 of the Verona Principles.

<sup>2</sup> Page 5 of the Verona Principles.

<sup>3</sup> Page 3 of the Verona Principles.

<sup>4</sup> Page 3 of the Verona Principles.

## **2.2. THE RIGHT TO POST-BIRTH CONTACT IN TERMS OF THE VERONA PRINCIPLES**

One unknown surrogate has mentioned the following about her commissioning parents:<sup>5</sup>

I used to think they would invite us to America. I used to think of her as a sister – all of it went to waste. Forget an invitation, they did not even call to see if we are dead or alive.

Another unknown surrogate expressed the following:<sup>6</sup>

I went through so much physically and emotionally for them to have a family and ... they vanish into the great unknown like a stranger in the grocery store.

The Verona Principles are premised on the assumption that surrogacy ordinarily creates relationships and then severs it after the birth of the child.<sup>7</sup> This would then result in there being no post-birth contact between the surrogate and family formed through surrogacy. The statements of the above two surrogates reflect why this assumption is problematic and requires reconsideration. The commissioning parents and surrogate could agree to have post-birth contact and change this position. The right to post-birth contact alters the starting point for surrogacy discussions on post-birth contact to where the commissioning parents and surrogate, and their respective families, are assumed to have contact after the birth of the child.<sup>8</sup> This right therefore transforms the assumption on post-birth contact from exclusion to inclusion and places the interests of the child first.<sup>9</sup> The Verona Principles do not distinguish between the position of the known and unknown surrogate on this score.

The Verona Principles aim to protect children born through surrogacy by ensuring that their best interests are safeguarded.<sup>10</sup> The best interests of the child principle is well-established in both international and domestic law. It is found in the right contained in Article 3(1) of the CRC and reads “in all actions concerning children ... the best interests of the child shall be a primary consideration.” This right also finds application in section 28(2) of the Constitution<sup>11</sup> and section 9 of the Children’s Act, although it elevates the child’s best interests to one of paramount

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<sup>5</sup> Gunnarsson Payne J, Koroleczuk E and Mezinska S ‘Surrogacy relationships: a critical interpretative review’ (2020) 5 *Upsala Journal of Medical Science* 189 (hereafter Gunnarsson Payne *et al* (2020)).

<sup>6</sup> Gunnarsson Payne *et al* (2020) 189.

<sup>7</sup> The preamble of the Verona Principles.

<sup>8</sup> Verona Principles 5.4 and 5.5 compels surrogates and commissioning parents to discuss their expectations regarding post-birth contact during their pre-surrogacy arrangements.

<sup>9</sup> This right also benefits the unknown surrogate who requires post-birth contact, whilst the exclusion of post-birth contact places the interests of the commissioning parents who require no such contact first.

<sup>10</sup> See above preamble.

<sup>11</sup> Constitution of the Republic of South Africa, 1996 (hereafter Constitution).

importance rather than a primary consideration. This right is understood to not exceed other rights in the CRC and Constitution as there are no hierarchy of rights.<sup>12</sup> When this right conflicts with other rights in the Constitution, then the former right is weighted more than the latter when these rights are balanced against each other.<sup>13</sup> The best interests of the child frequently conflicts with the commissioning parents' right to privacy, and it has been argued that the former should be given precedence and triumph when this occurs.<sup>14</sup> In New Zealand, post-birth contact is considered to be beneficial to the child and, as a result, this aspect is probed when surrogacy applications are considered.<sup>15</sup>

In furthering the child's best interests, the Verona Principles encourage that the contact and relationship which the commissioning parents and surrogate established prior to the birth of the child continues post-birth, and that transparency be included in the relationship between the surrogate and family formed through surrogacy.<sup>16</sup> No references are provided in the Verona Principles for its post-birth contact provisions, which could shed light on why such a contentious issue was considered to be in the child's best interests. In building the relationship between the parties, the Verona Principles provides the surrogate with an opportunity to meet with the commissioning parents and their children before deciding on whether to proceed with the surrogacy arrangement with them.<sup>17</sup> It also provides a prerequisite for surrogacy in that commissioning parents should be educated about the psycho-social effects of surrogacy on the child and all other parties involved.<sup>18</sup> They are therefore required to have pre-surrogacy counselling which includes education about disclosure of the child's origins.<sup>19</sup> The Verona Principles assume that commissioning parents hold the key to ensuring that this right is upheld and that they may be making uninformed decisions in this regard without having all the

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<sup>12</sup> Skelton A 'Too much of a good thing? Best interests of the child in South African jurisprudence' (2019) 52 *De Jure Law Journal* 558 and 578 (hereafter Skelton (2019)).

<sup>13</sup> Skelton (2019) 578.

<sup>14</sup> Olusegun OO and Olatawura O 'Surrogacy agreements and the rights of children in Nigeria and South Africa' (2021) 42 *Obiter* 27-37 (hereafter Olugesun *et al* (2021)). The preamble to the Verona Principles is also consistent with this argument.

<sup>15</sup> Imrie S and Jadvá V 'The long-term experiences of surrogates: relationships and contact with surrogacy families in genetic and gestational surrogacy arrangements' (2014) 29 *Reproductive Biomedicine Online* 426 (hereafter Imrie *et al* (2014))

<sup>16</sup> See the preamble of the Verona Principles, as well as principles 8.3, 10.13 and 11.5.

<sup>17</sup> Verona Principle 7.5*b* reads "...arrangements...should be clearly set out with respect to: ...b. selection of intending parent(s) by the surrogate mother with the opportunity to meet intending parents and any other children in the family to inform her decision".

<sup>18</sup> Verona Principle 8.2*b* reads "... [s]urrogacy should be permissible only when the intending parent(s)...b. understand the psychosocial issues that impact on a child born to surrogacy and all parties involved".

<sup>19</sup> Verona Principle 5.5*g*. This education would entail transparency of the child's birth through surrogacy. Mulligan A 'Protecting identity in collaborative assisted reproduction: the right to know one's gestational surrogate' (2020) 34 *International Journal of Law, Policy and the Family* 33 (hereafter Mulligan (2020)).



requisite information at their disposal. It further assumes that if commissioning parents are equipped with such information, then they will be persuaded to have post-birth contact between themselves, the surrogate and their respective families. The Verona Principles do not limit post-birth contact to interactions between the surrogate, commissioning parents and child only, but extends this to their families as well.

The Verona Principles accepts that post-birth contact decisions of the commissioning parents and surrogate may be influenced by other parties who are involved in the surrogacy process and it therefore provides for pre-surrogacy protections by recommending that services rendered by these parties be provided by independent professionals and that the surrogate has independent legal advice.<sup>20</sup> The Verona Principles does not prescribe the manner and extent of post-birth contact. It merely states that such contact should be an opportunity for the family formed through surrogacy to have appropriate opportunities to know the surrogate, her immediate family and community.<sup>21</sup> This is supported as the parties should make decisions on the terms of their relationship by taking into consideration their other commitments and the level of contact that they are comfortable with. Post-birth contact will therefore differ from one surrogacy arrangement to the next and can include in-person visits, telephonic or video call contact or contact through social media, emails or messages.<sup>22</sup> The Verona Principles' promotion of the right to post-birth contact suggests that there are definite benefits thereto. Some of these benefits are considered in the next section.

### **2.3. BENEFITS OF POST-BIRTH CONTACT**

#### **2.3.1. Identity and right to know origins**

One benefit of having post-birth contact, as identified by the Verona Principles, is that it encourages open surrogacy arrangements and protects the child's right to know and access his

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<sup>20</sup> Verona Principle 5 reads:

Pre-surrogacy protections ...

5.1 ... Pre-surrogacy arrangements include...screenings, multi-disciplinary assessments, informed consent of parties and reviews of these arrangements.

5.2 All such services should be provided by independent professionals free from any actual or perceived conflict of interest. ...

5.3 States should ... include ... a. the provision of independent legal advice for the surrogate mother (i.e. independent of intermediaries representing intending parent(s) and clinic(s).

<sup>21</sup> Verona Principle 8.3.

<sup>22</sup> Carone N, Baiocco R, Manzi D *et al* 'Surrogacy families headed by gay men: relationships with surrogates and egg donors, fathers' decisions over disclosure and children's views on their surrogacy origins' (2018) 33 *Human Reproduction* 251 (hereafter Carone *et al* (2018)).

origins and identity rights.<sup>23</sup> The surrogate born child's right to know and access his origins is considered to be in his best interests and is premised on the commissioning parents being honest and disclosing to the child from an early age his birth through surrogacy, the surrogate's role in his birth story and the contact details of the surrogate.<sup>24</sup> Early disclosure leads to the child forming his identity in accordance with this information, rather than a false sense of identity when late disclosure occurs and then having to readjust this identity when the truth comes to light.<sup>25</sup> Late disclosure could harm the child and compromise their trust in the commissioning parents.<sup>26</sup> Having knowledge of the details of the surrogate and her role in his birth story, enables the child to decide whether to pursue any contact with her if he deems such contact to be significant.<sup>27</sup> This right therefore provides a gateway for the parties to pursue an open relationship with each other.<sup>28</sup> Parties to open surrogacy relationships have frequent and regular contact as their expectations are matched, and they are highly satisfied with their relationships.<sup>29</sup>

Commissioning parents frequently disclose to their child his origins through surrogacy and intend to have contact with the surrogate post-birth.<sup>30</sup> Some studies indicate that children who were informed of their surrogacy origins from an early age were advantaged by this as they were slowly able to incorporate this information in accordance with their level of understanding of their origins.<sup>31</sup> Some commissioning parents are of the view that post-birth contact with the surrogate provides an opportunity for her to answer any questions or clarify any doubts which

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<sup>23</sup> Verona Principles 8.3 and 11.5. These rights appear to further the long-term interests of the child. Olusegun *et al* (2021) 23-25. The right to know one's origins in the context of surrogacy requires that the surrogate-born person is provided with information regarding his birth. The failure to do so affects the development of such person's identity as details of origins are an important part of identity formation.

<sup>24</sup> Mulligan (2020) 27. This right provides the child with information to make contact with the surrogate but it does not enforce a right to have contact or a relationship with her.

<sup>25</sup> Wade K 'Reconceptualising the interest in knowing one's origins: A case for mandatory disclosure' (2020) 28 *Medical Law Review* 745-746 (hereafter Wade (2020)). Identity comprises of a person's features and personality. Mulligan (2020) 21-22.

<sup>26</sup> Fronek P and Crawshaw M 'The 'new family' as an emerging norm: A commentary on the position of social work in assisted reproduction' (2015) 45 *British Journal of Social Work* 740-741. Readings J, Blake L, Casey P *et al* 'Secrecy, disclosure and everything in-between: decisions of parents of children conceived by donor insemination, egg donation and surrogacy' (2011) 22 *Reproductive BioMedicine Online* 486 (hereafter Readings *et al* (2011)) indicates that the child's sense of security and emotional well-being could be harmed.

<sup>27</sup> Wade (2020) 735-736. Some may consider a relationship with the surrogate as being beneficial to their growth or essential to their health whilst others may attach less significance to such relationship based on their principles and beliefs.

<sup>28</sup> Gunnarsson Payne *et al* (2020) 187-188.

<sup>29</sup> Gunnarsson Payne *et al* (2020) 187-188. The surrogate occasionally develops a relationship with the commissioning parents as a friend or family.

<sup>30</sup> Gunnarsson Payne *et al* (2020) 184.

<sup>31</sup> Golombok S 'Love and Truth: What really matters for children born through third-party assisted reproduction' (2021) 15 *Child Development Perspectives* 106.

the child may have related to his birth through surrogacy.<sup>32</sup> Regular post-birth contact between the surrogate and child therefore provides the child with a clearer understanding of his origins.<sup>33</sup> It also provides the child with an opportunity to ascertain information about the surrogate and her family.<sup>34</sup> Research reveals that most surrogates wish to have post-birth contact and for the relationship that they established with the commissioning parents pre-birth to continue post-birth, as this culminates in satisfaction with the surrogacy journey.<sup>35</sup> Guichon argues that commissioning parents, whose chosen method of family formation involves three or more parties, should not expect a conventional resulting family, but rather one which includes the surrogate in the child's life.<sup>36</sup> This argument supports the right to post-birth contact. The surrogate's role in the child's life would have a dual benefit in that it would benefit the child in his acquisition of a more complete identity and the surrogate would benefit by having a satisfactory surrogacy outcome as most surrogates expected post-birth contact and were disappointed when such contact terminated.<sup>37</sup>

### 2.3.2. Best interests of the child and right to be heard

A further benefit of post-birth contact is that it could give effect to the child's right to be heard and form relationships with the surrogate and her family. A child's right to be heard is vital when considering his best interests.<sup>38</sup> The right to be heard requires adult decision-makers to secure and consider relevant information and views of children affected by such decisions so that the quality of such decisions are enhanced and provide better protection for children.<sup>39</sup> Children's views are given due weight in accordance with their evolving capacity in matters that affect them.<sup>40</sup> This process ensures that decisions are made *with* rather than *for* children.<sup>41</sup>

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<sup>32</sup> Carone *et al* (2018) 256.

<sup>33</sup> Ruiz-Robledillo N and Moya-Albiol L 'Gestational surrogacy: Psychosocial aspects' (2016) 25 *Psycho Social Intervention* 189 (hereafter Ruiz-Robledillo *et al* (2016)).

<sup>34</sup> Carone *et al* (2018) 252. Over 50% of children surveyed in this study wanted information on the surrogate and her family and 54.8% considered her to be their aunt.

<sup>35</sup> Gunnarsson Payne *et al* (2020) 189.

<sup>36</sup> Guichon J 'The body, emotions and intentions: challenges of preconception arrangements for health care providers' (2007) 176 (4) *Canadian Medical Association Journal* 480 (hereafter Guichon (2007)).

<sup>37</sup> Guichon (2007) 480. Surrogates were reported to feel regret and betrayal.

<sup>38</sup> OHCHR 'UN Committee on the Rights of the Child General Comment No.12 (2009) The right of the child to be heard' available at <https://www.ohchr.org/en/treaty-bodies/crc/general-comments> (accessed 25 May 2023) (hereafter General Comment 12) para 74 indicates that the child's best interests and right to be heard complement each other with the latter providing the method for hearing children. The child's best interests are given effect to when his voice is taken into consideration in decision or policy-making.

<sup>39</sup> Plevin AM 'Children's Rights: Advocacy and international agenda setting' (2019) *International Human Rights of Children* 124-125 (hereafter Plevin (2019)).

<sup>40</sup> General Comment 12 paras 15 and 85.

<sup>41</sup> Plevin (2019) 126.

Human rights principles require that the voices of those who are directly impacted by laws and practices be heard before decisions are made.<sup>42</sup> In the surrogacy context, this will include securing the views of surrogates and commissioning parents, in addition to the views of the child.<sup>43</sup> In surrogacy, the commissioning parents and surrogate make arrangements that impact their lives and that of the unborn child. Whilst the former two parties can safeguard their interests during such arrangements, the unborn child is unable to do so and commissioning parents are expected to safeguard their rights.<sup>44</sup> However, the commissioning parents' interests often conflict with that of the child, with the risk that the former's needs are given precedence above those of the child.<sup>45</sup> Such child's interests may be protected by hearing the voices of other surrogate-born persons with lived views of their experiences, so that the lessons learnt from their experiences may be considered when decisions, laws and policies are made.<sup>46</sup>

Some children born through surrogacy want contact with the surrogate and her family and regard them as their family.<sup>47</sup> The lived views of children born through surrogacy were secured when the Verona Principles were drafted.<sup>48</sup> The lived views of children born through donor conception and surrogacy were also heard at the UN, and they indicated that they wanted contact with their surrogate and donor.<sup>49</sup> These children took issue with not being consulted when decisions were made that affected them and wanted their rights to family and access to their origins to be upheld.<sup>50</sup> Some persons born through surrogacy therefore feel disadvantaged and harmed when they had no relationship with their surrogate.<sup>51</sup> This is in contrast to a person

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<sup>42</sup> Centre for Reproductive Rights 'Centre submissions on surrogacy to UN Special Rapporteur on sale of children' available at <https://reproductiverights.org/stories> (accessed 12 October 2022) (hereafter Centre for Reproductive Rights (2019)) 5.

<sup>43</sup> Centre for Reproductive Rights (2019) 5.

<sup>44</sup> Olusegun *et al* (2021) 27.

<sup>45</sup> Olusegun *et al* (2021) 37. The right to post-birth contact will reduce this risk as parties to surrogacy agreements would have to incorporate such contact in their agreements and provide for the terms thereof.

<sup>46</sup> Preamble to Verona Principles. This is consistent with General Comment 12 para 14 that indicates that the right to be heard includes a consideration of the child's voice as an individual and children as a group and UN Committee on the Rights of the Child General Comment 14 para 91 which requires that when a decision affects a large group of children, then the views of a representative sample of children from such group should be heard and considered. OHCHR 'UN Committee on the Rights of the Child General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para.1)' available at <https://www.ohchr.org/en/treaty-bodies/crc/general-comments> (accessed 25 May 2023).

<sup>47</sup> Wade (2020) 751.

<sup>48</sup> Page 5 of the Verona Principles. These principles include the right to post-birth contact.

<sup>49</sup> Donor kinderen article.

<sup>50</sup> Donor kinderen article. The right to family entails having a relationship with the surrogate and her children as they are regarded as family.

<sup>51</sup> Van Woerden V "“Lost identities”": Surrogacy and the rights of the child in the United States and the Netherlands' (2018) 24 *Texas Journal on Civil Liberties and Civil Rights* 276. Some have reported psychological harm and a loss of autonomy in making decisions regarding their lives.

who informed the UN that she was born through surrogacy in 1998 and knew of her surrogate birth from the outset.<sup>52</sup> She had lifelong regular contact with her surrogate and her children, who she viewed as her half siblings. They meet up every year as one big extended family. She considered contact with the surrogate's family to be important to her identity formation and this resulted in her being proud to be a person born through surrogacy. She was grateful that she had open contact with her surrogate's family and that her commissioning parents were always honest about her birth.

One child took issue with his surrogate suppressing the natural bonding process between them during pregnancy and indicated that this impacted on his emotional wellbeing as he felt abandoned by her.<sup>53</sup> Some have also expressed a sense of abandonment at being relinquished by the surrogate to the commissioning parents and envied children whose surrogates fought to keep them.<sup>54</sup> Having contact with the surrogate may ameliorate some of these concerns.

### 2.3.3. Preservation of bond, closure and opportunities for relationships to form

Opponents of surrogacy have criticised the harm that a child suffers upon being permanently separated from his gestational mother.<sup>55</sup> They argue that surrogacy intentionally prevents the biological mother-child relationship from developing and places the commissioning parents' need to have a child above the best interests of the child.<sup>56</sup> Katy Faust, a child rights activist, is of the view that the moment of birth should be the first time that the child has sight of his gestational mother, rather than the last time.<sup>57</sup> Post-birth contact prevents the permanent separation of the child from his surrogate mother upon his birth. Instead, it provides for any bonds formed between the surrogate and child during pregnancy to continue rather than totally severing it.<sup>58</sup> Post-birth contact therefore allows the surrogate a role in the child's life, which co-exists with the commissioning parents' role in his life.<sup>59</sup> Several children born through surrogacy have reported good relationships with their surrogates, and referred to her as an aunt,

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<sup>52</sup> Donor kinderen article.

<sup>53</sup> Guichon (2007) 479-480. Guichon explains that surrogates are expected to feel compassion for the commissioning parents but suppress any feelings for the child that they are carrying. This may result in grief for the surrogate and having contact with the child may reduce this grief.

<sup>54</sup> Guichon (2007) 479.

<sup>55</sup> The surrogate is the gestational mother. The Heritage Foundation 'How surrogacy harms women and children' available at <https://www.heritage.org/marriage-and-family/commentary/how-surrogacy-harms-women-and-children> (accessed 28 February 2023) (hereafter The Heritage Foundation (2021)).

<sup>56</sup> The Heritage Foundation (2021).

<sup>57</sup> The Heritage Foundation (2021).

<sup>58</sup> Tieu MM 'Altruistic surrogacy: the necessary objectification of surrogate mothers' (2009) 35 *Journal of Medical Ethics* 172.

<sup>59</sup> Van Niekerk A and Van Zyl L 'Interpretations, perspectives and intentions in surrogate motherhood' (2000) 26 *Journal of Medical Ethics* 408-409.

without their commissioning parents being threatened by these relationships.<sup>60</sup> Article 7(1) of the CRC provides for a child's right to know and be cared for by his parents.<sup>61</sup> A broad interpretation of this right would include the surrogate having post-birth contact with the child.<sup>62</sup>

The Verona Principles envisage that relationships will form between the parties to the surrogacy agreement. Some studies have shown that surrogacy has resulted in lasting and fulfilling relationships being formed between the surrogate and her family and the family formed through surrogacy, and some of these parties regard themselves as being part of each other's families.<sup>63</sup> This has resulted in further surrogacy agreements being concluded between the commissioning parents and surrogate.<sup>64</sup> Surrogates have also established relationships with each other as a result of their common role during the surrogacy process.<sup>65</sup>

Children have also benefitted from having post-birth contact in that the child has formed connections with his surrogate's own children and the children born as a result of other surrogacies which she has had.<sup>66</sup> Some children born through surrogacy regard these children as their half siblings, and have particularly benefitted from contact with them when they have no siblings within their nuclear families.<sup>67</sup> Contact with the surrogate has provided the link for several families formed through surrogacy to connect with and support each other given the similar issues that they encounter.<sup>68</sup> UK studies have shown that many children born through surrogacy derive benefit from having contact with the surrogate, with some of them viewing themselves as being part of her family and developing their identities accordingly.<sup>69</sup> They feel positive about their relationship and referred to her in familial language.<sup>70</sup>

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<sup>60</sup> Golombok S *We are family: What really matters for parents and children* (2020) 132 (hereafter Golombok (2020)).

<sup>61</sup> This article reads "The child shall be registered immediately after birth and shall have the right from birth to a name, nationality and, as far as possible, the right to know and be cared for by his or her parents."

<sup>62</sup> SA Law Reform Commission Issue Paper 32 (Project 140) *The right to know one's own biological origins* (2017) 9-10 (hereafter Commission Issue Paper (2017)).

<sup>63</sup> Golombok (2020) 110-113 and 127. This benefit of surrogacy has persuaded one surrogate to proceed with a surrogacy. Some commissioning parents and surrogates have gained a sister or sibling as a result of the surrogacy process and some surrogates wanted commissioning parents to reach out to them for parenting advice. Fantus S 'Two men and a surrogate: A qualitative study of surrogacy relationships in Canada' (2021) 70 *Interdisciplinary Journal of Applied Family Science* 257 (hereafter Fantus (2021)).

