Guidelines for surrogacy applications

Guidelines for surrogacy applications as set out in Ex Parte WH and Others 2011 (6) SA 514 (GNP)

The Deputy Judge President constituted a court to consider an application in terms of s 295 of the Children's Act 38 of 2005 for the confirmation of a surrogacy application by a same sex couple, and to determine and provide guidelines on how similar applications should in future be dealt with. Certain constitutional and legal issues arise out of surrogacy applications:

Surrogacy and same sex relationships:

South African law recognises heterosexual as well as same sex civil marriages and in the light of the fact that no discrimination on grounds of sexual orientation is allowed, same sex couples must be treated in exactly the same manner as any heterosexual couple, and any deviation from that will be unconstitutional. Care should be taken that different tests are not applied to same sex couples which could be discriminatory.

The best interests of the child:

A child's best interests are of paramount importance. It also needs protection when considering a surrogate motherhood application. In terms of s 297(b) and (c) of the Act the surrogate mother has to hand the child over as soon as is reasonably possible after the birth and neither she or her partner or relatives have any right of parenthood or care.

The best interests of the child are furthermore addressed, in that the agreement may not be terminated after the artificial fertilisation has taken place. The surrogate mother who is also a genetic parent of the child may prior to the lapse of 60 days after the birth of the child terminate the agreement. If the mother voluntarily terminates the agreement, s 298(2) makes provision for the court to issue any other appropriate order and the court will be in a position to ensure that the best interests of the child are protected on termination of the agreement.

The surrogate mother and the risk of commercial surrogacy:

Any payment to any person other than those set out in s 301 of the Act is prohibited. This would include any facilitation fee or any compensation of any nature other than those that the Act makes provision for. The affidavit should state that no such fee was paid to any person.

If any agency is involved, full particulars regarding the agency should be revealed and an affidavit by the agency should also be filed. Full particulars should be set out in the founding affidavit on how the commissioning parents came to know the surrogate mother and why she is willing to act as a surrogate to them. The surrogate mother's background as well as her financial position should be set out in the affidavit. A comprehensive report by a psychologist is essential to assess the suitability of the surrogate mother. Full medical reports should also be obtained regarding her physical condition.

A suitable parent:

The Act prescribes in s 295(b)(ii) that the commissioning parents should in all respects be suitable parents for parenthood. Courts should consciously guard that in the exercise of their discretion personal perceptions should not operate to influence any decision on the suitability of a person to either accept parenthood or act as a surrogate mother.

When a court needs to decide on the suitability of a parent an objective test should be applied which would include an enquiry into the ability of the parents to care for the child both emotionally and financially and to provide an environment for the harmonious growth and development of the chid. A court should also have regard to the personal details of previous criminal convictions.

The role of the court and requirements for surrogacy application:

The validity of a surrogacy agreement is dependent upon the confirmation of the High Court, and as the upper guardian of all minor children it cannot simply be a rubber stamp validating the private arrangements between contracting parties. The court must ensure that both the formal and the substantive requirements of the Act are complied with and that sufficient information is placed before the court.

The affidavit must contain the following:

All factors set out in the Act with documentary proof where applicable;

whether there have been any previous applications for surrogacy, the division in which the application was brought, whether such application was granted or refused (if it was refused, the reasons for the refusal should be set out);

a report by a clinical psychologist in respect of the commissioning parents and a separate report in respect of the surrogate mother and her partner;

a medical report regarding the surrogate mother;

details and proof of payment of any compensation for services rendered, either to the surrogate herself or to the intermediary, the donor, the clinic or any third party involved in the process;

all agreements between the surrogate and any intermediary or any other person who is involved in the process;

full particulars if any agency was involved, any payment to such agency, as well as an affidavit by that agency; and

whether any of the commissioning parents have been charged with or convicted of a violent crime or a crime of a sexual nature