<sup>64</sup> Imrie *et al* (2014) 431 and Fantus (2021) 257.

<sup>65</sup> Bromfield NF 'Surrogacy has been one of the most rewarding experiences in my life' (2016) 9 *International Journal of Feminist Approaches in Bioethics* 206 (hereafter Bromfield (2016)).

<sup>66</sup> Golombok (2020) 112-114.

<sup>67</sup> Golombok (2020) 140-141.

<sup>68</sup> Golombok (2020) 115.

<sup>69</sup> Mulligan (2020) 30-32.

<sup>70</sup> Mulligan (2020) 30-32.

Some children of surrogates have also benefitted from post-birth contact and regard the children that their mother had given birth to through surrogacy as their half siblings or siblings.<sup>71</sup> Some of them have also reported good relationships with both these children and their commissioning parents and regarded post-birth contact with them as a benefit of their mothers' surrogacies.<sup>72</sup> Contact between the child and surrogate's children have also provided benefit to the latter in their understanding of the surrogacy process, including that the child was being raised by the commissioning parents.<sup>73</sup>

Post-birth contact during the period shortly after the birth of the child also provides benefits for children born through surrogacy, surrogates and her children, including providing them with closure. Kris Probasco, an experienced clinical social worker specialising in surrogacy and infertility, informs that when the child is born, it is important for him to have contact with the surrogate prior to handover so that he may confirm his sense of smell, touch and hearing.<sup>74</sup> This process also benefits the surrogate as she then sees the commissioning parents' family complete. Probasco suggests that commissioning parents endeavour to make contact with the surrogate family within a few weeks of the child's birth as this affirms to the child that he has not lost anyone. Western Fertility Institute also recommends this and explains that it assures the surrogate of the child's well-being and it may provide comfort for the child to hear the voice of the surrogate again.<sup>75</sup> It also benefits the surrogate's own children in their understanding of who will care for the child and where he lives.<sup>76</sup>

Dr Kim Bergman, a US psychologist, is of the view that commissioning parents should grant surrogates closure shortly after the birth of the child as almost all surrogates require but may

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<sup>71</sup> Jadva V 'Postdelivery adjustment of gestational carriers, intended parents, and their children' (2020) 113 *Fertility and Sterility* 904 (hereafter Jadva (2020)).

<sup>72</sup> Jadva V and Imrie S 'Children of surrogate mothers: psychological well-being, family relationships and experiences of surrogacy' (2014) 29 *Human Reproduction* 94-95.

<sup>73</sup> Van den Akker OBA 'Psychosocial aspects of surrogate motherhood' (2007) 13 *Human Reproduction Update* 57 (hereafter Van den Akker (2007)).

<sup>74</sup> American Surrogacy 'How to emotionally transfer a baby born via surrogacy' available at <https://surrogate.com/intended-parents/raising-a-child-born-from-surrogacy/how-to-emotionally-transfer-a-baby-born-via-surrogacy/> (accessed 17 August 2022).

<sup>75</sup> Western Fertility Institute 'What surrogate mothers should expect after delivery' available at <https://www.westernfertility.com/third-party-reproduction/what-surrogate-mothers-should-expect-after-delivery/> (accessed 30 January 2023) (hereafter Western Fertility Institute).

<sup>76</sup> Teman E and Berend Z 'Surrogacy as a family project: How surrogates articulate familial identity and belonging' (2021) 42 *Journal of Family Issues* 1156 (hereafter Teman *et al* (2021)). Photographs of the child and commissioning parents also assist with this.

not request this.<sup>77</sup> She adds that granting the surrogate such closure, regardless of whether the parties have further contact, conveys their gratitude to her for her role in the formation of their family. Closure is an opportunity for the surrogate to bid the child, and possibly the commissioning parents, farewell.<sup>78</sup> Closure need not be an elaborate affair, and simple gestures such as allowing the surrogate to hold the child, taking a photo with her and allowing her children to meet the child could suffice.<sup>79</sup> Despite the numerous benefits of post-birth contact, there are also risks. These risks are discussed in the following section.

## **2.4. RISKS OF POST-BIRTH CONTACT**

### **2.4.1. Compromise to pre-existing relationship**

One risk of post-birth contact is that it could compromise a good pre-existing relationship between the known surrogate and commissioning parents, if their relationship is not adequately managed after the birth of the child.<sup>80</sup> In order to preserve their good pre-existing relationship, it would be vital for the parties to discuss aspects such as the surrogate's role in the child's life and whether it would be a special one, such as a godmother or a guardian of the child in the event of the commissioning parents' death, or whether the surrogacy will not alter her role.<sup>81</sup>

### **2.4.2. Parental interference and unmatched expectations**

One unknown surrogate's statement aptly describes why surrogates, like her, should expect no post-birth contact:<sup>82</sup>

The absolute last thing that the women I'm helping need is a person in their lives trying to claim some sort of relationship with her children. I want my intended mother to be the

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<sup>77</sup> Bergman K 'The post birth relationship with your surrogate' available at <https://www.growinggenerations.com/surrogacy-resources-for-intended-parents/the-post-birth-relationship-with-your-surrogate> (accessed 17 May 2022).

<sup>78</sup> In the event that post-birth contact with commissioning parents do not occur.

<sup>79</sup> Teman *et al* (2021) 1161. ConceiveAbilities 'Pros and cons of altruistic surrogacy' available at <https://www.conceiveabilities.com/about/blog/pros-and-cons-of-altruistic-surrogacy> (accessed 14 October 2022). One surrogate reported great benefits from spending time with the commissioning parents in hospital after the birth and watching them interact with the child and another found that closure confirmed the boundaries of the parties' two homes with the child belonging to the commissioning parents' home and the surrogate going home to her family. This was also found to assist the surrogate's children in the UK context, rather than the child simply disappearing and perhaps leaving the impression that children, which could include them, are easily disposal. Crawshaw M, Purewal S and van den Akker O 'Working at the margins: The views and experiences of court social workers on parental orders work in surrogacy arrangements' (2013) 43 *British Journal of Social Work* 1236 (hereafter Crawshaw *et al* (2013)).

<sup>80</sup> ConceiveAbilities 'Pros and cons of altruistic surrogacy' available at <https://www.conceiveabilities.com/about/blog/pros-and-cons-of-altruistic-surrogacy> (accessed 14 October 2022). Crawshaw *et al* (2013) 1235.

<sup>81</sup> Van der Walt Radio Pretoria interview. MacCallum *et al* (2013) 1336.

<sup>82</sup> Yee S, Hemalal S and Librach CL "'Not my child to give away": A qualitative analysis of gestational surrogates' experiences' (2020) 33 *Women and Birth* e260 (hereafter Yee *et al* (2020)).



mother 100%. Not 99% with some creepy “tummy mommy” or “birth mother” as part of the kids’ lives. No, the mother deserves to be the one and only because she is the one and only. I’m already taking away something that she would have killed to do.

Post-birth contact provides the surrogate with a role in the child’s life. This could result in her interfering with the commissioning parents’ relationship with the child and create confusion for the latter regarding the parties’ roles in his life.<sup>83</sup> Geographical distance and indirect communication between the parties that is not intrusive have been found to insulate the family formed through surrogacy from possible interference by the surrogate.<sup>84</sup> The parties could also have unmatched expectations of post-birth contact if they fail to properly discuss this aspect. This could lead to dissatisfaction between the parties on the level of such contact, with some requiring more and others less contact.<sup>85</sup> The parties’ contact needs may also change with the passage of time and similarly result in unmatched expectations and dissatisfaction for the parties and the child.<sup>86</sup>

#### 2.4.3. Commissioning parents and surrogate’s choices curtailed

It has been argued that commissioning parents should exercise autonomy over the choices that they make for their family, which includes whether to disclose to the child his surrogate birth and also to safeguard their privacy.<sup>87</sup> The right to post-birth contact curtails these choices. It compromises their right to privacy in that the surrogate’s role in the child’s life would have to be explained, particularly in the case of an unknown surrogate, and will result in their reproductive choice through surrogacy being disclosed.<sup>88</sup> Some commissioning parents may choose not to disclose the child’s birth through surrogacy as they fear that disclosure and post-birth contact with the surrogate may cause their child distress and undermine their relationship

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<sup>83</sup> *QG* case. However, the Verona Principles envisage that the commissioning parents are the child’s parents and that the surrogate has occasional contact with the child. Golombok indicates that the commissioning mother may be threatened by the surrogate’s contact with her family. However, studies reflect that the child views the commissioning mother as his actual mother and not the surrogate. See Golombok (2020) 134 and 149. Fears that the latter will interfere with the child’s upbringing is unsubstantiated as good relationships develop between the commissioning parents and surrogate. See Carone N, Baiocco R and Lingardi V ‘Italian gay fathers’ experiences of transnational surrogacy and their relationship with the surrogate pre- and post-birth’ (2017) 34 *Reproductive Biomedicine Online* 187 (hereafter Carone *et al* (2017)).

<sup>84</sup> Gunnarsson Payne *et al* (2020) 186.

<sup>85</sup> Carone *et al* (2018) 251-252.

<sup>86</sup> Contact has been reported to reduce with time. Jadva V, Gamble N, Prosser H *et al* ‘Parents’ relationship with their surrogate in cross-border and domestic surrogacy arrangements: comparisons by sexual orientation and location’ (2019) 111 *Fertility and Sterility* 568 (hereafter Jadva *et al* (2019)).

<sup>87</sup> Wade (2020) 740-745. It has been argued that commissioning parents’ rights in this regard should be limited as it is more parent-focused, and that many children may want their surrogacy origins to be disclosed. Early disclosure minimises the risk of any adverse effects to the child emanating from such disclosure and any potential risk may be mitigated with counselling.

<sup>88</sup> The child’s right to know his biological origins, which is deemed to be in the best interests of the child, frequently conflicts with the commissioning parents’ right to privacy. Olusegun *et al* (2021) 27-37.

with him.<sup>89</sup> The child's distress would stem from him having difficulties in processing information of his surrogate birth and commissioning parents may wish to protect him from this.<sup>90</sup>

The right to post-birth contact also removes the parties' autonomy to choose no contact after the birth of the child. Surrogates may not want post-birth contact but to rather close the surrogacy chapter in their lives.<sup>91</sup> Surrogates in restricted relationships have a low expectation of contact and there is usually no or rare contact between them and their commissioning parents.<sup>92</sup> Commissioning parents may similarly not want post-birth contact.<sup>93</sup> The parties may therefore feel compelled to have post-birth contact and do so half-heartedly.<sup>94</sup> This would not be an ideal basis on which to build a relationship.<sup>95</sup>

#### 2.4.4. Relationship risks

A further risk of post-birth contact is that the relationship between the commissioning parents and surrogate could break down, and it may require constant management to avoid this from occurring.<sup>96</sup> There are also similar risks to the other relationships that are formed as a result of post-birth contact as discussed in 2.3.3. The parties' lack of compatibility and unmatched expectations of post-birth contact could contribute to this breakdown.<sup>97</sup> Post-birth contact may also reduce with the passage of time and pose relational risks.<sup>98</sup> Shozi argues that it is not always in the child's best interests to have a relationship with his surrogate as some children born through surrogacy have reported negative experiences in this regard.<sup>99</sup>

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<sup>89</sup> Wade (2020) 739.

<sup>90</sup> Readings *et al* (2011) 493-494. However, research suggests that these concerns are unfounded if the child is gradually told in an age-appropriate manner of his birth so that it would seem normal.

<sup>91</sup> Ruiz-Robledillo *et al* (2016) 189. Fantus (2021) 257.

<sup>92</sup> Gunnarsson Payne (2020) 188. Gunnarsson Payne's study found that restricted relationships are one type of relationship that can exist between commissioning parents and surrogate. These relationships involve the parties having no or little contact during the surrogate's pregnancy with the commissioning parents usually liaising with intermediaries, such as doctors or surrogacy agencies, during the surrogacy process. As a result, these surrogates have low expectations of post-birth contact.

<sup>93</sup> Jadvá *et al* (2019) 568. Some commissioning parents choose surrogacy in countries that do not facilitate contact.

<sup>94</sup> Lamba N, Jadvá V, Kadam K *et al* 'The psychological well-being and prenatal bonding of gestational surrogates' (2018) 33 *Human Reproduction* 652.

<sup>95</sup> The parties could be screened on their suitability for post-birth contact.

<sup>96</sup> Ciccarelli JC and Beckman LJ 'Navigating rough waters: An overview of psychological aspects of surrogacy' (2005) 61 *Journal of Social Issues* 32.

<sup>97</sup> Jadvá *et al* (2019) 567-568. Appropriate matching of the parties and pre-surrogacy discussions as envisaged by the Verona Principles may mitigate these risks.

<sup>98</sup> Imrie *et al* (2014) 426.

<sup>99</sup> Shozi B, Hazarilall R and Thaldar D 'Blood is thicker than water, but is it thicker than ink? An analysis of parenthood and sperm donor agreements in the wake of QG v CS (32200/2020) 2021 ZAGPPHC 366 (17 June 2021)' (2022) 33 *Stellenbosch Law Review* 545 (hereafter Shozi *et al* (2022)). They are of the view that commissioning parents should decide whether to have post-birth contact or not.

## **2.5. CONCLUDING REMARKS**

This chapter has shown that the Verona Principles consider it to be in the best interests of the child for the surrogate and her family to have contact with the family formed through surrogacy. The right to post-birth contact creates an obligation for the parties to surrogacy agreements to have contact after the birth of the child and to establish a relationship in accordance with this. They are at liberty to determine the nature and extent of their contact. Commissioning parents are assumed to hold the key to unlocking such contact and they are therefore required to be educated on the benefits of this contact.

This chapter has also outlined the numerous benefits of post-birth contact, which includes upholding several children's rights. The lived views of some children born through surrogacy are that they have benefitted from having contact with their surrogate and her children, and from connections formed with other children that their surrogate has had as a result of her other surrogacies. Surrogates have also derived benefits as post-birth contact results in their satisfaction with the surrogacy journey. The surrogate's own children have also benefitted as post-birth contact provided them with a better understanding of the surrogacy process, and provided them with opportunities to form relationships with the children that their mother has had through surrogacy and their commissioning parents. This chapter has balanced the benefits of post-contact by outlining the risks associated therewith, which may dissuade parties to surrogacy agreements from having such contact. The next chapter considers the South African legal and practical landscape on post-birth contact. This includes a consideration of the extent to which the right to post-birth contact finds application in the domestic context and whether this position caters for the needs of all parties to the surrogacy agreement.

## **CHAPTER 3**

### **THE SOUTH AFRICAN POSITION ON POST-BIRTH CONTACT**

#### **3.1. INTRODUCTION**

South Africa's surrogacy framework is considered to be advanced.<sup>1</sup> The question that arises is whether its post-birth contact laws and practices also keep up with such advancements. It would be useful to ascertain whether South African laws and practices are aligned with the child-focused right to post-birth contact, and whether the parties to surrogacy agreements experience the benefits of such contact or err on the side of caution and exclude it, given the risks associated therewith.

This chapter will consider the current legal position in SA with regard to contact between the surrogate and the family formed through surrogacy. This will first include a discussion of its post-birth contact provision as contained in section 297(1)(d) of the Children's Act, and the history thereof. Secondly, the current practice on contact between the parties when the agreement is concluded, during the surrogate's pregnancy and after she gives birth to the child will be analysed. This will include a consideration of whether the parties to the agreement can provide consent to exclude post-birth contact at the pre-conception stage. Thirdly, cases which have contemplated contact and the lessons to be learned from these will be discussed. Finally, an analysis will be conducted of whether the current position in SA adequately caters for the interests of all the parties to the agreement, particularly the best interests of the child to be born as a result of such agreement.

#### **3.2. CURRENT LAW ON POST-BIRTH CONTACT AND ITS HISTORY**

##### **3.2.1. Current law on post-birth contact**

Chapter 19 of the Children's Act regulates surrogacy in SA and requires that the commissioning parents and surrogate conclude an agreement. This chapter provides an opportunity to persons who would not otherwise be in a position to raise a child who is genetically related to them to do so by means of surrogate motherhood.<sup>2</sup> Prior to this Act coming into operation, surrogacy was practiced but was unregulated.<sup>3</sup> Commissioning parents

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<sup>1</sup> Kruger H and Skelton A *The Law of Persons in South Africa* 2 ed (2018) 95.

<sup>2</sup> *APP and Another v NPK* (2021) ZAWCHC 69 para 24.

<sup>3</sup> D1 of ad hoc Committee's report.

were required to adopt the child after birth in order to become such child's legal parents.<sup>4</sup> This held two main risks for the parties, namely that:

- (1) the surrogate may decide not to relinquish and instead decides to keep the child; or
- (2) the commissioning parents decide not to keep the child, particularly when the child is born with a defect.<sup>5</sup>

Chapter 19 therefore adopted the direct parentage model to mitigate these risks.<sup>6</sup> This model of making decisions on parentage and contact with the child at the preconception stage has been criticised.<sup>7</sup> The only risk that remained is when traditional surrogacy is practiced,<sup>8</sup> where the surrogate has a sixty (60) day cooling off period after giving birth to the child and elects to terminate the agreement and keep the child.<sup>9</sup> There is no such risk with gestational surrogacy, as the surrogate has no similar cooling off period, based on the effect of section 297(1) of the Children's Act.<sup>10</sup>

In order for an agreement to be valid, it is required to be confirmed by the high court.<sup>11</sup> Section 297(1) forms part of chapter 19 of the Children's Act and sets out the effect of a valid agreement. It reads:

The effect of a valid surrogate motherhood agreement is that-

- a) any child born of a surrogate mother... is for all purposes the child of the commissioning parent or parents from the moment of birth of the child concerned;
- b) the surrogate mother is obliged to hand the child over to the commissioning parent or parents as soon as is reasonably possible after the birth;
- c) the surrogate mother or her husband, partner or relatives has no rights of parenthood or care of the child;
- d) the surrogate mother or her husband, partner or relatives have no right of contact with the child unless provided for in the agreement between the parties; ...

<sup>4</sup> D4 of ad hoc Committee's report.

<sup>5</sup> Adele van der Walt YouTube 'Adele van der Walt – The Children's Act 38 of 2005' available at <https://www.youtube.com/user/adelevdwaltinc/videos> (accessed 16 May 2022).

<sup>6</sup> According to C9 of the ad hoc Committee's report, direct parentage means that a child born as a result of an agreement becomes the legitimate child of the commissioning parents from the moment of birth. The surrogate therefore has to relinquish the child to the commissioning parents and the commissioning parents have to accept the child regardless of any defects.

<sup>7</sup> Clark B 'Surrogate motherhood: comment on the South African law commission's report on surrogate motherhood (project 65)' (1993) 110 *SALJ* 777. Clark argues that this model is rigid and makes no provision for the surrogate to change her mind.

<sup>8</sup> Van Niekerk C 'Section 294 of the Children's Act: Do roots really matter?' (2015) 18 *PELJ* 400 (hereafter Van Niekerk (2015)). Traditional or partial surrogacy is when the surrogate's gametes are used during the fertilisation process and she will then be the genetic and gestational mother of the child.

<sup>9</sup> Section 298(1) of the Children's Act reads "A surrogate mother who is also a genetic parent of the child concerned may, at any time prior to the lapse of a period of sixty days after the birth of the child, terminate the surrogate motherhood agreement by filing written notice with the court."

<sup>10</sup> Van Niekerk (2015) 400. Gestational or full surrogacy is when the surrogate has no genetic connection to the child as her gametes are not used during the fertilisation process.

<sup>11</sup> Section 292(1)(e) of the Children's Act.

Section 297(1)(c) correctly excludes any parental rights between the surrogate and child born as a result of the agreement, as it is the commissioning parents' desire to be parents that gives rise to such agreement and the resultant birth of the child. Contact rights are also excluded in section 297(1)(d), unless the parties decide to include this in their agreement. The back door was therefore left open for contact to be included.<sup>12</sup> If no provision is made in the agreement for post-birth contact, then the default position is that the surrogate and her family will have no right of contact with the child. The definition of contact in the Children's Act provides for various methods of contact, which would apply to a surrogate having contact with the child. This includes having a personal relationship with the child and regular communication with the child, either in person or by visiting each other or telephonic, postal or electronic communication with each other.<sup>13</sup> This definition allows for relationship-building to be negotiated and exercised in a manner which is comfortable for the parties, and is similar to the personal and non-personal types of relationships that may be negotiated under the right to post-birth contact, as referred to in chapter 2. There is no legislative bar to the commissioning parents and surrogate mother having contact after the birth of the child.

As referred to in chapter 1, there is no reported case on surrogacy that has dealt with the provisions of section 297(1)(d). Amendments to chapter 19 of the Children's Act had been proposed but these did not include any amendments to section 297(1)(d) itself.<sup>14</sup> A recent case has demonstrated that courts are starting to initiate enquiries on the emotional aspects of surrogacy when it requested that the impact of the agreement on the surrogate and her children and the existing children of the commissioning parents be investigated so that it could be taken

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<sup>12</sup> Louw A 'Chapter 19: Surrogate Motherhood' in Davel CJ and Skelton A (ed) *Commentary on the Children's Act 38 of 2005* (2018) 25 indicates that the surrogate may use this provision to negotiate contact with the child as an optional clause in the surrogacy agreement but she may not enforce it. This suggests that the insertion of this clause would be at the request of the surrogate.

<sup>13</sup> This definition of contact with a child reads:

- (a) maintaining a personal relationship with the child; and
- (b) if the child lives with someone else –
  - (i) communication on a regular basis with the child in person, including –
    - (aa) visiting the child; or
    - (bb) being visited by the child; or
  - (ii) communication on a regular basis with the child in any other manner, including –
    - (aa) through the post; or
    - (bb) by telephone or any other form of electronic communication; ...

<sup>14</sup> Children's Amendment Bill (GN B18) GG 43656 of 26 August 2020 (hereafter Children's Amendment Bill). This bill was later amended and the Children's Amendment Act 17 of 2022 was passed in order to prioritise the provisions related to foster care. As a result of this, the proposed amendments to chapter 19 were excluded on the basis that they may be reintroduced at a later stage. Parliamentary Monitoring Group 'Children's Amendment Bill: adoption, with Deputy Minister' available at <https://pmg.org.za/committee-meeting/35254/> (accessed 26 April 2023).

into account in the court's decision on whether to confirm the agreement.<sup>15</sup> In a subsequent case, it was decided that this investigation does not require that the existing children of the parties to the surrogacy agreement be assessed by a clinical psychologist, in order to determine whether they are prepared for the effects of the surrogacy.<sup>16</sup> Rather, the courts retain a discretion to order such an assessment should the facts of the case warrant this.<sup>17</sup> The reported surrogacy cases do not reflect that the courts probe the issue of post-birth contact.

However, a recent sperm donor case dealt with post-birth contact rights.<sup>18</sup> The applicants' were the sperm donor and his mother who sought an order for contact rights with the child born as a result of such sperm donation. The sperm donor agreement which he concluded with the parents of the child excluded any contact rights<sup>19</sup> with the child, save that the parents could allow such contact if they deemed this to be in the child's best interests.<sup>20</sup> The sperm donor appears to have not been counselled prior to making such decision.<sup>21</sup> He was permitted to visit the child two days after his birth and indicated that he felt an instant bond with him and was emotionally unprepared for the effect that the child's birth would have on him.<sup>22</sup> He therefore regretted his previous decision to have no contact with the child. The applicants visited the child about four times in 2016, i.e. during the first year of the child's life, about twice in 2017 and there was no contact during 2018. During 2019, the child and his parents rented a smallholding belonging to the sperm donor for about nine months. During such time, the frequency of contact between the child and sperm donor and his mother (who also lived on the smallholding) increased and was more regular.<sup>23</sup> The relationship between the parents, sperm donor and his mother became strained when the latter questioned the former's parenting abilities.<sup>24</sup> This resulted in the parents moving away from the smallholding in January 2020 and all contact between the child and applicants then ceased.<sup>25</sup> The sperm donor then launched an application for contact with the child pending a report by the Family Advocate who would investigate the child's best

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<sup>15</sup> *Ex Parte JCR*.

<sup>16</sup> *Ex Parte Three Surrogacy Applications and Others* (2022) ZAGPPHC 848 (hereafter *Ex Parte Three Surrogacy Applications*) para 41 and order 1.

<sup>17</sup> Order 2 of *Ex Parte Three Surrogacy Applications*.

<sup>18</sup> *QG* case.

<sup>19</sup> Referred to as visitation rights in the donor agreement.

<sup>20</sup> Para 13.10.

<sup>21</sup> This also occurred in *EJ and Others v Haupt NO 2022 (1) SA 514 (GP)*, at para 37, where only the child's parents received counselling in preparation for her birth, whilst the sperm donor was not counselled as no role in the child's life was envisaged for him in the agreement.

<sup>22</sup> Para 18.

<sup>23</sup> Para 23.

<sup>24</sup> Para 24.

<sup>25</sup> Para 27 and 28.

interests and the issue of contact with the sperm donor and his mother.<sup>26</sup> He requested contact with the child every alternative Saturday from 9am to 5pm, reasonable electronic and telephonic contact two weekdays for half an hour each, for at least three hours on the child's birthday, for at least three hours each on his and his mother's birthdays and at least three hours on Christmas or New Year's Day.<sup>27</sup>

The court considered the best interests of the donor-conceived child and found that his best interests were not threatened due to poor parenting.<sup>28</sup> The court was of the view that the child's family life with his parents should be protected from outside interference.<sup>29</sup> The court further found that the parents' conduct in permitting the applicants' contact with their child did not result in the applicants being entitled to the type of contact that they requested in their application.<sup>30</sup> The court had regard to the applicants' limited contact with the child from 2016 to 2021 and questioned whether a mutual bond had formed between the applicants and the child.<sup>31</sup>

The court correctly indicated that the nature of the contact rights that the applicants sought were similar to parental rights and were not in the child's best interests.<sup>32</sup> It also found that such contact would not hugely further the child's best interests but rather go against it and cause confusion and uncertainty for him.<sup>33</sup> The court considered the factors in section 23 of the Children's Act and the values set out in the Constitution and refused the applicants' request for contact rights with the child.<sup>34</sup> The court remarked that contact rights would predominantly be

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<sup>26</sup> Para 29.

<sup>27</sup> Para 29.

<sup>28</sup> Para 60.

<sup>29</sup> Para 58.

<sup>30</sup> Para 59.

<sup>31</sup> Para 68. In para 69, however, the court acknowledged the sperm donor's perceived bond with the child due to the immediate connection that he felt upon first seeing the child, the similarity of their features and his realisation that he was his biological son, which resulted in him wanting to be part of his life at that stage. In para 72 and 73, it was indicated that the sperm donor did not share his feelings at the time about the child with the child's parents, nor did he go for counselling regarding these feelings.

<sup>32</sup> Para 77 to 79.

<sup>33</sup> Para 82.

<sup>34</sup> Para 80 to 88. Section 23 of the Children's Act inter alia provides that a person who has an interest in the care, well-being or development of a child may apply to court for an order to have contact with such child and a court considering such application must take into account the following factors:

- a) the best interests of the child;
- b) the relationship between the applicant and child, and any other relevant person and the child;
- c) the degree of commitment that the applicant has shown towards the child;
- d) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and
- e) any other factor which in the court's opinion should be taken into account.



considered based on the nature of the relationship and involvement between the child and sperm donor and not their genetic link.<sup>35</sup>

The court interestingly referred to an Australian case where an application was launched by a known sperm donor who sought contact and parental responsibility for his biological son, who was part of the applicant's sister's same-sex family.<sup>36</sup> The court in that case denied the applicant's request for parental responsibility but granted him contact. The order for contact was made as the child was required to know from an early stage that the applicant was more than only his uncle, as this fact would at some future stage be disclosed to him. However, contact was limited to four instances a year to avoid the development of a relationship that might be considered parental.

The *QG* case is being taken on appeal.<sup>37</sup> The lessons learnt from this case regarding post-birth contact are the following:

- (1) A genetic link between a sperm donor, and by implication a traditional surrogate, can contribute to a bond being created with the child when post-birth contact occurs.
- (2) Whilst a donor agreement, and by implication a surrogacy agreement, can give an indication of the parties intention prior to the child being conceived, such intention can subsequently change when emotions become involved. Informed consent is vital, particularly when contact rights for a sperm donor or surrogate are excluded. This case highlights whether informed consent to exclude post-birth contact can truly be given by the donor at the preconception stage to create certainty. It is submitted that independent counselling and legal advice should be provided prior to any post-birth contact rights being signed away.<sup>38</sup>
- (3) The court did not exclude contact rights for the sperm donor based on him contracting out of it in the donor agreement. It rather determined contact rights based on the nature of the relationship between the donor and child and the former's involvement in the child's life, and not their genetic connection, and whether this resulted in a mutual bond. Had the facts been different and had the donor had substantially more contact with the child, contact

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<sup>35</sup> Para 91.

<sup>36</sup> Para 92 and 93. A 2007 case.

<sup>37</sup> Shozi B and Thaldar D 'Unplanned parent in the hood – Navigating the legal maze of known sperm donor agreements' available at <https://www.dailymaverick.co.za/article/2021-09-21-unplanned-parent-in-the-hood-navigating-the-legal-maze-of-known-sperm-donor-agreements/> (accessed 3 July 2022) (hereafter Shozi and Thaldar (2021)).

<sup>38</sup> Shozi *et al* (2022) 545-546 correctly underscores the importance of counselling for the sperm donor so that he understands his role as such, and that the parties to the agreement's expectations are matched with each other when post-birth contact is agreed.

rights may have been awarded to him.<sup>39</sup> This would probably similarly apply to post-birth contact rights for surrogates.

- (4) Post-birth contact which is akin to assuming a parental role should be excluded. The donor or surrogate's role should not change to a parent-like role as parental rights, correctly so, are expressly excluded for surrogates in the Children's Act.<sup>40</sup> The surrogate is required by this Act to have a living child of her own.<sup>41</sup> This may reduce the risk of her wanting to acquire contact rights which are akin to parental rights, particularly in the case of surrogates who engage in surrogacy on more than one occasion.
- (5) If contact with the donor or surrogate is in the child's best interests and permitted, then it should be carefully managed and limited to avoid opening the door too widely and attracting more substantial parent-like rights. Daily contact and living on the same premises provides an opportunity for a donor or surrogate to interfere in the lives of the family formed through surrogacy. Provision should therefore be made for sufficient distance and absence from each other to avoid such interference.
- (6) This case could result in commissioning parents being reluctant to agree to post-birth contact between their child and the surrogate given the risks involved. The Australian case referred to by the court in the *QG* case could be used as a yardstick in the event that the parties agree to post-birth contact. This Australian case also highlights that the risks of pre-existing relationships being negatively affected by these arrangements, as referred to in chapter 2, do materialise.

### 3.2.2. History of post-birth contact

After Pat Anthony made history in 1987 by being the first SA surrogate and giving birth to her grandchildren,<sup>42</sup> the SALC was appointed to consider the regulation of surrogacy.<sup>43</sup> The SALC, inter alia, recommended that the effect of an agreement is that the surrogate will have no right of parenthood, custody or access<sup>44</sup> to the child born as a result of surrogacy.<sup>45</sup> An ad hoc

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<sup>39</sup> Shozi and Thaldar (2021).

<sup>40</sup> Section 297(1).

<sup>41</sup> Section 295(c)(vii) of the Children's Act. E2(1)(e)(ii) of the ad hoc Committee's report indicates that the reason for this requirement is to minimise the risk of the surrogate not relinquishing the child, as such child will not be her only one.

<sup>42</sup> Nicholson C and Bauling A 'Surrogate motherhood agreements and their confirmation: A new challenge for practitioners?' (2013) 46 *De Jure Law Journal* 512.

<sup>43</sup> Sloth-Nielsen (2019) 185. She gave birth to the Ferreira-Jorge triplets by using the gametes of her daughter. This resulted in her being the biological grandmother and gestational mother of the triplets.

<sup>44</sup> The current equivalent of contact.

<sup>45</sup> Para A4(8) of ad hoc Committee's report.

Committee was subsequently appointed to conduct further investigations on issues raised in the SALC's report. It conducted, inter alia, consultations in four of SA's provinces,<sup>46</sup> the UK and the US.<sup>47</sup> The ad hoc Committee's investigations revealed that most commentators in SA were of the view that visitation rights should be left to the parties to the agreement, with the best interests of the child at heart and with regard to the provisions of the Constitution.<sup>48</sup> The commentators recommended that the agreement contains provision for any visitation rights for the surrogate.<sup>49</sup> The UK and US position at the time was that it was vital for parties to the surrogacy agreement to be screened and counselled by social workers and psychologists and to ensure that they were a suitable match.<sup>50</sup> Contact between the parties to the surrogacy agreement in the UK and US was left to choice but encouraged on a social basis so that the parties could interact with each other and develop a relationship.<sup>51</sup>

The ad hoc Committee's recommendation was that the agreement should specify any arrangements regarding the surrogate child, such as visitation rights and access to the child.<sup>52</sup> As indicated in chapter 1, a dialogue between the parties was envisaged on post-birth contact. Contrary to this recommendation, the ad hoc Committee's report then indicated that the effect of the agreement in gestational surrogacy is that the surrogate and her relatives will have no right of guardianship, custody or access to the child but the parties may agree on visitation rights and access to the child.<sup>53</sup> The latter position then went on to form the basis of section 297(1)(d) of the Children's Act, without taking cognisance of the earlier context related to the access provisions. The default position created by section 297(1)(d) is thus inconsistent with the ad hoc Committee's recommendation that the parties discuss any access arrangements between the surrogate and child to be born. This inconsistency may have arisen due to access to the child being combined in error with the exclusion of guardianship and custody provisions in the ad hoc Committee's report.<sup>54</sup> This is particularly so as the position in the case of traditional surrogacy does not outright exclude access on the same issue but rather leaves access and visitation rights to the choice of the parties.<sup>55</sup>

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<sup>46</sup> Para B1(4). This occurred in North West, Northern Province, Eastern Cape and KwaZulu-Natal.

<sup>47</sup> Para B1(5).

<sup>48</sup> Para E4(4)(d).

<sup>49</sup> Para E6(3)(j).

<sup>50</sup> Para E7(6).

<sup>51</sup> Para E9(4)(b).

<sup>52</sup> Para F7(4)(h).

<sup>53</sup> Para F9(1)(c).

<sup>54</sup> Para F9(1)(c).

<sup>55</sup> Para F9(2)(f). It is unclear why both access and visitation rights were referred to as they are understood to be the equivalent of post-birth contact.

The ad hoc Committee secured input from two surrogates, i.e. the first SA and UK surrogates.<sup>56</sup> However, no lived views of children born through surrogacy were obtained. Surrogacy had not been practised for very long in SA and the children born as a result thereof may not have been old enough to comment on their experiences at that stage.<sup>57</sup> Furthermore, the lived views of children being taken into account in decision-making and draft legislation was still in its infancy stage. This position has changed now and there will be many children with lived views of having been born through surrogacy since the Ferreira-Jorge triplets' birth in 1987. These children's input will be vital when considering any amendment to the current post-birth contact provision and will give effect to their right to be heard. Similarly, the input of more surrogates, as well as commissioning parents, should be secured for this purpose.

### **3.3. CURRENT PRACTICE ON CONTACT**

#### **3.3.1. Background on number and type of surrogacies**

The precise number of surrogacies in SA are unknown as this information is not readily available from fertility clinics and high courts.<sup>58</sup> Fertility specialist, Dr Heylen, is of the view that there are not many surrogacies in SA as most woman have a normal uterus and can carry the child.<sup>59</sup> As there are no statistics on surrogacy, he estimates that there are about 100 surrogacies done per year.<sup>60</sup> This is consistent with Sloth-Nielsen's estimate that surrogacies run into the hundreds rather than thousands.<sup>61</sup> Since the inception of the Children's Act on 1 April 2010, surrogacy is altruistic and this has reduced the number of surrogates who are willing to act as such.<sup>62</sup> The cost of surrogacy also makes it inaccessible to many South Africans.<sup>63</sup> As infertility rates increase, there has been a rise in the couples using surrogacy.<sup>64</sup>

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<sup>56</sup> Para E1(2)(a)(i) and H.

<sup>57</sup> The Ferreira-Jorge triplets would have been about twelve years old when the ad hoc Committee finalised its report in 1999.

<sup>58</sup> Sloth-Nielsen (2019) 186.

<sup>59</sup> Javan (2020).

<sup>60</sup> Javan (2020).

<sup>61</sup> Sloth-Nielsen (2019) 186.

<sup>62</sup> Adele van der Walt Inc. available at [surrogacyagreements.co.za](http://surrogacyagreements.co.za) (accessed 22 May 2022) (hereafter AdeleVan der Walt website).

<sup>63</sup> IFAASA 'How do I start the surrogacy process? A typical chain of events' available at <https://ifaasa.co.za/the-surrogacy-process/> (accessed 30 June 2022) (hereafter IFAASA). The cost of surrogacy has been estimated at R250 000 to R300 000 or more.

<sup>64</sup> Living and Loving 'Everything you need to know about surrogacy in South Africa' available at <https://www.all4women.co.za/2136039/parenting/falling-pregnant/surrogacy/amp> (accessed 28 July 2021) (hereafter Living and Loving (2018)). One in six couples in Africa struggle with fertility issues. Bezuidenhout L 'Aanlyn skou beantwoord vrae oor vrugbaarheid' available at [maroelamedia.co.za/leefstyl/ouerskap/aanlyn-skou-beantwoord-vrae-oor-vrugbaarheid/](http://maroelamedia.co.za/leefstyl/ouerskap/aanlyn-skou-beantwoord-vrae-oor-vrugbaarheid/) (accessed 31 January 2022).

This could therefore result in an increase in Heylen and Sloth-Nielsen's estimated number of surrogacies.

Most surrogacies in SA are now gestational due to the risks of traditional surrogacy.<sup>65</sup> Most fertility clinics in SA do not perform traditional surrogacy<sup>66</sup> or discourage it.<sup>67</sup> Attorneys who specialise in surrogacy also discourage it.<sup>68</sup> This dissertation will therefore focus on the position of gestational surrogates only.

### 3.3.2. Previously known or unknown surrogates, how they are sourced and profile of surrogates

In SA, surrogates are first sourced within the commissioning parents own family or social network circles.<sup>69</sup> Adele van der Walt ("van der Walt") indicates that the surrogate is usually a sister, sister-in-law or cousin.<sup>70</sup> She can also be a good friend of the commissioning parents<sup>71</sup> or an acquaintance from their social circles or community, for example a church member.<sup>72</sup> All surrogates secured in these ways are thus known to the commissioning parents ("known surrogates").

When there is no one within these circles to assist, then surrogates may be sourced through fertility clinics who are approached by women who volunteer to be surrogates<sup>73</sup> or surrogacy

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<sup>65</sup> Fertility Law available at <https://www.fertilitylaw.co.za> (accessed 16 May 2022) (hereafter Fertility Law website).

<sup>66</sup> Cape Fertility available at <https://capefertility.co.za> (accessed 31 May 2022) (hereafter Cape Fertility).

<sup>67</sup> Wijnland Fertility available at [wijnlandfertility.co.za/surrogacy](http://wijnlandfertility.co.za/surrogacy) (accessed 3 September 2021) (hereafter Wijnland Fertility).

<sup>68</sup> Adele van der Walt YouTube 'Legal pitfalls on surrogacy and fertility' available at <http://www.youtube.com/user/adelevdwaltinc/videos> (accessed 16 May 2022) and Friedman says she will not accept a traditional surrogacy case unless it is a sister or niece of the commissioning mother. The Global Herald 'International Surrogacy Forum: The Regulatory Approach – Robynne Friedman' available at [theglobalherald.com/law/international-surrogacy-forum-the-regulatory-approach-robynne-friedman/](http://theglobalherald.com/law/international-surrogacy-forum-the-regulatory-approach-robynne-friedman/) (accessed 31 January 2022) (hereafter Global Herald (2019)).

<sup>69</sup> Robynne Friedman Surrogacy Attorneys available at [surrogacylaw.co.za/surrogacy-in-south-africa/](http://surrogacylaw.co.za/surrogacy-in-south-africa/) (accessed 17 December 2021) (hereafter Robynne Friedman Attorneys website). Adele van der Walt's website also confirms this.

<sup>70</sup> Van der Walt Radio Pretoria interview.

<sup>71</sup> E4(1)(b)(iii) of the ad hoc Committee's report noted that surrogates were mostly family or friends of commissioning parents.

<sup>72</sup> Adele van der Walt YouTube 'Surrogacy: A meaningful journey with a happy ending.04 September 2020' available at <http://www.youtube.com/user/adelevdwaltinc/videos> (accessed 16 May 2022) (hereafter van der Walt YouTube (2020)).

<sup>73</sup> Robynne Friedman Attorneys website. Friedman has a child who was born through surrogacy. In *Ex Parte KAF and Others* (2018) ZAGPJHC 529 (hereafter *Ex Parte KAF*), para 6, it was mentioned that Medfem was a fertility clinic that rendered a matching service and connected commissioning parents to surrogates. *Ex Parte HPP* para 6 indicates that the surrogate in the first surrogacy was the applicant's best friend but as she was unable to assist with the second surrogacy, an agency was approached.

agencies or advisory groups.<sup>74</sup> Attorneys who specialise in surrogacy at times assist commissioning parents to find surrogates<sup>75</sup> and some commissioning parents also find their own surrogate through the internet.<sup>76</sup> These surrogates would be previously unknown to the commissioning parents (“unknown surrogates”).

Andrew Martin (“Martin”) is of the view that surrogates are mostly found through fertility clinics.<sup>77</sup> Due to surrogacy being altruistic, it is difficult to find surrogates who are not family members or friends.<sup>78</sup> One fertility clinic observes that in most cases, the surrogate carries a baby for a complete stranger.<sup>79</sup>

Robynne Friedman (“Friedman”) mentions that few black parents consider surrogacy and that they often receive many enquiries from black women who want to be surrogates but they often do not have suitable commissioning parents that they can assist.<sup>80</sup> It appears that despite the shortage of surrogates, commissioning parents are at times selective of who they choose as surrogates. Van der Walt informs that the surrogate’s colour and culture can differ from that of the commissioning parents.<sup>81</sup> Despite different preferences, the surrogate should ideally be healthy, have had uncomplicated pregnancies and completed her family.<sup>82</sup> South African surrogates are described as someone who the average woman feels comfortable with.<sup>83</sup>

### 3.3.3. Preconception stage

This stage includes the events leading up to the agreement between the parties being confirmed by the high court and until fertilisation takes place. The court’s duty when considering surrogacy applications is to first have regard to the agreement between the commissioning parents and surrogate.<sup>84</sup> The court’s role, as upper guardian of all minor children, is not to

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<sup>74</sup> Surrogacy Advisory Group’s (“SAG”) website indicates that commissioning parents can find their own surrogate or they will assist them by introducing the surrogate to them for free. Surrogacy Advisory Group available at <https://surrogacy.co.za> (accessed 30 June 2022).

<sup>75</sup> Fertility Solutions ‘Robynne Friedman on Dagbreek’ available at <https://fertilitysolutions.co.za/robynne-friedman-attorney/> (accessed 24 May 2022) (hereafter Friedman on Dagbreek).

<sup>76</sup> Fertility Law website. Martin explains during his webinar that they are sometimes approached by women who want to be surrogates and they then connect them with commissioning parents, but the latter mostly find surrogates through websites that provide matching services for commissioning parents and surrogates.

<sup>77</sup> Martin webinar. These surrogates will probably be previously unknown to commissioning parents. This differs from Van der Walt’s experience as surrogates in her cases are mostly known.

<sup>78</sup> Friedman on Dagbreek.

<sup>79</sup> Cape Fertility ‘Surrogacy All you need to know...’ available at [capefertility.co.za](http://capefertility.co.za) (accessed 31 May 2022).

<sup>80</sup> Panyane M ‘Surrogacy battle is her baby’ available at [iol.co.za/news/south-africa/kwazulu-natal/surrogacy-battle-is-her-baby-2095423](http://iol.co.za/news/south-africa/kwazulu-natal/surrogacy-battle-is-her-baby-2095423) (accessed 1 February 2022) (hereafter Panyane (2016)).

<sup>81</sup> Sarie (2015).

<sup>82</sup> Hudson M ‘As net ‘n surrogaat my kan help om ‘n baba te he’ available at [rsgplus.org/as-net-n-surrogaat-my-kan-help-om-n-baba-te-he/](http://rsgplus.org/as-net-n-surrogaat-my-kan-help-om-n-baba-te-he/) (accessed 5 June 2022).

<sup>83</sup> Sarie (2015).

<sup>84</sup> *Ex parte WH* para 72.

merely rubber stamp such agreement but to consider the best interests of the child to be born from the agreement.<sup>85</sup> The court therefore safeguards the interests of the “sleeping partner” to the agreement.<sup>86</sup>

During court proceedings to confirm the agreement, it appears that only one attorney drafts the agreement and one clinical psychologist assesses both the surrogate (and her spouse or partner, if any) and commissioning parents, with the latter paying for their services.<sup>87</sup> This raises the question whether one attorney can in fact protect all parties’ needs and rights when they conflict with each other or whether the needs of the commissioning parents, as their paying client, are given preference potentially at the expense of the surrogate. Ideally, the surrogate should secure independent legal advice to safeguard her rights and interests, particularly on post-birth contact.<sup>88</sup> Surrogates will probably be more comfortable to discuss this subject with her own attorney rather than a joint one, and the former attorney may negotiate her position with the commissioning parents’ attorney, with a view to ensuring that her views are reflected in the agreement. This independent attorney’s charges should form part of the cost of surrogacy, and be for the commissioning parents’ account.

Another question which arises is whether one psychologist should assess both parties to the surrogacy agreement, particularly on post-birth contact which is the subject of this dissertation.<sup>89</sup> The argument against this is that a conflict of interest may arise for the psychologist if the parties cannot agree on post-birth contact especially if the psychologist’s starting point is that such contact between unknown surrogates and commissioning parents is not to be expected or is not permitted. Psychologists’ reasons for any such views should be

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<sup>85</sup> *Ex Parte CJD and Others* (2017) ZAGPPHC 717 (hereafter *Ex Parte CJD*) para 10.

<sup>86</sup> *Ex Parte MS* para 53.

<sup>87</sup> Javan (2020) and surrogate AB, in her post of 11 August 2021, suggests that one attorney was used for both surrogate and commissioning parents. Facebook ‘Angelique Butler (mej Sonnebloem)’ available at <https://facebook.com> (accessed 20 June 2022) (hereafter Angelique Butler Facebook). The names of surrogates and commissioning parents have been anonymised in this dissertation. This excludes the names of the first SA and UK surrogates whose names have been widely publicised, and attorneys Martin and Friedman who each have a child born through surrogacy. Adele van der Walt’s website suggests that one attorney drafts the surrogacy agreement and attempts to protect the surrogate, commissioning parents and child’s rights therein. It also suggests that one clinical psychologist assesses both the surrogate and commissioning parents when assessing the child’s best interests. IFAASA also indicates that only one attorney and psychologist is used. Le Roux C ‘As surrogaatma wys ek niks is vir God onmoontlik nie’ available at <https://lig.christians.co.za/as-surrogaatma-wys-ek-niks-is-vir-god-onmoontlik-nie/> (accessed 5 June 2022) (hereafter Le Roux (2021)). A 2021 article indicates that one clinical psychologist assessed both the surrogate and commissioning parents for purpose of the surrogacy application and also assisted them with counselling. In the *Ex Parte WH*, *Ex Parte HPP*, *Ex Parte KAF* and *Ex Parte CJD* cases, one psychologist also assessed both parties.

<sup>88</sup> This would be consistent with Verona Principle 5.3a.

<sup>89</sup> Surrogacy applications require a psychologist report that indicates the suitability of the commissioning parents to act as parents and the surrogate to act as such (para 67 and 77.3 of *Ex Parte WH*).

investigated. A counter argument is that using one psychologist, whose duty is to assist the court rather than to be partial, allows such psychologist to form a holistic view of both parties and places him or her in a better position to evaluate the best interests of the child by ensuring that the parties are appropriately matched. Such psychologist could possibly also counsel the parties with a view to relationship-building as previously discussed. The Children's Amendment Bill attempted to amend section 295 of the Children's Act by including a subsection which sets out some of the additional requirements for surrogacy applications as set out in *Ex Parte WH* and some subsequent cases.<sup>90</sup> However, it did not provide for more than one psychologist to assess the parties to the surrogacy agreement or for more than one attorney to represent these parties. This bill also attempted to amend section 303 of the Children's Act by introducing section 303A which provides for regulations to facilitate the implementation of chapter 19 of the Children's Act. Should this amendment be made at a later stage and these regulations come into effect, then they can explore in more detail the advantages and disadvantages of one psychologist assessing both parties, including securing input from psychologists who regularly conduct suitability assessments for surrogacy applications, and then decide on this aspect.

During surrogacy applications, courts have also considered the emotional<sup>91</sup> and physical well-being of the surrogate.<sup>92</sup> SA courts are now required to weigh all parties' interests, i.e. the surrogate and her children, the commissioning parents and their existing children and the child to be born as a result of the surrogacy agreement, during its decision to confirm the agreement.<sup>93</sup> However, the unborn child's rights are still placed at the centre of the enquiry<sup>94</sup> and takes precedence over conflicting rights of the commissioning parents.<sup>95</sup> This does not appear to apply in practice when post-birth contact with the surrogate is determined.

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<sup>90</sup> Section 295(dA)(i) was introduced in the bill. The courts have developed guidelines through these cases in which they set out the requirements for applications to confirm surrogacy agreements.

<sup>91</sup> At para 24 of *Ex Parte JCR* and para 19 of *Ex parte KAF*.

<sup>92</sup> At para 14 and 16 of *Ex Parte JCR*, the court took issue with the generic nature of the gynaecologist and clinical psychologist reports and ordered that the gynaecologist investigates whether the surrogate is physically able to carry another child given that she had two children of her own, three prior surrogate pregnancies and four caesarean sections. The court also ordered that the psychologist investigates her emotional ability to proceed with another surrogacy.

<sup>93</sup> Para 35 of *Ex Parte JCR*. This is consistent with section 295(e) of the Children's Act which requires that the personal and family circumstances of all parties to the surrogacy agreement be considered when confirming the agreement, with the unborn child's rights being given paramount importance.

<sup>94</sup> *AB* case para 192. *Ex parte MS*, at para 53, also indicated that the rights of the unborn child requires the most protection.

<sup>95</sup> Para 10 of *Ex Parte CJD*.



As mentioned earlier, the reported surrogacy cases indicate that the courts do not probe post-birth contact provisions or the lack thereof in agreements.<sup>96</sup> It is recommended that the courts should do so to ensure that it meets their obligations in terms of section 295(d) of the Children's Act.<sup>97</sup> It is unclear whether post-birth contact, and the different methods of such contact,<sup>98</sup> is discussed with the commissioning parents and surrogate when the agreement is drafted or whether the parties are led to believe that this is excluded in the case of an unknown surrogate.<sup>99</sup> Fertility Law<sup>100</sup> has detailed questionnaires for the surrogate and commissioning parents which includes provision, for example, that the surrogate indicates her religion and race and her preference for the commissioning parents' religion, with no provision for pre or post-birth contact.<sup>101</sup> It is unclear whether this is canvassed during consultations with commissioning parents and unknown surrogates or during the psychologist consultations with them. If it is canvassed, it is also unclear whether commissioning parents are discouraged to do so or are led to believe that it is excluded with unknown surrogates and whether a surrogate who requires post-birth contact is deemed to be unsuitable by the psychologist or attorney.

Martin clearly discourages post-birth contact.<sup>102</sup> Van der Walt is of the view that the parties' expectations, including the surrogate's role post-birth and the extent of her involvement in the life of the family formed through surrogacy,<sup>103</sup> should be discussed at the outset, with the assistance of a social worker. She advises that commissioning parents decide on the manner

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<sup>96</sup> In the reported case of *SA and Another v IO and Another* (2014) ZAGPPHC 953 for example, the judge considered issues such as whether the surrogacy was indeed altruistic or whether the surrogate was being remunerated for her services and whether the surrogate and commissioning parents were suitable. No mention was made at all of any post-birth contact provision in the agreement.

<sup>97</sup> This section reads "A court may not confirm a surrogate motherhood agreement unless-... (d) the agreement includes adequate provisions for the contact, care, upbringing and general welfare of the child that is to be born..."

<sup>98</sup> As envisaged in the definition of contact in the Children's Act.

<sup>99</sup> It seems that one psychologist, who provides psychological assessment reports to the high court, primes the surrogate to look after the child during pregnancy but to envisage no relationship with such child at all as the child was never hers. Facebook Medfem Fertility Clinic available at [facebook.com/2144199649164727/videos/2119556541678912](https://www.facebook.com/2144199649164727/videos/2119556541678912) (accessed 24 May 2022).

<sup>100</sup> Fertility Law website. During an interview with Hart Fertility clinic during the Covid-19 pandemic, Martin indicated that he has a three year old son through surrogacy.

<sup>101</sup> Fertility Law website.

<sup>102</sup> Martin webinar.

<sup>103</sup> Van der Walt YouTube (2020). Surrogate SS in Health 24 'Surrogacy: the truth' available at <https://www.news24.com/health24/parenting/fertility/Surrogacy-the-truth-20120721> (accessed 30 June 2022) (hereafter Health 24 (2008)) indicated that it is important to discuss whether commissioning parents' wishes for the surrogate to be part of their child's life in the future so that both are aware of their intention on this score. This suggests that commissioning parents have the upper hand in decision-making on post-birth contact, and if contact is required then the surrogate can agree or not agree to this. Van der Walt has also indicated that donor agreements should include a discussion of the donor's involvement in the child's life and this should then be recorded in the donor agreement. Adele van der Walt YouTube 'Legal pitfalls on surrogacy and fertility' available at <http://www.youtube.com/user/adelevdwaltinc/videos> (accessed 16 May 2022). This will similarly apply to surrogacy agreements as well.

and amount of post-birth contact with known surrogates but when surrogates are unknown then they require boundaries and there is no such contact.<sup>104</sup> The clinical psychologist then provides support to the surrogate to cut ties.<sup>105</sup> Van der Walt elaborates that when there is post-birth contact between the child and a known surrogate who is a family member or friend, this is recorded in the surrogacy agreement, and the surrogate's role is as a family friend rather than parental.<sup>106</sup> Some commissioning parents require close contact with known surrogates who are family or close friends but geographical distance such as living in a different province may not make this possible.<sup>107</sup>

It is unclear whether surrogacy agreements in general specifically exclude provision for post-birth contact or whether post-birth contact is not referred to at all in the agreement in the case of unknown surrogates.<sup>108</sup> In the latter case, the default position created by section 297(1)(d) of the Children's Act will exclude such contact. A draft agreement which was intended to be used by attorneys includes a clause that is drafted in accordance with section 297(1)(d) of the Children's Act and excludes any rights of contact by the surrogate and her family to the child.<sup>109</sup> The authors of this draft agreement correctly draw attention to the unique nature of the document, and that it should be adapted, in accordance with the needs of the parties, for example when they elect to provide for contact.<sup>110</sup> Generic agreements should therefore be avoided and not reflect anyone else's views on the matter except those of the parties. Clinical psychologists conducting the suitability assessment and attorneys who may be partial to the interests of commissioning parents, having had a surrogate child of their own, should not influence the process, but rather provide balanced and unbiased advice when requested to do so. Surrogacy agreements drafted by Van der Walt's law firm appears to include provision for post-birth contact for known surrogates and would either specifically exclude such contact or not refer to it at all in the agreement for unknown surrogates. Fertility Law's surrogacy agreements would probably be drafted on the same basis for unknown surrogates if Martin's advice is accepted.

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<sup>104</sup> Van der Walt Radio Pretoria interview. This distinction in post-birth contact requirements is not borne out by section 297(1)(d), the ad hoc Committee's report or the Verona Principles.

<sup>105</sup> Van der Walt Radio Pretoria interview.

<sup>106</sup> Van der Walt YouTube (2020).

<sup>107</sup> Van der Walt YouTube (2020).

<sup>108</sup> Sloth-Nielsen (2019) 186 indicates that agreements are filed at the high court and attorneys who draft them do not disclose the terms thereof. Furthermore, such files may be confidential and inaccessible to the general public as was ordered in *Ex Parte JCR*.

<sup>109</sup> Carnelley M and Soni S 'Surrogate motherhood agreements' (2011) *De Rebus* 32.

<sup>110</sup> At page 31.

Ex parte surrogacy applications require utmost good faith from commissioning parents.<sup>111</sup> It is recommended that such applications should include details regarding the following:

- (1) the discussions with the surrogate on post-birth contact and what each party's view is in this regard (and that such view was not unduly influenced by another person);
- (2) the surrogacy agreement reflects both parties' views on post-birth contact; and
- (3) both parties have been educated on the benefits of post-birth contact and that their agreement regarding this is in the best interests of the child to be born. The proposal that the commissioning parents be educated on the benefits of post-birth contact is consistent with the Verona Principles, as referred to in chapter 2. It is further proposed that the surrogate, as the other party to the surrogacy agreement who is directly impacted by having post-birth contact, also receives similar education as this may benefit her in making a more informed decision on this topic. Such education may also result in her being more amenable to having such contact, if this is deemed to be in the best interests of the child, as her consent and cooperation thereto is also required for this contact to materialise. It is also proposed that the parties be educated on the risks of post-birth contact to enable comprehensive and balanced decision-making.

The abovementioned regulations to the Children's Act should make provision for such discussions. In the interim, courts should include this in their guidelines when considering surrogacy applications. The lessons learnt from the *QG* case should also be considered when surrogacy agreements are drafted and scrutinised by the courts, and when regulations are drafted.

Surrogates are required to know the emotional, physical, mental, legal and administrative (i.e. in respect of the paperwork and tests to be completed) requirements of being a surrogate, seemingly without independent legal and clinical psychologist assistance.<sup>112</sup> Surrogate YS states that surrogates should research how it works and what to expect and that the agency informed her and her husband about what to expect.<sup>113</sup> They are also provided sound advice to

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<sup>111</sup> *Ex Parte WH* para 73.

<sup>112</sup> Living and Loving (2018). Surrogate YS advises other surrogates, in her video post of 16 September 2020, to do their homework and know their rights as there are numerous documents to be completed for the agency, psychologist (which comprises of four tests with more than one hundred and fifty questions), medical aid, gap cover and disability cover. Facebook 'Yolandi Swart' available at <https://facebook.com> (accessed 24 June 2022) (hereafter Yolandi Swart Facebook).

<sup>113</sup> Yolandi Swart Facebook video post of 9 July 2021. In her 16 September 2020 video post, she informs that most information for surrogates can be found on overseas websites. Commissioning mother, RN, also found most of the relevant information on American and Indian websites, where the surrogacy is not comparable

liaise with other surrogates about their experiences and consider their expectations of commissioning parents during pregnancy and post-birth.<sup>114</sup> Surrogates may be comfortable and benefit from the former advice, but may not be open about their feelings in respect of the latter when consulting with a joint attorney and clinical psychologist.<sup>115</sup> They are also required to consider and sign numerous legal documents and forms without the assistance of a lawyer.<sup>116</sup>

The surrogate and commissioning parents do not appear to interact much with each other at the preconception stage. They appear to meet only when they decide on whether to proceed with the surrogacy agreement<sup>117</sup> and they may also meet when the agreement is finalised.<sup>118</sup> Martin explains that the commissioning parents and surrogate's relationship starts with a telephonic consultation to determine compatibility between them, followed by a face-to-face meeting, with a continuation of their relationship being encouraged during the surrogate's pregnancy.<sup>119</sup>

#### 3.3.4. During pregnancy and the period immediately after the birth of the child

For the sake of convenience, the discussion on contact during the period of pregnancy will be extended to include contact during the period immediately after the birth of the child. Commissioning parents are often involved in the surrogate pregnancy.<sup>120</sup> Such involvement includes attending prenatal doctor's appointments with the surrogate, keeping a pregnancy photo album with a view to communicating the surrogate pregnancy to the child in the future and playing voice and musical recordings to the foetus.<sup>121</sup> Surrogate LV indicates that she

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as commercial surrogacy is practiced there. Velleman L 'Vrou speel surrogaat vir vriendin' available at <https://rekord.co.za/241198/cent18surrogaat/> (accessed 2 June 2022). It is therefore imperative that advice provided to the parties by intermediaries in the surrogacy process be comprehensive and unbiased.

<sup>114</sup> Living and Loving (2018). Surrogates in altruistic surrogacy have been found to consider it inappropriate to divulge their expectations on relationship-building and friendship with commissioning parents and end up disappointed when their expectations are unmet. Van Zyl L and Walker R 'Beyond altruistic and commercial contract motherhood: The professional model' (2013) 27 *Bioethics* 375. South African surrogates should be encouraged to do so to avoid such disappointment.

<sup>115</sup> Surrogate KI in Javan (2020) advises this too and was of the view that it would be beneficial to have such a support system with other experienced surrogates. A private Facebook group created in 2020 aims to connect and support surrogates and allows them to share their experiences with each other. No commissioning parents are allowed to join this group as surrogates should be comfortable to share their thoughts and feelings with the group. This suggests that surrogates' may not be completely comfortable to share their views when commissioning parents are involved. This could apply to when post-birth contact with the child is discussed and bolsters the argument that an independent attorney and psychologist should be appointed for surrogates. Facebook 'surrogate mothers South Africa' available at <https://facebook.com> (accessed 14 June 2022).

<sup>116</sup> Javan (2020). Surrogate KI indicated that she had to sign three books with very heavy legal documents and stressed that surrogates should know what they are doing.

<sup>117</sup> Yolandi Swart Facebook posts of 16 September 2020 and 9 July 2021 and Martin webinar.

<sup>118</sup> Javan (2020) and IFAASA.

<sup>119</sup> Martin webinar.

<sup>120</sup> AB case para 182.

<sup>121</sup> AB case para 183.

included her commissioning parents in her pregnancy by providing them with updates about its progress.<sup>122</sup> Psychologists endorse the commissioning parents' involvement as it benefits the unborn child and provides a basis for their future relationship.<sup>123</sup>

In *Ex Parte HPP*, the court found that the emotional support services to guide and advise a surrogate, mediate with her and manage any dispute resolution, which services were ordinarily performed by lawyers and psychologists, were necessary services.<sup>124</sup> These services are indeed indispensable and beneficial to manage the relationship between the surrogate and commissioning parents and to provide emotional support for the surrogate.<sup>125</sup> If contact is maintained post-birth, then these counselling, mediation and dispute resolution services should continue and also form part of the costs of surrogacy.<sup>126</sup> It is submitted that the wording of section 301(3) is wide enough to include post-birth counselling and mediation expenses by a clinical psychologist and lawyer respectively, where contact is maintained between the surrogate and the family formed through surrogacy.<sup>127</sup> These expenses would fall under the ambit of bona fide professional legal or medical services rendered in the execution of the agreement. It is therefore argued that the above services should be available throughout the surrogacy process and beyond where contact is maintained between the surrogate and family formed through surrogacy. Regulations should confirm that these services fall within the ambit of section 301(3).

Commissioning parents are largely encouraged to have contact with their surrogate during her pregnancy as relationship-building between the surrogate and them is deemed vital during this period.<sup>128</sup> However, this relationship and contact associated therewith is discouraged after the

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<sup>122</sup> The Azania Mosaka Show 'The journey of surrogacy' available at <https://omny.fm/shows/the-best-of-azania-mosaka/the-journey-of-surrogacy> (accessed 15 June 2022). Surrogate LV is a mother of two and an office manager at a law firm, who provided information of her morning sickness, cravings and the baby's kicks to her commissioning parents.

<sup>123</sup> *AB* case para 183 and 185.

<sup>124</sup> Sarie (2015). Dr Kruger, a fertility specialist at Aevitas, informs that surrogates have regular access to a psychologist during the surrogacy process. This is consistent with the ad hoc Committee's recommendation at F6(1) that continued counselling be made available before and after the surrogacy agreement has been completed and implemented.

<sup>125</sup> Martin's webinar indicates that he is encouraging counselling on a monthly or quarterly basis to ensure that the parties are coping well during the pregnancy. SAG encourages relationship-building and IFAASA encourages counselling during pregnancy. Surrogate AB found counselling support very beneficial during her pregnancy (Angelique Butler Facebook).

<sup>126</sup> Experts also agree that counselling should be available before, during and after pregnancy in order to prepare everyone for the surrogate pregnancy and what comes thereafter (Health 24 (2008)).

<sup>127</sup> This section reads "Any person who renders a bona fide professional legal or medical service with a view to the confirmation of a surrogate motherhood agreement in terms of section 295 or in the execution of such an agreement, is entitled to reasonable compensation therefor."

<sup>128</sup> SAG website and Martin webinar.

birth of the surrogate child.<sup>129</sup> Martin indicates that commissioning parents should manage their relationship with their surrogate and some commissioning parents want more involvement in the surrogacy journey and others none. He advises commissioning parents to have a cordial relationship with the surrogate, with the occasional coffee and lunch date, but to keep the relationship at arm's length, given that it terminates after the birth of the child.<sup>130</sup> He warns that a too close relationship with the surrogate complicates matters and leads to emotional problems when the surrogacy journey ends, i.e. after the birth of the child.<sup>131</sup>

Van der Walt's experience is that some commissioning parents require close contact especially if the surrogate is their family or friend.<sup>132</sup> She indicates that a clinical psychologist or social worker manages the relationship between the commissioning parents' and the surrogate. She elaborates that surrogate pregnancies are meant to be happy ones, with commissioning parents focusing considerable attention on the surrogate and making her feel special.<sup>133</sup>

Friedman is of the view that surrogates do not bond with the foetus<sup>134</sup> as they know that the baby is not theirs, but that the bonding or friendship rather occurs with the commissioning parents and never or rarely with the baby.<sup>135</sup> She reports having had a very good and comfortable relationship with her unknown surrogate during the pregnancy.<sup>136</sup>

Commissioning parents are present at the birth of the child and commissioning mothers often share a room with the surrogate in hospital.<sup>137</sup> The surrogate's duty after giving birth to the

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<sup>129</sup> Aevitas Fertility Clinic available at <https://aevitasfertilityclinic.co.za/Fertility-Treatment#Surrogacy> (accessed 26 March 2023) (hereafter Aevitas).

<sup>130</sup> Martin webinar.

<sup>131</sup> Martin webinar.

<sup>132</sup> Van der Walt YouTube (2020). She explains that this is not always possible as the parties may live in different provinces.

<sup>133</sup> Van der Walt YouTube (2020). Surrogate AB indicates that she was also spoiled with treats from her commissioning parents. Angelique Butler Facebook posts of 27 November 2021 and 19 January 2022. Surrogate YS had a similar experience and was also included in her commissioning parents' baby shower. Yolandi Swart Facebook posts of July 2021.

<sup>134</sup> This is consistent with surrogate DB's account in Whitfield (2015) that she never felt attached to the foetus and that she was rather only the vessel bringing the child into the world. Surrogate YS also indicated that a surrogate needs to believe that the carrying of the baby is merely a job. She explained to her children that as the commissioning mother's oven does not work, she bakes the cake and then gives it away. She reports that they responded positively to this explanation. Yolandi Swart Facebook video post of 9 July 2021.

<sup>135</sup> Friedman on Dagbreek. Sunday Times 'Law proposals spark 'designer baby' fears' available at [surrogacyagreements.co.za](http://surrogacyagreements.co.za) (accessed 20 May 2022) (hereafter Sunday Times (2013)). Surrogates from other countries have also reported that they experience their pregnancy differently as compared to when they carry their own child, given their awareness that the child is not their own. Jadvá (2020) 904.

<sup>136</sup> Panyane (2016) and Friedman on Dagbreek.

<sup>137</sup> Van der Walt indicates in her Radio Pretoria interview that commissioning parents can book into hospital with surrogates for two to three days after the birth of the child.

child is to hand him over to the commissioning parent(s) as soon as is reasonably possible.<sup>138</sup> This suggests a form of immediate contact between the surrogate and the child, with transfer of the latter occurring thereafter. However, this is not the case in some surrogate's experiences.<sup>139</sup> The practice of handing the child first to the commissioning parents is probably due to the surrogacy agreement providing for their direct parentage upon his birth. This may not be in the child's best interests as it would probably be beneficial for the child to have the first contact with his or her gestational carrier, who would be the most familiar to him or her, as with a conventional birth, as discussed in chapter 2. The surrogate in the *MIA* case did not see the child at all after birth.<sup>140</sup> This is far from ideal and such situations should be avoided by, at the very least, discussing these situations beforehand and making provision for handover of the child and closure in the surrogacy agreement.

### 3.3.5. Post-birth

The post-birth period will relate to the time after the surrogate and child are discharged from hospital. Several fertility clinics indicate that the surrogate has no rights to the child after birth.<sup>141</sup> This will include parental and contact rights. Whilst legal parental rights are entirely excluded in section 297(1)(a) and (c) of the Children's Act, this is not the case with contact.<sup>142</sup> These fertility clinics therefore do not accurately portray the law on this score.

Consistent with the altruistic rhetoric, Dr Kruger's view is that the surrogate's role is to do a good deed by making the commissioning parents happy and then relinquishing the child after birth and walking away.<sup>143</sup> She should not expect anything more.<sup>144</sup> He states that surrogates are mostly people in the commissioning parents' living world, a known surrogate who is a

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<sup>138</sup> Section 297(1)(b) of the Children's Act. The basis for this provision stems from F9(1)(b) of the ad hoc Committee's report albeit that such report required handover of the child after birth without any reference that same occurs as soon as reasonably possible.

<sup>139</sup> Surrogate YS, in Yolandi Swart Facebook post of 9 July 2021, informs that she saw the baby after birth and indicates that holding her the day after giving birth provided her with closure, given that she was able to see how the baby and commissioning parents were doing. Surrogate AB, in Angelique Butler Facebook post of 10 December 2021, indicates that she saw and held the baby the day after she gave birth. Surrogate ES of Swellendam did not see the baby immediately after birth but had contact with the child when she was back in the ward. Le Roux C 'Deel van my sterf saam met my baba, maar God bring weer vreugde deur surrogaatma' available at <https://lig.christians.co.za/deel-van-my-sterf-saam-met-my-baba-maar-god-bring-weer-vreugde-deur-surrogaatma/> (accessed 7 June 2022) (hereafter Le Roux (2021) 2).

<sup>140</sup> Para 16.

<sup>141</sup> Hart Fertility Clinic available at <https://www.hartfertility.co.za> (accessed 2 September 2021), Aevitas and Cape Fertility.

<sup>142</sup> Section 297(1)(d).

<sup>143</sup> Sarie (2015).

<sup>144</sup> Sarie (2015). In Dr Kruger's experience only one surrogate was a bit hesitant to handover the child but eventually did so.

family member, friend or acquaintance, and the parties decide how much contact they are comfortable with.<sup>145</sup> Whilst it is not necessary to have contact, the parties do sometimes visit each other and a commissioning parent has occasionally invited the surrogate to the child's baptism.<sup>146</sup> He describes this relationship as a respectful one, with both parties respecting each other's boundaries, and counselling is provided should this be required.<sup>147</sup>

Van der Walt's view is that surrogates are usually family members of the commissioning parents and they can agree to the surrogate being appointed as the child's guardian after their death.<sup>148</sup> In these cases, the parties have contact, their relationship is a comfortable one and the commissioning parents determine the terms of the contact.<sup>149</sup> However, when the surrogate is not from the commissioning parents' family or social circle, then the commissioning parents, want firmer boundaries and the psychologist and social worker counsels her to walk away after giving birth to the child.<sup>150</sup> There is therefore a distinction in the relationship between the known surrogate and unknown one. The former has contact with the family formed through surrogacy after the birth of the child, with the terms of such contact being determined by commissioning parents and not amounting to a parental role,<sup>151</sup> whilst the latter has no contact at all.<sup>152</sup> These arrangements further the commissioning parents' interests.

Martin, whose clients' surrogates are mostly previously unknown to the commissioning parents, encourages relationship-building between the parties during the surrogacy journey but cautions against a very close bond forming between them as this creates complications when the journey ends, i.e. after the birth of the child and when contact between the parties terminates.<sup>153</sup> His clients' unknown surrogates will therefore have no post-birth contact with the child after relinquishment, if his advice is accepted. This practice caters for the needs of commissioning parents and suggests a transactional nature to the surrogacy arrangement rather

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<sup>145</sup> Sarie (2015).

<sup>146</sup> Sarie (2015).

<sup>147</sup> Sarie (2015).

<sup>148</sup> Van der Walt Radio Pretoria interview.

<sup>149</sup> Van der Walt Radio Pretoria interview.

<sup>150</sup> She mentions in her Radio Pretoria interview that the clinical psychologist assessment is intense and lasts at least three to five hours per party.

<sup>151</sup> Footnotes 104 and 106. Pat Anthony reported no change in her role as maternal grandmother after she gave birth to her triplet grandchildren. Sulaiman N 'Meet the surrograndma - the woman who gave birth to her own granddaughter' available at <https://www.news24.com/you/news/international/meet-the-surrograndma-the-woman-who-gave-birth-to-her-own-granddaughter-20201112> (accessed 15 June 2022).

<sup>152</sup> The Verona Principles and section 297(1)(d) of the Children's Act, as mentioned earlier, make no such distinction. The reason for SA's conservative approach of excluding post-birth contact with unknown surrogates is unclear given her profile of being congenial, and the good relationship that develops between the parties during the surrogate's pregnancy.

<sup>153</sup> Martin webinar.



than an opportunity for continued relationship-building. If the relationship continues post-birth, it is submitted that counselling and conflict management services should be available as it is in the case of known surrogates<sup>154</sup> and that the costs associated with such services should form part of the cost of surrogacy, and be regulated accordingly, as argued above.

In two reported surrogacy cases, the surrogates had no contact with the children born as a result of their surrogacy agreements.<sup>155</sup> RN's older child's pre-school teacher offered to act as a surrogate for her and her husband when they were unable to have any further children. She indicated, during her surrogate's pregnancy, that she will allow her surrogate to see her child to be born through surrogacy and that such child will know his birth story, including the role of the surrogate in such story.<sup>156</sup> The details of their agreement regarding contact are unknown but probably excludes post-birth contact with a possibility of contact at RN's discretion. This assumption is based on RN's account of what she will permit the surrogate to do in relation to contact with the child and what appears to be the practice in SA with known surrogates who are acquaintances.

In two surrogacy arrangements, the surrogates chose no contact with the child, with one of these surrogates, SS, who was five months pregnant at the time, indicating that it is important to discuss this aspect at the outset so that both parties are informed of each other's view in this regard.<sup>157</sup> She also indicated that she would welcome any attempts by the commissioning parents to make post-birth contact with her.

Surrogate KI who acted as surrogate on two occasions, had no contact with the surrogate children but indicated that they are welcome to meet her in future.<sup>158</sup> Surrogate LV similarly appeared to have no contact with her children born through surrogacy and would welcome contact with them.<sup>159</sup> Surrogate DB also had no contact with the child nearly five years after the surrogacy process.<sup>160</sup> She had intermittent contact with the parents who sent her occasional photographs of their son, and this arrangement suited her.<sup>161</sup>

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<sup>154</sup> Dr Kruger's account in Sarie (2015).

<sup>155</sup> *Ex Parte HPP* comprised of two applications where both surrogates were ordered to have no contact with the child. Para 6 of the *MIA* case, indicated that the agreement specifically provided for no contact between the surrogate and the child after birth and handover of the child.

<sup>156</sup> Sunday Times (2013).

<sup>157</sup> Health24 (2008).

<sup>158</sup> Javan (2020).

<sup>159</sup> Cape Talk 'What about the children? The ethics of donor conception and surrogacy' available at <https://capetalk.co.za/articles/419131/panelists-explore-complexities-of-donor-conception-and-surrogacy> (accessed 31 January 2022) (hereafter Cape Talk interview).

<sup>160</sup> Whitfield (2015).

<sup>161</sup> Whitfield (2015).

Friedman had contact with her surrogate and indicated that they are good friends.<sup>162</sup> In order to give effect to her son's right to know his origins, she was open about his conception and has provided him with all the information that she knows about his birth story.<sup>163</sup> She is of the view that transparency and honesty leads to contentment for the child.<sup>164</sup> It appears that her son has no contact with the surrogate and that he may elect to have such contact when he is eighteen years old.<sup>165</sup> A lived experience of an adult donor conceived person is that children should have the right to know their donor parents and have relationships with them, and that it is difficult to start building relationships only when they become adults.<sup>166</sup> She was of the view that terminating relationships with the donor's family and the child passes the burden onto the child who has to find and put together the missing pieces of the jigsaw puzzle.<sup>167</sup> This raises important questions about a child's rights to know their biological origins and whether it is sufficient to be open about the child's birth story or whether post-birth contact between the surrogate and child is also required for purpose of the child's identity formation.

The SA Law Reform Commission Issue Paper<sup>168</sup> indicates that Article 7 of the CRC can be interpreted to include the right to know one's gestational parents<sup>169</sup> and that this may include the right to have contact with her and have knowledge of her identity.<sup>170</sup> Tertia Albertyn, co-founder of an egg donation and surrogacy programme named Nurture, indicates that whilst she is of the view that commissioning parents should be honest and disclose their child's origins, this decision is ultimately theirs.<sup>171</sup> She adds that most commissioning parents do disclose as it is difficult not to do so given the availability of DNA testing and the discovery of ancestry.<sup>172</sup> However, some parents do not disclose due to religious, cultural or family reasons.<sup>173</sup> She correctly points out that the views of donor-conceived and surrogate-born children should be heard on this aspect. South Africa's position on disclosure of the child's origins is at odds with

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<sup>162</sup> Global Herald (2019).

<sup>163</sup> Cape Talk interview.

<sup>164</sup> Cape Talk interview.

<sup>165</sup> Cape Talk interview. Her son was eleven years old at that stage. It is unclear whether her child has requested contact with the surrogate or whether the impression has been created that such contact is disallowed before his eighteenth birthday.

<sup>166</sup> Cape Talk interview.

<sup>167</sup> Cape Talk interview.

<sup>168</sup> Commission Issue Paper (2017) 9-10.

<sup>169</sup> The surrogate.

<sup>170</sup> Section 41(2) of the Children's Act, however, states that a child born as a result of surrogacy is not entitled to information regarding the identity of the surrogate mother when he turns 18. This is contrary to the child's right to know his origins.

<sup>171</sup> Cape Talk interview and Nurture 'Intended Parents FAQ' available at <https://www.nurture.co.za/intended-parents/intended-parents-faq/> (accessed 1 February 2022).

<sup>172</sup> Cape Talk interview.

<sup>173</sup> Cape Talk interview.

the Verona Principles, his right to know his identity and his best interests, as it is focused on the commissioning parents rather than the child.

It is unclear from the above surrogates' lived experiences whether they were consulted beforehand on post-birth contact arrangements and, if not, whether they would have preferred such contact or more contact with the family formed through surrogacy.

Surrogate YS indicated that she still has post-birth contact with her commissioning parents and that she expresses milk for them.<sup>174</sup> She also indicated that she intends to have another surrogate child for them in the future.<sup>175</sup> She was of the view that the commissioning parents have been very good to her and that they enquired about her well-being two weeks after the birth of the surrogate child.<sup>176</sup> A closure session with the commissioning parents was planned within two months after the birth of the child, which would benefit her children, particularly her three year old, so that they could see the child with her family.<sup>177</sup>

Surrogate JMC's commissioning parents had daily telephonic contact with her after the child was discharged from hospital after his birth.<sup>178</sup> Their relationship deteriorated when the child died, six days after birth, and the surrogate was informed hereof a day after his death through a message and was forbidden to attend the funeral.<sup>179</sup> The surrogate was reported to grieve after the child's death and had an inquest opened to secure clarity regarding his death.<sup>180</sup> This case illustrates poor management of a post-birth contact arrangement between the parties. The parties to surrogacy agreements should discuss this aspect and provide for the surrogate's role in their agreement in the event of the child's death, particularly if this occurs shortly after birth.

Surrogate AB appeared to also have no arrangement in place for post-birth contact with the child. She expected no contact as with many surrogacy journeys, contact ends after the birth of the child and the surrogate would only receive a photograph of the child.<sup>181</sup> She was very

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<sup>174</sup> Yolandi Swart Facebook video post of 22 July 2021. She explains that they still have a chat group and message each other. There are times when they fail to respond and she assumes that they are busy taking care of their newborn baby.

<sup>175</sup> Yolandi Swart Facebook post of 9 July 2021.

<sup>176</sup> Yolandi Swart Facebook post of 9 July 2021.

<sup>177</sup> Yolandi Swart Facebook post of 9 July 2021. This accords with Probasco's abovementioned recommendations in chapter 2, but raises the question whether the psychological effect on the surrogate's children were taken into account by the clinical psychologist in that case.

<sup>178</sup> Smit J 'Ware lewendramas: Tereza Troskie-Herbst se laaste dae met baba' available at [netwerk24.com/huisgenoot/nuus/ware-lewendramas/tereza-troskie-herbst-se-laaste-dae-met-baba-20210419](http://netwerk24.com/huisgenoot/nuus/ware-lewendramas/tereza-troskie-herbst-se-laaste-dae-met-baba-20210419) (accessed 7 June 2022).

<sup>179</sup> Smit J '“Ek soek duidelikheid,” eis Tereza Troskie-Herbst se oorlede baba se surrogaatma' available at [netwerk24.com/huisgenoot/nuus/ek-soek-duidelikheid-eis-tereza-troskie-herbst-se-oorlede-baba-se-surrogaatma-20170528](http://netwerk24.com/huisgenoot/nuus/ek-soek-duidelikheid-eis-tereza-troskie-herbst-se-oorlede-baba-se-surrogaatma-20170528) (accessed 7 June 2022) (hereafter Smit (2016)).

<sup>180</sup> Smit (2016).

<sup>181</sup> Le Roux (2021). The children were reported to be satisfied with this arrangement.

grateful that her commissioning parents elected to have post-birth contact by sending her regular updates on the child.<sup>182</sup> This surrogacy process was facilitated and mediated throughout by a psychologist and the surrogate consulted with her every four to six weeks during pregnancy.<sup>183</sup> Such facilitation and mediation services may have contributed to what appears to be a favourable post-birth contact surrogacy experience for the surrogate. The limited level of contact between the surrogate and the child and commissioning parents given that they live in different provinces may also have contributed to such favourable experience.<sup>184</sup>

There are no known surveys conducted in SA that have elicited the views of commissioning parents, surrogates and children born through surrogacy on post-birth contact. Academic sources on post-birth contact are also limited and available information was largely secured on internet websites which depicts some views of attorneys and fertility specialists who are involved in the surrogacy process, commissioning parents and surrogates. The benefit of lived views of these parties and the knowledge and lessons learnt that may be derived from this, and any legislative and practical changes that may need to be made as a result hereof, is thus not available.

### **3.4. CONCLUDING REMARKS**

This chapter has shown that South Africa's post-birth contact provision as contained in section 297(1)(d) of the Children's Act creates a default position that excludes such contact between the surrogate and her family and the child unless the parties decide to include this in their surrogacy agreement. This provision was based on what appears to be an erroneous interpretation of the ad hoc Committee's recommendation, which envisaged a dialogue between the surrogate and commissioning parents on post-birth contact rather than an outright exclusion thereof. This error should be corrected and the lived views of all affected parties in the surrogacy process should be secured when amendments to this provision are considered. The views and experiences of specialist attorneys and psychologists who are involved in surrogacy cases may also add value to this process. With an estimated one hundred surrogacy cases a year, with some involving multiple births, the post-birth contact provisions have and will continue to impact the parties to the surrogacy agreement, especially the children born

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<sup>182</sup> Angelique Butler Facebook posts of 19 January, 30 January and 15 June 2022. It appears that the commissioning parents determine whether there will be post-birth contact and the surrogate sees this as a blessing as such contact is rare between other commissioning parents and surrogates.

<sup>183</sup> Angelique Butler Facebook video posts of 30 August, 13 September and 22 November 2021.

<sup>184</sup> Angelique Butler Facebook posts of 18 and 27 November 2021.

through surrogacy and unknown surrogates. An informed and updated decision in this regard is therefore essential.

This chapter has highlighted the fluidity of preconception intentions to exclude post-birth contact and the significance of the surrogate having independent counselling and legal advice prior to her agreeing to have no post-birth contact. The importance of post-birth contact arrangements being limited and managed to avoid opening the proverbial Pandora's box have also been discussed. This chapter also reveals that high courts, in reported surrogacy cases, do not probe post-birth contact provisions in surrogacy agreements. It is proposed that they do so to ensure that all parties' interests have been taken into account in surrogacy agreements, including the interests of the unborn child, given that the Verona Principles consider it to be in his best interests to have such contact. This chapter has found that the right to post-birth contact does not apply in SA and that there rather appears to be an assumption of no post-birth contact for unknown surrogates as such contact is largely excluded for her and her family, with only isolated reports of contact between her and her commissioning parents. A key finding of this chapter is that South Africa's law and practice on post-birth contact gives precedence to the commissioning parents' interests potentially over that of the surrogate and unborn child. It is proposed that the latter two parties' interests should more adequately be considered when amendments and regulations to section 297(1)(d) of the Children's Act are effected.

The following chapter will survey the UK, US and Canadian experience with regard to contact between the surrogate and the family formed through surrogacy, and compare this to the South African one. It will then be determined whether such experiences support the recommendations in this chapter or whether they have practices that may be incorporated in the domestic framework.

## **CHAPTER 4**

### **THE UNITED KINGDOM, UNITED STATES AND CANADIAN EXPERIENCE OF POST-BIRTH CONTACT**

#### **4.1. INTRODUCTION**

As there is limited post-birth contact practices and literature thereon in SA, it is imperative to consider other jurisdictions where these practices do occur to understand how these relationships are established and navigated, including how challenges in these relationships are avoided or overcome. The UK and US were chosen as jurisdictions as post-birth contact practices have occurred in these countries for a long time. This includes as far back as when the ad hoc Committee investigated the position in these countries, when chapter 19 of the Children's Act was drafted. Such practices were encouraged then. It would be useful to ascertain how this position has evolved when amendments to section 297(1)(d) of the Children's Act are considered. Several studies have also been conducted on the relationships that are formed between the parties to surrogacy agreements in the UK and US. A long-term study has also been conducted on this topic in the UK.<sup>1</sup> This study provides insight into how these relationships develop over time. Canada was chosen as a destination due to post-birth contact practices between the commissioning parents and surrogates occurring there too. Recent research on this topic has also been conducted in Canada.

This chapter will first briefly set out the legal and general position on surrogacy in these three countries, and how this compares with the position in SA. Secondly, the practices in these countries at the pre-conception stage will be considered to determine whether SA should adopt any of these practices, if they are superior to the current practices, insofar as it is relevant to relationship-building between the parties. Finally, the practices in these countries during the pregnancy and post-birth stages will similarly be explored, with a view to determine whether SA may learn any lessons from these practices and incorporate them into its law when amendments to section 297(1)(d) of the Children's Act are considered. Some of these countries' practices may also affirm some Verona Principles and the recommendations made in chapter 3.

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<sup>1</sup> Golombok (2020) 135-139.

## 4.2. GENERAL POSITION, THE LAW AND PRECONCEPTION

### 4.2.1. The United Kingdom (UK)

The UK, like SA, only permits altruistic surrogacy.<sup>2</sup> Its law differs from South African law in that the commissioning parents do not become the legal parents of the child from birth, as the surrogate and her husband are considered to be the child's legal parents at birth.<sup>3</sup> In order to transfer legal parenthood from the surrogate and her husband to the commissioning parents, the latter is required to bring a court application for a parental order.<sup>4</sup> The UK Law Commission is proposing a review of this position whereby the commissioning parents can acquire legal parenthood from birth if the surrogate has no objection to this and if certain pre-conception requirements are met.<sup>5</sup> Gestational surrogacy practices occurs mostly in the UK.<sup>6</sup> UK surrogates, like South African ones, are in short supply.<sup>7</sup>

Surrogacy arrangements in the UK are made directly between commissioning parents and surrogates who know each other or who connect through the internet, or they can be made with the assistance of surrogacy agencies.<sup>8</sup> The parties to these agreements are encouraged to form friendships.<sup>9</sup> The three main non-profit surrogacy agencies that assist the parties are COTS, Surrogacy UK and Brilliant Beginnings.<sup>10</sup> COTS match the parties by providing them with the profiles of several surrogates and commissioning parents to choose from.<sup>11</sup> Once the parties are matched, then COTS assists them with concluding a written surrogacy agreement.<sup>12</sup>

Surrogacy UK matches surrogates and commissioning parents with a view to establishing enduring friendships.<sup>13</sup> They do so by providing opportunities to commissioning parents and surrogates to socialise with each other at events, and this has led to the creation of a surrogacy

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<sup>2</sup> Golombok (2020) 145.

<sup>3</sup> Weltman J and Kanellis N 'What family law attorneys should know about ARTS issues' (2015) 29 *American Journal of Family Law* 135 (hereafter Weltman and Kanellis (2015)).

<sup>4</sup> Weltman and Kanellis (2015) 135.

<sup>5</sup> Law Commission Consultation Paper 244 *Building families through surrogacy: a new law* (2019) (hereafter UK Law Commission report) paras 7.3 and 8.104. Most surrogates and commissioning parents who were consulted were of the view that the commissioning parents should be regarded as the legal parents of the child from birth. Their views are vital when informed decisions on legislative reform is considered.

<sup>6</sup> COTS 'Surrogates' available at <https://www.surrogacy.org.uk/surrogates> (accessed 2 February 2023).

<sup>7</sup> Prosser H and Gamble N 'Modern surrogacy practice and the need for reform' (2016) 4 *Journal of Medical Law and Ethics* 261 (hereafter Prosser *et al* (2016)).

<sup>8</sup> Prosser *et al* (2016) 258. Surrogacy arrangements made directly between the parties exclude screening processes and have resulted in disappointing outcomes.

<sup>9</sup> Golombok (2020) 115.

<sup>10</sup> Prosser *et al* (2016) 258.

<sup>11</sup> Prosser *et al* (2016) 259.

<sup>12</sup> Prosser *et al* (2016) 259. COTS 'About' available at <https://www.surrogacy.org.uk/about> (accessed 2 February 2023). COTS support and advise both commissioning parents and surrogates.

<sup>13</sup> Prosser *et al* (2016) 259.

community where friendships develop.<sup>14</sup> The parties are required to spend at least three months to acquaint themselves with each other.<sup>15</sup> Their nuclear families are also included in this process and relationships have developed between the surrogate's own children and the child as well.<sup>16</sup> Surrogacy UK therefore provides a platform for the parties to meet each other, and also provides mediation when the terms of their surrogacy agreement are discussed.<sup>17</sup>

Brilliant Beginnings only work with gestational surrogates and vet their prospective surrogates and commissioning parents, by having them undergo medical and psychological assessments.<sup>18</sup> They also become acquainted with them, provide them with information about the surrogacy process and discuss their expectation of contact with their prospective surrogacy partner.<sup>19</sup> The parties are provided with legal advice, with the surrogate receiving independent legal advice that is not affiliated to their agency.<sup>20</sup> This entire process generally lasts about four months, with matching only occurring thereafter based on the parties' personalities, expectations and compatibility.<sup>21</sup> The matched parties then meet with a view to determining whether they wish to proceed with a surrogacy arrangement with each other and, if they elect to do so, they are then encouraged to become acquainted with each other so that a strong foundation for their future relationship, both during pregnancy and post-birth, may be laid.<sup>22</sup> UK commissioning parents and unknown surrogates appear to spend more time, as compared to those in SA, in becoming acquainted with each other and lay a firm foundation before proceeding with the surrogacy. This approach is consistent with the Verona Principles, as referred to in chapter 2.<sup>23</sup>

The parties to surrogacy arrangements are encouraged to conclude an agreement that clarifies the terms of their arrangement, including the terms of their pre- and post-birth contact arrangements.<sup>24</sup> UK lawyers are not permitted to draft surrogacy agreements due to the strict

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<sup>14</sup> Prosser *et al* (2016) 259. Golombok (2020) 115. This community provides support to its members during their surrogacy arrangements.

<sup>15</sup> Prosser *et al* (2016) 259.

<sup>16</sup> Golombok (2020) 111-113. The continued role of the surrogate and her family in the lives of the family formed through surrogacy enabled these relationships to develop.

<sup>17</sup> Surrogacy UK available at <https://surrogacyuk.org/> (accessed 31 October 2022).

<sup>18</sup> Prosser *et al* (2016) 259-261.

<sup>19</sup> Prosser *et al* (2016) 260.

<sup>20</sup> Brilliant Beginnings 'UK surrogacy agreement pathway' available at <https://brilliantbeginnings.co.uk/uk-surrogacy-support/> (accessed 4 April 2023).

<sup>21</sup> Prosser *et al* (2016) 260. This is intended to lay a foundation for a lasting relationship between the parties.

<sup>22</sup> Prosser *et al* (2016) 261.

<sup>23</sup> Verona Principle 7.5b.

<sup>24</sup> Human Fertilisation and Embryology Authority available at <https://www.hfea.gov.uk/treatments/explore-all-treatments/surrogacy/> (accessed 31 October 2022). The Human Fertilisation and Embryology Authority recommends that the parties discuss contact arrangements and the Department of Health considers it best practice to do so. Brilliant Beginnings 'UK surrogacy agreements' available at <https://brilliantbeginnings.co.uk/uk-surrogacy-agreements/> (accessed 21 December 2022) (hereafter Brilliant Beginnings). This agreement is not binding on the parties.



prohibition of commercial surrogacy and surrogacy agencies assist with this process.<sup>25</sup> Fertility clinics encourage counselling to ensure that the parties provide informed consent to the surrogacy arrangement and that there is agreement between them.<sup>26</sup> The publishers of the Verona Principles, International Social Services (“ISS”),<sup>27</sup> have recommended to the UK Law Commission that commissioning parents be trained to address issues of kinship and identity formation with the child.<sup>28</sup> This is consistent with the approach as set out in the Verona Principles.<sup>29</sup> A suggestion has also been made to the UK Law Commission that counselling includes screening commissioning parents for prospects of having a good relationship with their surrogates and to manage the parties’ expectations and differences on contact, and assist with boundary setting.<sup>30</sup>

Ireland is in the process of enacting surrogacy laws and secured valuable input from people who were born through surrogacy, surrogates and commissioning parents.<sup>31</sup> The ISS also provided input and this led to the principles related to the surrogate receiving independent legal and psycho-social advice at the pre-conception stage being incorporated in its recommendations.<sup>32</sup> The Verona Principles do not provide any sources for the principle related to post-birth contact and why it deems having such contact to be a best practice and beneficial to the child. It is recommended that South African lawmakers adopt a similar approach and also secure input from the ISS, and request that they clarify this. This information will assist the legislature to make an informed decision on the amendment of section 297(1)(d) of the Children’s Act. South African courts will also benefit from this information when it considers whether surrogacy agreements adequately cater for the best interests of the child.

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<sup>25</sup> Brilliant Beginnings. Laytons ‘Fertility and Surrogacy/Surrogacy Agreements’ available at <https://www.laytons.com/expertise/family-matrimonial/surrogacy-agreements> (accessed 15 April 2023). Paras 3.93 and 13.52 of UK’s Law Commission report indicates that Surrogacy UK’s surrogacy agreements includes details of the parties agreed contact and the frequency thereof, and recommends that the parties to the agreement receive independent legal advice to safeguard their interests.

<sup>26</sup> Penningtons Manches Cooper available at <https://www.penningtonslaw.com/expertise/individuals/family-law/surrogacy-law/faqs-on-surrogacy-law-in-the-uk> (accessed 31 October 2022).

<sup>27</sup> Page 2 and 5 of the Verona Principles. They also coordinated discussions related to the drafting of these principles.

<sup>28</sup> Para 10.76 of UK Law Commission report.

<sup>29</sup> Verona Principles 8.2*b* and 11.5.

<sup>30</sup> At paras 13.9 and 13.21 of the commission’s report.

<sup>31</sup> Houses of the Oireachtas ‘Final report of the joint committee on international surrogacy’ available at <https://www.oireachtas.ie/en/press-centre/press-releases/20220706-joint-committee-on-international-surrogacy-has-published-its-report/> (accessed 27 October 2022) 3 (hereafter Houses of the Oireachtas (2022)).

<sup>32</sup> Houses of the Oireachtas (2022) 16.

#### 4.2.2. The United States (US)

Unlike SA and the UK, commercial surrogacy is practised in the US.<sup>33</sup> Federal laws do not govern surrogacy and individual states regulate their own surrogacy practices.<sup>34</sup> Laws on surrogacy contracts differ from one state to the other and ranges from it being banned, to there being no laws on it, to states that are surrogacy-friendly.<sup>35</sup> In surrogacy-friendly states such as California, the commissioning parents are considered to be the parents of the child from the time of his birth.<sup>36</sup> Similar to the position in SA, a surrogacy agreement is required to be concluded and, prior to the child's birth, the commissioning parents then secure a court order to confirm their parentage.<sup>37</sup> Some states apply a strictly contractual law model when deciding disputes that arise from the surrogacy agreement, whilst others consider the terms of the contract but deviate from it if it is not in the best interests of the child born as a result of such contract.<sup>38</sup> US surrogates are mostly of white ethnicity and gestational surrogacy is largely practiced.<sup>39</sup>

Parties can conclude a surrogacy arrangement amongst themselves or engage the services of a surrogacy agency. In cases where no surrogacy agency is used, the surrogate is medically screened and the surrogacy contract is concluded with the assistance of lawyers.<sup>40</sup> If a surrogacy agency is used, then the surrogacy process that is followed is similar to the one of Brilliant Beginnings in the UK.<sup>41</sup> Several US surrogacy agencies indicate that the psychological screening process includes having a discussion with the surrogate about her expectations on the relationship with the commissioning parents (during the pregnancy and post-birth) and with the child to be born as a result of the surrogacy arrangement.<sup>42</sup> It is considered vital for both

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<sup>33</sup> Smietana M 'Affective de-commodifying, economic de-kinning: Surrogates' and gay fathers' narratives in U.S. surrogacy' (2017) 22 *Sociological Research Online* 164 (hereafter Smietana (2017)).

<sup>34</sup> Demopoulos M 'Surrogacy in California: Replacing Section 7962 of the California Family Code with a two-part hybrid best interests test' (2018) 51 *UC Davis Law Review* 1754 (hereafter Demopoulos (2018)).

<sup>35</sup> Fuchs EL and Berenson AB 'Screening of gestational carriers in the United States' (2016) 106 *Fertility Sterility* 1497 (hereafter Fuchs *et al* (2016)).

<sup>36</sup> Cahn N and Carbone J 'Surrogacy in the United States of America' in Scherpe JM, Fenton-Glynn C and Kaan T (ed) *Eastern and Western perspectives on Surrogacy* (2019) 316-317 (hereafter Cahn *et al* (2019)).

<sup>37</sup> Cahn *et al* (2019) 323.

<sup>38</sup> Demopoulos (2018) 1756 and 1760.

<sup>39</sup> Bromfield (2016) 197. Circle Surrogacy available at <https://www.circlesurrogacy.com/> (accessed 23 January 2023) (hereafter Circle Surrogacy).

<sup>40</sup> Ziff E "'The mommy deployment": Military spouses and surrogacy in the United States' (2017) 32 *Sociological Forum* 419 (hereafter Ziff (2017)).

<sup>41</sup> Ziff (2017) 419. Brilliant Beginnings also assists commissioning parents who choose to proceed with surrogacy abroad. Prosser *et al* (2016) 258.

<sup>42</sup> Circle Surrogacy. Creative Family Connections available at <https://www.creativefamilyconnections.com/us-surrogacy-law-map/> (accessed 19 January 2023). California Centre for Reproductive Medicine 'Evaluating surrogate mothers' available at <https://cacrm.com/surrogacy-and-egg-donation/guide-to-finding-your-surrogate/evaluating-surrogate-mothers/> (accessed 5 December 2022). One US clinic has their surrogates psychologically evaluated by psychiatrists' who are not affiliated to their clinic, but attend to the matching

the commissioning parents and surrogate to honestly discuss these relationship expectations, so that they may be matched with like-minded counterparts on this aspect, as matching is an important component of the surrogacy process.<sup>43</sup> These discussions are consistent with the requirements of the Verona Principles as referred to in chapter 2.<sup>44</sup>

Maintaining post-birth contact is regarded as a benefit of surrogacy and most US surrogacy agencies encourage such contact and relationship-building.<sup>45</sup> Most surrogates elect to be matched by surrogacy agencies as they provide professional guidance and have a database of commissioning parents which they can choose from, which assists with matching.<sup>46</sup> Fuchs *et al*'s study of over two hundred US gestational surrogates found that surrogacy agencies could provide support with regard to the provision and coordination of legal services, matching parties and managing the communication between them.<sup>47</sup> The parties in US surrogacy arrangements also have the opportunity to become acquainted with each other through telephonic contact or personal visits.<sup>48</sup> Once the parties are matched, then a surrogacy contract is concluded.<sup>49</sup> This preconception surrogacy process can take a few months or longer.<sup>50</sup>

In order to curtail disputes between the parties and protect their interests, a comprehensively drafted surrogacy agreement (which includes the parties' agreed rights and responsibilities on pre and post-birth contact) is considered to be important, with the surrogate having separate legal representation.<sup>51</sup> The commissioning parents' attorney usually drafts the agreement and

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of the parties themselves. Berend Z and Guerzoni CS 'Reshaping relatedness? The case of US surrogacy' (2019) 6 *Antropologia* 85 (hereafter Berend *et al* (2019)).

<sup>43</sup> California Centre for Reproductive Medicine recommends that parties with compatible values and expectations are matched with each other and that they discuss the resolution of potential problems that they may face during their relationship. ConceiveAbilities employs a match manager, who previously acted as a surrogate and is also a mental health professional. ConceiveAbilities 'Post-birth relationship with your surrogate mother' available at <https://www.conceiveabilities.com/about/blog/post-birth-relationship-with-your-surrogate-mother/> (accessed 14 December 2022) (hereafter ConceiveAbilities).

<sup>44</sup> Verona Principles 5.4e and 5.5h.

<sup>45</sup> Circle Surrogacy. Southern Surrogacy 'The legal, emotional and health risks of surrogacy (and how we minimize them)' available at <https://southernsurrogacy.com/surrogates/is-surrogacy-right-for-you/the-legal-emotional-and-health-risks-of-surrogacy-and-how-we-minimize-them/> (accessed 16 February 2022) (hereafter Southern Surrogacy).

<sup>46</sup> Surrogate.com 'About surrogacy' available at <https://surrogate.com/about-surrogacy/surrogacy-101/surrogacy-questions/> (accessed 21 January 2023) (hereafter Surrogate.com). Surrogate.com is a surrogacy agency. Ruiz-Robledillo *et al* (2016)).

<sup>47</sup> Fuchs *et al* (2016) 1497.

<sup>48</sup> Surrogate.com.

<sup>49</sup> Ziff (2017) 419.

<sup>50</sup> Ziff (2017) 419. According to Circle Surrogacy, the matching process itself can last between one week and two months.

<sup>51</sup> Surrogate.com 'Intended parents understanding surrogacy contracts' available at <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/understanding-surrogacy-contracts/> (accessed 21 January 2023). California-based fertility clinic, Western Fertility Institute, recommends that the parties' agreement on pre and post-birth contact be recorded in the surrogacy agreement. American College of Obstetricians and Gynecologists also shares this view. American College

the surrogate's lawyer reviews it to ensure that it incorporates their client's interests.<sup>52</sup> The American Society for Reproductive Medicine ("ASRM") requires that the surrogate's interests be protected by providing her with an independent lawyer and counsellor so that she may provide informed consent to the surrogacy and the risks associated with this.<sup>53</sup> The ASRM recommends that the parties conclude a written agreement and that the surrogate's independent lawyer be at her disposal when this agreement is concluded and throughout the surrogacy process.<sup>54</sup> In SA, lawyers largely only feature up to the pre-conception stage, when the agreement is confirmed. It is recommended that SA follows this approach and that separate legal representation be available to her throughout the surrogacy process in the event that this is required.

The surrogate's psychological evaluation entails assessing her ability to deal with relationships, manage conflicts and her contact preference with the family formed through surrogacy.<sup>55</sup> The ASRM recommends that a separate psycho-educational consultation with the commissioning parents then occurs where their contact expectations with the surrogate and disclosure to their child of his origins are explored.<sup>56</sup> The psychologist is then required to consult jointly with the parties on issues such as their expectations on post-birth contact, regardless of whether they previously knew each other or not, and determine whether they are compatible.<sup>57</sup> The ASRM's recommendations are followed by most surrogacy agencies and clinics in the US.<sup>58</sup> These psychological evaluations are consistent with some Verona Principles, as referred to in chapter 2.

Whilst reading about surrogacy is considered to be useful, communicating with other, experienced surrogates is regarded as more beneficial.<sup>59</sup> A surrogate community has developed

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<sup>52</sup> of Obstetricians and Gynecologists 'Committee Opinion No. 660: Family building through gestational surrogacy' (2016) 127 *Obstetrics and Gynecology* e97-e98 (hereafter ACOG Committee Opinion (2016)). However, some surrogates in Berend's study did not consider this to be useful, and required spontaneity in the relationship, as this results in the formation of good friendships. Berend *et al* (2019) 92. Surrogate.com 'Intended parents understanding surrogacy contracts' available at <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/understanding-surrogacy-contracts/> (accessed 21 January 2023).

<sup>53</sup> Kapfhamer J and Van Voorhis B 'Gestational surrogacy: a call for safer practice' (2016) 106 *Fertility and Sterility* 270. The American College of Obstetricians and Gynecologists supports this recommendation so that a conflict of interests may be avoided and to ensure that both parties' needs are contained in the agreement. ACOG Committee Opinion (2016) e97-e98.

<sup>54</sup> Penzias A, Bendikson K, Cedars M *et al* 'Recommendations for practices using gestational carrier: a committee opinion' (2022) 118 *Fertility and Sterility* 71-72 (hereafter Penzias *et al* (2022)).

<sup>55</sup> Penzias *et al* (2022) 70.

<sup>56</sup> Penzias *et al* (2022) 69.

<sup>57</sup> Penzias *et al* (2022) 69, 71 and 72.

<sup>58</sup> Ruiz-Robledillo *et al* (2016) 191.

<sup>59</sup> Circle surrogacy.

in the US.<sup>60</sup> More informed surrogates provide more input into the contents of the surrogacy agreement.<sup>61</sup> Berend's study of a large surrogacy website, which then consisted of approximately six thousand US surrogates, also found that surrogates provide support and information to each other and this assists them with their decision-making and choices.<sup>62</sup> Berend also found that surrogates who used an agency to match them with commissioning parents, as opposed to those who did the matching themselves, were more informed and often had particular expectations and requirements.<sup>63</sup> Fuchs study found that about 71% of mostly first time surrogates used an agency, 92% had her own lawyer and about 95% were screened and counselled by a counsellor.<sup>64</sup> They were not financially vulnerable to enter into surrogacy arrangements and whilst they were informed of most medical risks, they were less informed about the psychosocial effects of surrogacy.<sup>65</sup> Fuchs *et al* therefore recommends that it is vital for surrogates to be psychologically screened on these latter effects.<sup>66</sup>

The surrogacy practice in SA appears to lack effective dialogue between the parties on post-birth contact when unknown surrogates are involved, with such dialogue only occurring in the case of known surrogates. The US practice is for these discussions to be included in the psychologist evaluation for both known and unknown surrogates. This should be emulated in SA. Unlike the US, SA lacks an effective matching process where like-minded parties are matched with each other with a view to long-term relationship-building. This should be considered when SA reforms its law and enact regulations related thereto on post-birth contact.

#### 4.2.3. Canada

Canada, like SA and UK, permits only altruistic surrogacy.<sup>67</sup> Gestational surrogacy is preferred in Canada due to the potential risks associated with the surrogate bonding with and not relinquishing the child when traditional surrogacy occurs.<sup>68</sup> The surrogate is considered to be the child's mother at birth, and she has a seven day period after birth within which to decide

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<sup>60</sup> Ziff (2017) 411. Their discussions take place on social media. Berend Z "'We are all carrying someone else's child!': Relatedness and relationships in third-party reproduction' (2016) 118 *American Anthropologist* 34.

<sup>61</sup> Berend *et al* (2019) 87.

<sup>62</sup> Berend Z 'The romance of surrogacy' (2012) 27 *Sociological Forum* 917 (hereafter Berend (2012)).

<sup>63</sup> Berend (2012) 920.

<sup>64</sup> Fuchs *et al* (2016) 1496 and 1499.

<sup>65</sup> Fuchs *et al* (2016) 1501.

<sup>66</sup> Fuchs *et al* (2016) 1502.

<sup>67</sup> Yee S and Librach CL 'Analysis of gestational surrogates' birthing experiences and relationships with intended parents during pregnancy and post-birth' (2019) 46 *Birth* 629 (hereafter Yee *et al* (2019)).

<sup>68</sup> Fantus S 'Experiences of gestational surrogacy for gay men in Canada' (2021) 23 *Culture, Health & Sexuality* 1364 (hereafter Fantus (2021)).

whether she wishes to keep the child.<sup>69</sup> The province in which the child is born through surrogacy determines the procedure to be followed by the commissioning parents in order to be registered as the child's sole parents.<sup>70</sup>

Many commissioning parents and surrogates employ surrogacy consultants, which are typically managed by former surrogates, who assist in matching surrogates and commissioning parents and provide guidance during the surrogacy process.<sup>71</sup> Canadian law requires that a surrogacy contract be concluded prior to fertilisation occurring.<sup>72</sup> The legal status of these contracts are unclear, as courts have not decided on this, but they are considered to serve as proof of the parties' intentions.<sup>73</sup> The commissioning parents' lawyer drafts the contract and the surrogate is often required to have her own lawyer to advise her on it and to negotiate any amendments that she requires to be made thereto.<sup>74</sup> The surrogate's lawyer's cost are paid by the commissioning parents.<sup>75</sup>

Several fertility clinics require that the surrogate have independent legal representation when the surrogacy agreement is concluded.<sup>76</sup> There are considered to be numerous benefits of separate legal representation for the surrogate, which includes preventing a conflict of her interests with those of the commissioning parents and ensuring that her interests are safeguarded.<sup>77</sup> One Canadian lawyer correctly points out that separate legal representation is also required for known surrogates who are family members of the commissioning parents due to the potential of family pressure being exerted on her.<sup>78</sup> Other Canadian lawyers regard separate legal representation as vital from an ethical viewpoint and to prevent the surrogate from challenging the surrogacy agreement on the basis of her not being fully informed of her rights and obligations in terms thereof. The surrogate's lawyer can inform her about her rights

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<sup>69</sup> Carsley S *Surrogacy in Canada: Lawyers' experiences, practices and perspectives* (unpublished LLD thesis, McGill University, 2020) 299 (hereafter Carsley (2020)).

<sup>70</sup> Dar S, Lazer T, Swanson S *et al* 'Assisted reproduction involving gestational surrogacy: an analysis of the medical, psychosocial and legal issues: experience from a large surrogacy program' (2015) 30 *Human Reproduction* 347 (hereafter Dar *et al* (2015)). In some provinces a court order is required and in others certain legal documents are required.

<sup>71</sup> Fantus (2021) 1362.

<sup>72</sup> Fantus (2021) 1362.

<sup>73</sup> Carsley (2020) 332.

<sup>74</sup> Dar *et al* (2015) 347.

<sup>75</sup> McKenzie Lake lawyers '5 things you need to know about surrogacy law in Canada' available at <https://www.mckenzielake.com/insights-articles/five-things-you-need-to-know-about-surrogacy-law-in-canada/> (accessed 21 December 2022) (hereafter McKenzie Lake lawyers).

<sup>76</sup> Carsley (2020) 133.

<sup>77</sup> Shirley Eve Levitan 'Surrogacy Law in Canada' available at [familyandfertilitylaw.ca](http://familyandfertilitylaw.ca) (accessed 20 July 2022).

<sup>78</sup> Carsley (2020) 133.

and ensure that her preferences are incorporated in the surrogacy agreement.<sup>79</sup> Separate legal representation in Canada therefore benefits not only the surrogate but also the commissioning parents and their lawyer who drafts the agreement as it prevents the surrogate challenging the agreement based on her lacking informed consent. In instances where surrogates can opt to have no separate lawyer, only few choose to do so and this mostly occurs in the case of surrogates who had already completed a surrogacy and are already familiar with the rights and duties related to surrogacy.<sup>80</sup> Canada's practice of having separate legal representation for the surrogate is consistent with the US approach and Verona Principles, and affirms the recommendation in chapter 3 that South African law should make provision for this.

Similar to the US, surrogacy agreements are comprehensively drafted and provide details regarding whether the surrogate will have contact with the child.<sup>81</sup> Some Canadian lawyers interviewed by Carsley have indicated that certain surrogacy agreements include post-birth contact provisions between the surrogate and commissioning parents and child and that these provisions differ from one surrogacy agreement to the next, and depends on the parties preferences.<sup>82</sup> These lawyers also indicate that some surrogates have even insisted that post-birth contact provisions be included.<sup>83</sup> Similar to US surrogates, Canadian surrogates have agency in determining the terms of the surrogacy agreement and are generally not vulnerable to exploitation.<sup>84</sup> It begs the question whether Canadian surrogates, to some extent, have better bargaining power on the terms of post-birth contact than South African surrogates based on them having separate legal representation.

Dar *et al* conducted a large study of the experiences of surrogates who were treated at Create Fertility Centre over a fifteen-year period from 1998 to 2012.<sup>85</sup> Only 25% of these surrogates were previously known to the commissioning parents. This fertility clinic requires that the commissioning parents and surrogate have separate pre-conception counselling, with each party first having an individual consultation so that they may freely discuss issues of concern to them. This counselling includes a discussion of the surrogate's birth plan, relinquishment of the child and the surrogate's post-birth contact with the commissioning parents and child.<sup>86</sup>

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<sup>79</sup> Carsley (2020) 142.

<sup>80</sup> Carsley (2020) 133, 135 and 176. Some Canadian clinics only require that a surrogacy agreement be concluded without specifying that the surrogate have separate legal representation.

<sup>81</sup> Mckenzie Lake lawyers.

<sup>82</sup> Carsley (2020) 152.

<sup>83</sup> Carsley (2020) 176.

<sup>84</sup> Carsley (2020) 330.

<sup>85</sup> Dar *et al* (2015) 346.

<sup>86</sup> Dar *et al* (2015) 346-347.

The parties may meet jointly thereafter in order to discuss their expectations, to ensure that the other is aware of these and that there is agreement in relation to them.<sup>87</sup> Counselling of the surrogate ensures that she provides informed consent in relation to her rights and responsibilities in terms of the surrogacy arrangement.<sup>88</sup> Dialogue and agreement on post-birth contact therefore occurs at the pre-conception stage rather than it being assumed to be excluded or included only at the discretion of the commissioning parents as appears to be the position in SA.

### **4.3. DURING PREGNANCY**

#### **4.3.1. The UK**

The surrogacy of the UK's first surrogate, Kim Cotton, was arranged through a commercial surrogacy agency, and this resulted in her having no contact with her commissioning parents.<sup>89</sup> These commercial agencies are no longer involved in the surrogacy process and the parties now have close interactions with each other during the surrogate's pregnancy.<sup>90</sup> This has resulted in good relationships being formed between them.<sup>91</sup> The relationship between the surrogate and commissioning mother generally strengthens during the pregnancy, with the latter attending medical appointments and scans with the surrogate.<sup>92</sup> Surrogates are reported to not consider the children who they give birth to through surrogacy as their own, and this enables them to relinquish the child.<sup>93</sup> They assist their commissioning parents to establish a connection with their unborn child by involving them in their pregnancy.<sup>94</sup> Contact between the parties during the pregnancy includes the commissioning parents visiting their surrogates.<sup>95</sup> One UK commissioning mother has reported that COTS connected her with a friend and that they had contact every one to two weeks, as well as daily telephonic contact.<sup>96</sup> Her surrogate also wanted her to be present when she gave birth to the child.

A study of thirty-four surrogates found that most commissioning parents saw their surrogates at least once a month during the pregnancy, with the commissioning mothers being more

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<sup>87</sup> Dar *et al* (2015) 346-347.

<sup>88</sup> Yee *et al* (2020) e263.

<sup>89</sup> Golombok (2020) 102.

<sup>90</sup> Jadvá *et al* (2019) 568.

<sup>91</sup> Jadvá *et al* (2019) 568.

<sup>92</sup> Golombok (2020) 138.

<sup>93</sup> Jadvá V, Murray C, Lycett E *et al* 'Surrogacy: the experiences of surrogate mothers' (2003) 18 *Human Reproduction* 2203 (hereafter Jadvá *et al* (2003)).

<sup>94</sup> Jadvá *et al* (2019) 563-564.

<sup>95</sup> Jadvá *et al* (2019) 566.

<sup>96</sup> Golombok (2020) 138.



involved in the pregnancy than the commissioning fathers.<sup>97</sup> The parties had good relationships regardless of whether the surrogacy involved a known or unknown surrogate.<sup>98</sup> These surrogates mostly had support from their family during the surrogacy process.<sup>99</sup> Another study which comprised of forty-two commissioning parents had similar findings, with the commissioning parents having contact more often with known surrogates.<sup>100</sup>

#### 4.3.2. The US

Many US surrogates, like South African ones, do not bond with the child and view their role as a babysitter or oven.<sup>101</sup> They do not view the child as their own or consider them to have any familial ties with each other.<sup>102</sup> They bond with their commissioning parents and hope for a post-birth continuation of their friendship that they established during the surrogacy process.<sup>103</sup> Similar to the South African and UK practice, US surrogates provide frequent updates regarding the pregnancy to their commissioning parents and some invite them to attend important medical appointments.<sup>104</sup> Most surrogates include their commissioning parents in their labour and birthing process. Creative Family Connection provide services that include drafting a birth plan with the hospital where the surrogate will deliver the baby.<sup>105</sup> A US surrogacy program required that the surrogate who was thirty-two weeks pregnant meets with her commissioning parents and nurse manager of the hospital where she will give birth in order to discuss what will transpire when she gives birth.<sup>106</sup>

A Californian study of fifty largely Hispanic and African American surrogates from a clinic and commissioning parents who were mainly from China, Australia and Europe, found that most surrogates had no relationship-building or friendship expectations with their commissioning parents.<sup>107</sup> They had very limited personal contact with their commissioning

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<sup>97</sup> Jadvá *et al* (2003) 2200.

<sup>98</sup> Jadvá *et al* (2003) 2199 and 2203.

<sup>99</sup> Jadvá *et al* (2003) 2203.

<sup>100</sup> MacCallum *et al* (2003) 1335 and 1338.

<sup>101</sup> Berend (2012) 925. Berend *et al* (2019) 90 and 96.

<sup>102</sup> Berend *et al* (2019) 89 and 92.

<sup>103</sup> Berend (2012) 925. Berend *et al* (2019) 84. These surrogates were of white ethnicity.

<sup>104</sup> Surrogate.com 'About surrogacy Surrogacy FAQ's: 23 questions you may have' available at <https://surrogate.com/about-surrogacy/surrogacy-101/surrogacy-questions/> (accessed 21 January 2023). This also applied in cases where the commissioning parents and surrogates resided in different continents. They were then included in the pregnancy by being updated thereon through electronic and text messages, and video calls. The surrogates' personality and character were carefully selected by these commissioning parents to facilitate such contact and post-birth contact. Carone *et al* (2017) 186-187.

<sup>105</sup> Creative Family Connections.

<sup>106</sup> Pelko C 'Embracing diverse families through creation of the exemplary surrogacy experience' (2019) 48 *J Obstet Gynecol Neonatal Nurs*. S45.

<sup>107</sup> Berend *et al* (2019) 84-85 and 92.

parents during pregnancy, and were of the view that their commissioning parents should decide whether to have contact with them during pregnancy and post-birth.<sup>108</sup> They indicated that they would appreciate being provided with updates and photographs by the commissioning parents over future years, should they elect to do so, but required no more than an annual update.<sup>109</sup> The parties' lack of contact during pregnancy, limited awareness of the lasting friendships that could develop during the surrogacy process and beyond, as well as cultural differences, may have contributed to this lack of expected contact.<sup>110</sup> Chapter 3 has revealed that SA surrogates also have limited expectations of post-birth contact and are guided by their commissioning parents' preferences on contact, particularly on post-birth contact. Should SA surrogates have independent legal advice, awareness of the lasting friendships that other unknown surrogates have established and being matched with like-minded and compatible commissioning parents who are amenable to post-birth contact, then they may require that post-birth contact provisions be included in their agreements.

#### 4.3.3. Canada

In Canada, positive relationships also often develop between the parties during the surrogate's pregnancy.<sup>111</sup> Yee *et al*'s study of 184 gestational surrogates, who were mostly unknown surrogates, found that very good relationships were maintained between commissioning parents and surrogates during pregnancy in about 75% of cases.<sup>112</sup> Fantus's recent small study of surrogates and same sex male commissioning parents' relationships found that the latter wanted to be matched with individuals with whom they shared common values and interests and that they spent time becoming acquainted with each other.<sup>113</sup> Their bond grew stronger during the pregnancy and developed into a friendship.<sup>114</sup> The parties' contact was frequent with the surrogates updating the commissioning parents on her pregnancy through regular texting and them meeting at medical appointments.<sup>115</sup> This level of contact is similar to the experiences of some South African surrogates as mentioned in chapter 3.

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<sup>108</sup> Berend *et al* (2019) 93.

<sup>109</sup> Berend *et al* (2019) 93 and 96. They viewed the relationship as a long-distance friendship and were matched with like-minded commissioning parents.

<sup>110</sup> Berend *et al* (2019) 93 and 97.

<sup>111</sup> Houses of the Oireachtas 'Joint committee on international surrogacy debate' available at [https://www.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_international\\_surrogacy/2022-06-02/2/](https://www.oireachtas.ie/en/debates/debate/joint_committee_on_international_surrogacy/2022-06-02/2/) (accessed 21 December 2022).

<sup>112</sup> Yee *et al* (2019) 630. Only about 9% of the surrogates in this study were known surrogates.

<sup>113</sup> Fantus (2021) 247 and 253.

<sup>114</sup> Fantus (2021) 254.

<sup>115</sup> Fantus (2021) 255.

Similar to US surrogates, the surrogates in Yee *et al*'s study bonded with their commissioning parents and not the child, and viewed their role as an oven or babysitter rather than as a parent.<sup>116</sup> These surrogates also benefitted from connecting with other surrogates and the support that they received from surrogacy agencies, including when conflicts arose with commissioning parents.<sup>117</sup> Yee *et al* ascribed the good relationships' between commissioning parents and surrogates in her study to surrogacy agencies possibly matching parties with similar expectations of the pregnancy, birth and post-birth stages.<sup>118</sup>

Yee *et al* was of the view that a successful surrogacy arrangement, with limited disputes, requires open communication and compatibility between the commissioning parents and surrogate, management of their relationship and expectations, boundary negotiation and mediation to resolve any conflicts between them.<sup>119</sup> She envisaged a role for counsellors in mediating the relationship between the parties by assisting them with communication, conflict resolution and management of expectations during the surrogacy process.<sup>120</sup> A South African psychologist appears to be fulfilling this role in some surrogacy cases until the child is relinquished. As referred to in chapter 3, this service should continue post-birth when the parties maintain contact.

Similar to the US surrogacy program, a Canadian study involving Create Fertility Centre also revealed that during the last three months of the surrogate's pregnancy, the surrogate and commissioning parents meet with the hospital social worker to revise the birth plans, which includes whether the commissioning parents will be present at birth.<sup>121</sup> Several surrogacy agreements provide for the child to be handed over to the commissioning parents upon birth.<sup>122</sup> Create Fertility Centre also provides a post-birth opportunity for the commissioning parents and surrogate to consider issues such as contact between the parties and disclosure to the child of his origins through surrogacy.<sup>123</sup> The parties in this program therefore have three opportunities to discuss post-birth contact, i.e. at the preconception stage, during the third trimester of the surrogate's pregnancy and post-birth. This process allows for constant dialogue

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<sup>116</sup> Yee *et al* (2020) e261-e262.

<sup>117</sup> Yee *et al* (2020) e261-e263. Surrogates who had no intermediary, such as a surrogacy agency, had to be aware of their rights and responsibilities and resolve conflicts on their own.

<sup>118</sup> Yee *et al* (2020) e259 and e 263. Those with post-birth contact expectations were matched with their like-minded counterpart. Likewise, those commissioning parents and surrogates who expected no such contact were matched with each other.

<sup>119</sup> Yee *et al* (2020) e261 and e 263.

<sup>120</sup> Yee *et al* (2020) e263.

<sup>121</sup> Dar *et al* (2015) 347.

<sup>122</sup> Dar *et al* (2015) 347.

<sup>123</sup> Dar *et al* (2015) 351.

between the parties on this aspect and acknowledges that their circumstances and views may change, and provides intervals for their contact arrangements to be reconsidered, rather than a unilateral termination thereof. Issues on contact, and changes thereto, may also be addressed with mediation or counselling.<sup>124</sup> Contact arrangements in SA, particularly with known surrogates who have post-birth contact, can benefit from this practice.

#### **4.4. POST-BIRTH**

##### **4.4.1. The UK**

Kim Cotton did not have the opportunity to meet her commissioning parents and hand their child to them during her first surrogacy.<sup>125</sup> Decades later, she still felt sad about this missed opportunity and the joy associated with this.<sup>126</sup> The handover stage appears to be a defining moment for surrogates and careful discussion between the parties about what will transpire at birth and shortly thereafter is a vital part of the surrogate having a fulfilling surrogacy experience. Birth plans are usually prepared by the parties to the surrogacy agreement at the preconception stage, and includes details such as who will be present when the child is born and who will hold the child post-birth.<sup>127</sup> In one UK study, in 91% of cases, the commissioning parents and surrogate jointly decided on when the child would be handed over and in the remaining 9% of cases the surrogate decided on this.<sup>128</sup> In another UK study, most commissioning parents attended the child's birth, with the child being relinquished to the commissioning parents within about a day after birth.<sup>129</sup>

Kim Cotton's second surrogacy, where she gave birth to twins, had a happier ending. She reported having a good relationship with the twins when they were twenty-seven years of age. Despite them living in New Zealand, they often visited her in the UK. Their contact comprised of frequent visits, Facebook contact and the exchange of birthday messages, and she considers them to be a part of her family.<sup>130</sup> Another surrogate and her family have maintained contact with the family formed through surrogacy, which contact consists of contacting each other on special occasions and having yearly personal contact.<sup>131</sup> These post-birth contact stories

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<sup>124</sup> Carsley (2020) 190, 191 and 194.

<sup>125</sup> Golombok (2020) 101 and 103.

<sup>126</sup> Golombok (2020) 103.

<sup>127</sup> Hall S 'Surrogacy Guideline 2019' available at

<https://www.bedfordshirehospitals.nhs.uk/documents/surrogacy-policy-ldh-attachment-foi-1052/> (accessed 9 December 2022) 6.

<sup>128</sup> Jadva *et al* (2003) 2200.

<sup>129</sup> MacCallum *et al* (2003) 1339.

<sup>130</sup> Golombok (2020) 106 and 127.

<sup>131</sup> Golombok (2020) 131-132.

illustrate that correctly managed surrogacy arrangements need not intrude on the parental turf, where the boundaries between the parent and surrogate roles become blurred. This may be what was envisaged by the Verona Principles on post-birth contact.

Golombok and her colleagues conducted a long-term study of forty-two families formed through surrogacy, over seven stages in the children's lives.<sup>132</sup> The study has ended and the information gathered from the study at age twenty-one was still being analysed.<sup>133</sup> Surrogates, commissioning parents and the children born through surrogacy were consulted during these studies. The study found that the parties to the surrogacy agreement formed close relationships with each other during pregnancy and most continued to have post-birth contact with the family formed through surrogacy when the child was one year old, in the case of both known and unknown surrogates.<sup>134</sup> This study proved that both known and unknown surrogates had good prospects of having a harmonious relationship with the family formed through surrogacy, with most commissioning mothers considering the surrogate's role in their child's life to be beneficial.<sup>135</sup> These parties mostly had contact between once a month and once a year.<sup>136</sup>

The parties' relationships were still good when the children were seven and ten years old but their contact reduced with the passage of time.<sup>137</sup> Commissioning mothers maintained the most contact with known surrogates, probably due to their entrenched relationship.<sup>138</sup> At age fourteen, 64% of the children in the study had contact with their surrogate, with 86% of them having a good relationship with her, despite about 60% of these surrogates being previously unknown to the commissioning parents.<sup>139</sup> Contact ranged from weekly, to monthly, to

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<sup>132</sup> Houses of the Oireachtas 'Joint Committee on International Surrogacy debate – Thursday, 26 May 2022' available at [https://www.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_international\\_surrogacy/2022-05-26/2/](https://www.oireachtas.ie/en/debates/debate/joint_committee_on_international_surrogacy/2022-05-26/2/) (accessed 31 January 2023). The children in this study were born in 2000 and studies were conducted when they were one, two, three, seven, ten, fourteen and twenty-one years of age.

<sup>133</sup> Houses of the Oireachtas 'Joint Committee on International Surrogacy debate – Thursday, 26 May 2022' available at [https://www.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_international\\_surrogacy/2022-05-26/2/](https://www.oireachtas.ie/en/debates/debate/joint_committee_on_international_surrogacy/2022-05-26/2/) (accessed 31 January 2023).

<sup>134</sup> Golombok (2020) 109. MacCallum *et al* (2003) 1338-1339. Commissioning parents often had more contact with previously known surrogates.

<sup>135</sup> Jadva *et al* (2003) 2203. MacCallum *et al* (2003) 1339.

<sup>136</sup> Jadva *et al* (2003) 2201.

<sup>137</sup> Imrie and Jadva (2014) 3010-3012. Thirty-eight of the forty families had contact at age one, and nineteen of the thirty-three families that remained in the study had contact at age seven. At age ten, twenty (comprising of half known and half unknown surrogates) of the thirty-three families had contact. Jadva (2020) 905 indicates that this long-term study found that post-birth contact reduced mostly with unknown traditional surrogates and endured the most with known gestational surrogates who were family or friends.

<sup>138</sup> Imrie and Jadva (2014) 3012.

<sup>139</sup> Zadeh S, Ilioi EC, Jadva V *et al* 'The perspectives of adolescents conceived using surrogacy, egg donation or sperm donation' (2018) 33 *Human Reproduction* 1100-1102 (hereafter Zadeh *et al* (2018)).

occasional contact during the year, to contact less than once a year.<sup>140</sup> Despite the good relationships that developed between the surrogate and these children, the latter did not regard the former as their mother.<sup>141</sup> The long-term study therefore found that several families formed through surrogacy have post-birth contact ranging from occasional personal visits to non-personal contact in the form of social media, photograph exchange and sending flowers, when personal visits were not possible.<sup>142</sup> Golombok is correct of the view that this illustrates the different methods of contact that can satisfactorily be maintained and adjusted with changed circumstances.<sup>143</sup>

Brilliant Beginnings have handled a few hundred surrogacy arrangements between UK commissioning parents and US surrogates, and found that close relationships develop between them during the surrogacy process and beyond.<sup>144</sup> A 2015 survey of one hundred and eleven surrogates and two hundred and six commissioning parents found that about 95% surrogates had post-birth contact with the family formed through surrogacy, due to surrogacy being regarded as a relationship rather than a transaction.<sup>145</sup> Approximately 90% of the surrogates were UK-based and the rest lived abroad.<sup>146</sup> Intermediaries involved in the surrogacy process, such as medical practitioners, lawyers and social workers, and academics were also consulted during this survey.<sup>147</sup> This approach is consistent with the recommendation in chapter 3 in relation to the role players who should be consulted when legislative reform is considered.

Jadva's study of one hundred and sixteen UK commissioning parents who had surrogacy arrangements with fifty-eight US, thirty-eight UK and twenty Asian surrogates, found that the commissioning parents often knew their UK surrogates and had personal contact.<sup>148</sup> This is as a result of UK surrogacy occurring within a relatively small community that encourages close relationships. Commissioning parents in this study required their US surrogate to have a good personality in order to facilitate contact. Surrogates in the US and UK mostly had very good to good post-birth relationships with their commissioning parents, with others having cordial

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<sup>140</sup> Zadeh *et al* (2018) 1102.

<sup>141</sup> Golombok (2020) 137 and 149. The commissioning mother was considered by them to be their mother.

<sup>142</sup> Golombok (2020) 163.

<sup>143</sup> Golombok (2020) 163.

<sup>144</sup> Prosser *et al* (2016) 264-265.

<sup>145</sup> Horsey K 'Surrogacy in the UK: Myth busting and reform Report of the Surrogacy UK Working Group on Surrogacy Law Reform' available at <https://kar.kent.ac.uk/59740/> (accessed 16 February 2023) (hereafter Horsey (2015)) 19 and 35.

<sup>146</sup> Horsey (2015) 22.

<sup>147</sup> Horsey (2015) 25.

<sup>148</sup> Jadva *et al* (2019) 563-566 and 568. Most children born through surrogacy in this study were under four years of age.

relationships and only four relationships being distant.<sup>149</sup> The parties had contact using emails, telephones, social media, sending messages and cards with UK surrogates and their commissioning parents also having personal contact. Technology assisted the parties to maintain indirect contact and for close relationships to develop, particularly when geographic barriers with US surrogates required bridging.<sup>150</sup> Contact was mostly monthly, but it also included weekly, three monthly, bi-annual and annual contact. This study illustrates that geographic barriers between the parties can still result in post-birth contact practices. Asian, unlike US, surrogates rarely had any contact with their UK commissioning parents due to additional barriers related to language differences and the agencies' role as intermediaries.<sup>151</sup>

Jadva *et al* correctly recommended that psychologists involved in the surrogacy process should not make unfounded assumptions about contact, but that they should rather discuss contact between the parties during pregnancy and post-birth, and consider how these are practiced in several countries.<sup>152</sup> This is an important lesson to be learnt in the South African context as parties to surrogacy agreements may be led to believe by some attorneys and psychologists that post-birth contact is not permitted or is excluded, and this topic may as a result not be fully explored, as referred to in chapter 3. It is essential that these role players dispense informed and impartial advice. Some experienced UK social workers who have considered the child's interests after his birth, when applications for parental orders are brought, were of the view that it was vital for the parties to surrogacy agreements to include provision for post-birth contact and disclosure of the child's origins in their agreements.<sup>153</sup> Some of them met with the parties in order to provide for this, where their agreement excluded this.<sup>154</sup>

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<sup>149</sup> Jadva *et al* (2019) 564-568. Those with very good relationships considered their surrogate to be like family or close friends. Those with cordial relationships had occasional contact. There were also times where the parties chose no post-birth contact.

<sup>150</sup> Jadva *et al* (2019) 567-568. Geographic distance between the parties has been beneficial to commissioning parents as it allowed them to safely have post-birth contact with the surrogate. This was due to the clear definition of their roles in the child's life, with the surrogate being regarded as an aunt, and limited opportunity for disputes and interference by the surrogate in their lives. Carone *et al* (2017) 186-187.

<sup>151</sup> Jadva *et al* (2019) 565. These agencies largely had contact with the commissioning parents.

<sup>152</sup> Jadva *et al* (2019) 568.

<sup>153</sup> Crawshaw *et al* (2013) 1225, 1226 and 1230.

<sup>154</sup> Crawshaw *et al* (2013) 1231. Some of these social workers criticised the late stage at which the child's interests were considered, i.e. when the child had already been living with the commissioning parents.

#### 4.4.2. The US

In the US, pre and post-birth contact between the parties is contingent on their choices and the relationship that they establish during the surrogacy process.<sup>155</sup> Post-birth contact ranges from surrogates becoming part of the commissioning parents' family, to limited contact (in the form of occasional updates, photograph and Christmas card exchanges, intermittent visits and special occasions and holidays spent together), to no contact.<sup>156</sup> Contact can also cease due to a deterioration of the post-birth relationship.<sup>157</sup> When this occurs, or when commissioning parents undertake to remain in contact and then renege on this undertaking, then surrogates are disappointed.<sup>158</sup> Many surrogates require honesty from their commissioning parents regarding whether they want post-birth contact and also want them to choose the option of having an ongoing friendship.<sup>159</sup> These ongoing friendships usually occur when the parties' expectations in this regard are matched.<sup>160</sup> Van den Akker's 2003 study found that most unknown surrogates expected some form of contact with their commissioning parents to continue post-birth, so that their friendships which were formed during pregnancy could continue and for their own children to have contact with the child.<sup>161</sup> The study of Ruiz-Robledillo *et al* found that gestational surrogates mostly require post-birth contact with their commissioning parents and the child.<sup>162</sup> It would be useful to ascertain whether SA surrogates, who are mostly gestational surrogates, share this expectation.

When contact is chosen, the parties can agree to a contact schedule to match their contact expectations and establish boundaries.<sup>163</sup> The parties to surrogacy agreements in SA who choose contact can benefit from this practice. Consistent with the recommendation in chapter 3, Southern Surrogacy makes provision for counselling throughout the surrogacy process and post-birth to manage relationship challenges, and they also educate surrogates on methods of boundary setting with the commissioning parents and the child.<sup>164</sup> Communication between the

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<sup>155</sup> Surrogate.com.

<sup>156</sup> Western Fertility Institute. *ConceiveAbilities*. Smietana (2017) 165 and 168. Smietana's study comprised of twenty US surrogacy arrangements, with all arrangements involving US surrogates and 60% foreign and 40% American commissioning parents respectively. All the parties in these arrangements intended to have post-birth contact and many proceeded to do so.

<sup>157</sup> Berend (2012) 926.

<sup>158</sup> Berend (2012) 926 and 930.

<sup>159</sup> Berend (2012) 929. Berend *et al* (2019) 95. These surrogates were prepared to put in the effort to maintain their relationships, including providing their commissioning parents with time and space whilst they adjusted to parenthood.

<sup>160</sup> Berend (2012) 933.

<sup>161</sup> Van den Akker (2007) 57.

<sup>162</sup> Ruiz-Robledillo *et al* (2016) 191.

<sup>163</sup> Surrogate.com.

<sup>164</sup> Southern Surrogacy.



parties throughout the surrogacy journey is important as their needs may change, and most of them are able to find a comfortable level of communication between them and on post-birth contact.<sup>165</sup> Changes in the level of contact and the parties' relationships are managed with pre-conception counselling and support from psychologists during pregnancy and post-birth.<sup>166</sup>

US studies have found that post-birth contact between the commissioning parents and unknown surrogates often occurred, with there being differences in the frequency thereof.<sup>167</sup> One such study is by Blake *et al* that found that good relationships do develop between the parties during the early post-birth stage.<sup>168</sup> These good relationship outcomes, despite these involving commercial surrogacy, were ascribed to the commissioning parents choosing surrogates with particular expectations and attributes that would enable them to have such relationships.<sup>169</sup> This study found that good relationships develop between the surrogate, child and commissioning parents, regardless of whether the latter is heterosexual or a same sex male couple.<sup>170</sup>

Carone *et al*'s study, where thirty-nine of the forty commissioning parents and surrogates were previously unknown to each other, also found that good relationships largely developed between the parties in the thirty-five cases where post-birth contact occurred, with more than half of the children born through these surrogacy arrangements regarding their surrogate as an aunt.<sup>171</sup> In Ziff's study of thirty-three surrogates, fifteen of them had post-birth contact with their commissioning parents and the child born through surrogacy, with such contact varying from receiving photographs and updates, to having a more substantial role in the child's life as

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<sup>165</sup> ConceiveAbilities.

<sup>166</sup> Soderstrom-Antilla V, Wennerholm U-B, Loft A *et al* 'Surrogacy: outcomes for surrogate mothers, children and the resulting families – a systematic review' (2016) 22 *Human Reproduction Update* 273 (hereafter Soderstrom-Antilla *et al* (2016)). Psychologists Ciccarelli and Beckman's study also regarded ongoing counselling at all stages of the surrogacy process to be important. Ciccarelli *et al* (2005) 34.

<sup>167</sup> Yee and Librach (2019) 629. Bromfield's study reveals that some US surrogates' contact with the child entailed the occasional telephonic contact, updating each other and spending family vacations together. Bromfield (2016) 207.

<sup>168</sup> Blake L, Carone N, Slutsky J *et al* 'Gay father surrogacy families: relationships with surrogates and egg donors and parental disclosure of children's origins' (2016) 106 *Fertility and Sterility* 1506-1508 (hereafter Blake *et al* (2016)). Thirty-eight of the forty surrogates in this study were previously unknown to their commissioning parents. Post-birth contact occurred in thirty-four cases with eighteen of these relationships, including the relationships with the children born through these surrogacy arrangements, being good and close and the surrogates were regarded as family, friend or special visitor. Closer relationships between the surrogate and child occurred when the parties interacted more frequently with each other and some commissioning parents even wanted more contact with their surrogates. Contact comprised predominantly of Facebook and email contact. Contact through cards, flowers and gifts exchange, telephonic messages and calls and video calls also occurred.

<sup>169</sup> Blake *et al* (2016) 1508.

<sup>170</sup> Blake *et al* (2016) 1508-1509.

<sup>171</sup> Carone *et al* (2018) 248-252. The commissioning parents in this study were Italian same-sex male couples who engaged in surrogacy with Canadian and US surrogates, as surrogacy in Italy is illegal.

their godparent.<sup>172</sup> Post-birth contact reduces in the initial stage as the commissioning parents adjust to parenthood.<sup>173</sup> Similar to the UK, post-birth contact also reduces with the passage of time.<sup>174</sup>

#### 4.4.3. Canada

Similar to the UK and US, a Canadian fertility lawyer indicated that positive relationships often develop between surrogates and commissioning parents during pregnancy and post-birth.<sup>175</sup> Positive relationships also develop between surrogates and the child. The study of Yee *et al* found that post-birth contact often occurred between the parties in about two-thirds of cases, mostly through emails, phone messaging and Facebook.<sup>176</sup> Both known and unknown surrogates had frequent contact with their commissioning parents, with the known surrogates having somewhat more frequent contact.<sup>177</sup> The quality of their relationship during and at the end of the pregnancy determined the level of their post-birth contact.<sup>178</sup> 80% of unknown surrogates had post-birth contact with their commissioning parents at least once every six months and harmonious relationships were reported, with surrogates largely being satisfied with the amount of such contact.<sup>179</sup> This contact ranged from watching the child grow up to commissioning parents becoming part of the surrogates' families.<sup>180</sup>

Only three of the fifteen commissioning fathers in the Fantus study had no post-birth contact.<sup>181</sup> Similar to the US, when post-birth contact occurred, this reduced in the early post-birth stage as the commissioning parents adjusted to parenthood. Distance was at times considered to be necessary to maintain boundaries and some surrogates required flexibility with their level of contact. Post-birth contact was more frequent in the first year (once a week) and reduced to about once a month thereafter, with personal contact only occurring about twice a year on occasions such as birthdays or holidays.<sup>182</sup> This contact at times ceased when the child was five

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<sup>172</sup> Ziff (2017) 407 and 414.

<sup>173</sup> Western Fertility Institute.

<sup>174</sup> ConceiveAbilities.

<sup>175</sup> Houses of the Oireachtas 'Joint committee on international surrogacy debate' available at [https://www.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_international\\_surrogacy/2022-06-02/2/](https://www.oireachtas.ie/en/debates/debate/joint_committee_on_international_surrogacy/2022-06-02/2/) (accessed 21 December 2022).

<sup>176</sup> Yee and Librach (2019) 630 and 635. A limitation of this study is that most surrogate births occurred three years before information was collected for this study and concerns were raised that such contact may reduce with the passing of time.

<sup>177</sup> Yee and Librach (2019) 630 and 634.

<sup>178</sup> Yee and Librach (2019) 634.

<sup>179</sup> Yee and Librach (2019) 630, 634 and 635.

<sup>180</sup> Yee *et al* (2020) e262.

<sup>181</sup> Fantus (2021) 256-257.

<sup>182</sup> Fantus (2021) 259.

years old. This study confirms that the relationships formed during surrogacy can continue post-birth and that the issue of post-birth contact should be discussed at the pre-conception counselling stage.<sup>183</sup> This study also found that successful surrogacy relationships require good communication, respect and common values between the parties, as well as boundary management and flexibility.<sup>184</sup>

Soderstrom conducted a review of certain studies on surrogacy outcomes for the parties involved in the surrogacy process and their children, and found that there is a need for future long-term follow up studies of these families.<sup>185</sup> This finding is supported, particularly in the South African context. Studies to secure the views and experiences of Canadian commissioning parents and surrogates are underway and underscore the importance of these parties input when legislative responses to issues on surrogacy are considered.<sup>186</sup> Carsley's thesis highlights and supports the recommendation in chapter 3 of the value of the experiences and views of lawyers who draft and advise on surrogacy agreements when legislative reform to surrogacy is considered.<sup>187</sup>

#### **4.5. CONCLUDING REMARKS**

This chapter has surveyed the post-birth contact practices in the three jurisdictions and it has provided insight into how the parties to the surrogacy agreement approach and manage their contact arrangements as compared to SA. Their approach differs from SA in that it supports the establishment of relationships that continue post-birth, rather than being regarded as one that terminates after the birth of the child for unknown surrogates. There are several good practices that occur in the UK, US and Canada that SA should emulate. Some of these practices are also contained in the Verona Principles and have been recommended in chapter 3. The parties spend more time during the preconception stage on becoming acquainted with each other, with a view to relationship and friendship formation. There is dialogue on the topic of post-birth contact and emphasis is placed on correctly matching parties who have compatible interests, values and preferences on post-birth contact. The intermediaries involved in the surrogacy process (such as lawyers and psychologists) are required to be impartial and

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<sup>183</sup> Fantus (2021) 260.

<sup>184</sup> Fantus (2021) 259.

<sup>185</sup> Soderstrom-Anttila *et al* (2016) 260, 261 and 274.

<sup>186</sup> YouTube 'Surrogacy in Canada: Lawyers' practices and perspectives' available at [https://www.google.com/search?q=carsley+%27surrogacy+in+Canada&rlz=1C1PRFC\\_enZA631ZA631&oq=carsley+%27surrogacy+in+Canada&aqs=chrome..69i57j33i160.26686j0j15&sourceid=chrome&ie=UTF-8#fpstate=ive&vld=cid:4dfa6cdf,vid:vVwVopdKIq4](https://www.google.com/search?q=carsley+%27surrogacy+in+Canada&rlz=1C1PRFC_enZA631ZA631&oq=carsley+%27surrogacy+in+Canada&aqs=chrome..69i57j33i160.26686j0j15&sourceid=chrome&ie=UTF-8#fpstate=ive&vld=cid:4dfa6cdf,vid:vVwVopdKIq4) (accessed 14 January 2023).

<sup>187</sup> Carsley (2020) 329.

independent so that no undue influence is exerted on the parties which affects their decision-making. They are also required to provide informed advice. There are practices in the US where the parties' agreement on post-birth contact are incorporated in the surrogacy agreement in order to curtail or avoid future disputes. Dialogue can also occur on what will transpire at birth.

This survey demonstrates that good and fulfilling post-birth contact relationships can largely be established between commissioning parents and both known and unknown surrogates, if this is correctly approached and managed. Counselling and mediation have a role to play in the establishment and maintenance of these relationships. There have also been benefits that were gained from the role of surrogacy agencies in the process. These relationships are formed during the preconception stage and often strengthen during the surrogate's pregnancy and endures post-birth. Many surrogates also have good and fulfilling relationships with their children born through surrogacy. Contact comprises of personal and non-personal methods, and can differ in frequency, to suit the parties' requirements and to allow for any changes in their circumstances. Whilst there are risks to these relationships breaking down or the parties choosing to not maintain contact, these situations only occur in the minority of cases and post-birth contact practices trumps this. This lends support to the argument that SA should, as a result, reconsider its conservative and exclusionary approach to post-birth contact, particularly in light of its reported benefits to the parties to the surrogacy agreement and their families. The importance of consulting with all role players involved in and affected by the surrogacy process when legislative reform is considered is also confirmed by the survey. The concluding chapter to this dissertation will follow and will include recommendations for the way forward.

## **CHAPTER 5**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **5.1. CONCLUSIONS**

This dissertation set out to assess the suitability of South Africa's current framework on post-birth contact in surrogacy law and whether it provides protection to all parties to the surrogacy agreement, and promotes the best interests of the child to be born from such agreement. In doing so, section 297(1)(d) of the Children's Act and its origins were examined. This was then compared with the Verona Principles' best interests of the child standard and the position in the UK, US and Canada where post-birth contact practices occur. This assessment revealed that post-birth relationship-building between the parties to surrogacy agreements has not been prioritised in SA. This has resulted in several deficiencies in the post-birth contact framework being overlooked, which impacts the parties to surrogacy agreements. This problem is a sizable one given that an estimated one hundred surrogacy births occur each year, with some involving multiple births and many surrogacy arrangements involving unknown surrogates who are most affected.

##### **5.1.1. Deficiencies in law and practices**

The first deficiency in South Africa's current framework relates to the largely exclusionary approach to post-birth contact being adopted in its law and practices. The law as contained in section 297(1)(d) of the Children's Act erroneously creates a default position that excludes post-birth contact between the surrogate and her family and the child unless provision is made for its inclusion in the surrogacy agreement. This was found to be contrary to the discussion that was envisaged on this aspect by the ad hoc Committee on surrogacy. South Africa's practices were also found to be exclusionary as the parties to surrogacy agreements assume that such contact is excluded or not allowed, or it is discouraged for unknown surrogates. This has resulted in inadequate discussions between the parties on their expectations regarding post-birth contact, and such contact is excluded unless the commissioning parents determine otherwise. These parties are at times misinformed in this regard by professionals who render services during the surrogacy process who themselves may not be fully informed of the benefits and risks of post-birth contact, the different methods of contact that may be negotiated, and how these are successfully established and managed, as in the UK, US and Canada. Known surrogates' needs were also found to be inadequately reflected in surrogacy arrangements, as commissioning parents dictate the terms thereof.

The abovementioned default position, exclusionary approach towards unknown surrogates and the limited autonomy of the known surrogate to determine the terms of post-birth contact, gives precedence to the needs of commissioning parents who require no post-birth contact or control over the terms of such contact, above those of the child (if it is in his best interests to have post-birth contact with the surrogate) and the surrogate who requires contact or autonomy over its terms. This position was found to persist as high courts do not appear to probe post-birth contact provisions or the lack thereof in surrogacy agreements, despite their duty to ensure that these agreements consider the interests of all parties to the agreement and to safeguard and give precedence to the child's interests.

An assessment of South Africa's surrogacy practices also raised concerns about the independence of the professionals involved in the surrogacy process due to perceptions of bias (in favour of commissioning parents) and conflict of interests. It was found that one attorney represents and one psychologist assesses all the parties to the surrogacy agreement, which is contrary to the best practices of the Verona Principles and prevailing practices in some of the countries surveyed. Weaknesses were also identified in the practices that occur during the period shortly after the birth of the child, as the child is often handed to the commissioning parents upon his birth without the surrogate having physical contact with the child, and in one case without seeing the child. Some surrogacy arrangements were also found to inadequately provide for closure.

A further problem with South Africa's practice is that it only provides for a decision to be made on post-birth contact at the preconception stage (to create certainty), without the surrogate having experienced the surrogacy process and the parties establishing a good relationship with each other during the pregnancy which they may wish to continue. Some of the countries surveyed were found to provide further opportunities to discuss and include post-birth contact, as the quality of the pre-birth relationship often determined whether such relationship would continue. In contrast to this, practices in SA only provides for the commissioning parents to change their mind and allow post-birth contact.

#### 5.1.2. Disparity with Verona Principles and international positions

A further deficiency which was identified in this dissertation relates to the disparity between South Africa's framework on post-birth contact and the Verona Principles. The former is exclusionary of post-birth contact and is focused on the commissioning parents whilst the latter is inclusionary and child-focused. This right to post-birth contact, which the Verona Principles

promotes, was found to require all surrogates and commissioning parents, and their families, to have post-birth contact without prescribing the terms of such contact. The Verona Principles deems such contact to be in the best interests of the child born through surrogacy as it holds benefits for his right to know his origins and preservation of his identity rights. Aside from this, the Verona Principles were found not to provide detail regarding the reasons for including this right in its principles.

These benefits and other benefits of post-birth contact were explored in chapter 2 and it was found that post-birth contact resulted in several children's rights being upheld. It also provided closure for several parties, benefitted unknown surrogates who required such contact and led to the formation of several fulfilling relationships without the commissioning parents' parental rights being threatened. These relationships were also evident in the countries surveyed. The risks of post-birth contact were also explored, and it was found that this contact may pose relational risks that do not always further the child's best interests. Privacy concerns and limitation of the parties' choice to have no such contact were also found to be risks of post-birth contact. A key finding of this dissertation is that the benefits of post-birth contact was largely not experienced in SA by unknown surrogates, as more weight appears to be attached to the risks of such contact. As a result of this, the numerous benefits that could be derived from such contact are overlooked.

## **5.2. RECOMMENDATIONS**

As a result of the above shortcomings, the South African narrative on post-birth contact in surrogacy cases requires change. The following two broad changes are recommended:

### **5.2.1. Recommendation 1**

The legislature should amend the defect in section 297(1)(d) of the Children's Act. In doing so, as recommended in chapter 3 and confirmed in chapter 4, it should consult widely and secure the lived views of commissioning parents, surrogates and children born through surrogacy, as well as input from specialist surrogacy attorneys and psychologists regarding their experiences and practices on post-birth contact and their reasons for them. This input should include a consideration of whether the US approach that requires separate psychologists to assess the parties to the surrogacy agreement should be adopted or whether the current practice of one psychologist assessing all the parties should be maintained.

The amended law should make provision for the Verona Principles' best practice of the surrogate having independent legal representation. This practice also occurs in Canada and the

US, and this independent legal representation should be available to the surrogate throughout the surrogacy process and post-birth if required, as occurs in the US, with the commissioning parents paying the cost thereof.

The legislative process should include consultations with the ISS regarding the sources and information that were considered when the Verona Principles on post-birth contact were formulated, particularly the reasons for it being deemed to be in the best interests of children born through surrogacy.

The implementation of this recommendation will result in an updated and informed decision on South Africa's post-birth contact law that will better reflect the interests of all the parties to surrogacy arrangements than is currently the case. It is also recommended that studies be undertaken on the relational aspects of surrogacy in SA as these can inform legislative responses on its post-birth contact laws and practices.

#### 5.2.2. Recommendation 2

Whilst the legislative and research process runs its course, the high courts' guidelines on the requirements for assessing surrogacy applications should be amended to include a probe of post-birth contact provisions in surrogacy agreements or the lack thereof. In doing so, the following points should be considered.

- a) Surrogacy applications should reflect that the parties are aware that they are permitted to discuss and choose post-birth contact and its terms or they can elect to have no such contact and that they proceeded to do so. In both instances, their views should be informed by education on the benefits and risks of post-birth contact, the different methods of contact that may be negotiated and how it has been successfully established, practised and managed abroad. The best interests of the child should also be considered although this would be limited at this stage as further consultations and research are recommended to establish this. Psychologists should familiarise themselves with this information so that they may educate the parties regarding this and enable informed decision-making. The parties should also be matched with like-minded surrogacy partners based on their choices. The surrogate should be required to have independent legal advice at the commissioning parents' expense. The above discussions and education should also make provision for adequate handover of the child at birth and closure. The terms of the parties' agreement on post-birth contact or the exclusion thereof should be recorded in the surrogacy agreement to ensure that they are aware of their rights, obligations and limitations in terms thereof.



- b) In the event that the parties choose no post-birth contact, then they should have independent counselling to avoid any perception of bias or conflict of interests, as observed in US practices. This will contribute to more informed decision-making and awareness of the implications thereof.
- c) When the parties choose post-birth contact, then surrogacy applications should reflect that the parties have been matched with compatible surrogacy partners who have established a relationship with each other. Provision should be made for mediation and counselling services to manage the parties' relationship and changes thereto, and any disputes arising from these. The cost of these services should be for the commissioning parents' account, as it is permitted by chapter 19 of the Children's Act and as argued in chapter 3.

The implementation of this recommendation will ensure that surrogacy applications better reflect the views and interests of all the parties to the surrogacy agreement, than is currently the case. This will also result in high courts' upholding their legislative duty to ensure that surrogacy arrangements are more representative of the interests of all the parties.

### **5.3. CONCLUDING REMARKS**

In conclusion, the implementation of the above recommendations will result in an improved legal and practical framework on post-birth contact in South African surrogacy law. It will remove the defect in the current law and also result in a framework that is updated, informed and more inclusive of the interests of all the parties to surrogacy agreements than the current one. The above role players should proceed to implement these recommendations.

**WORD COUNT 34 300**

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### **Thesis**

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