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GENERAL NOTICE

NOTICE 512 OF 1995

DEPARTMENT OF JUSTICE

SELECT COMMITTEE ON REPORT OF SA LAW COMMISSION ON SURROGATE MOTHERHOOD (NATIONAL ASSEMBLY): DRAFT BILL ON SURROGATE MOTHERHOOD, PROPOSED BY SOUTH AFRICAN LAW COMMISSION

It is hereby notified for general information that the Report of the South African Law Commission on Surrogate Motherhood was submitted to Parliament on 19 April 1993 and referred to the Select Committee on Report of SA Law Commission on Surrogate Motherhood (National Assembly) for its investigation and report on 26 August 1994. The Report also contains a draft Bill, proposed by the South African Law Commission.

The Select Committee desires all persons and institutions who wish to make representations on the draft Bill (contained in Schedule A of the Report) to submit such representations in writing to the Committee by not later than 30 July 1995 (if possible, 30 copies should be provided). If any person or institution wishes to address the Committee in addition to such written representations, a request to that effect should be made of the Committee by not later than 30 July 1995. It should be borne in mind that the Committee reserves the right to afford persons and institutions the opportunity of appearing before it.

All correspondence in this regard should be addressed to the Secretary to Parliament, Attention: Mr M. Philander, P.O. Box 15, Cape Town, 8000 [Fax: (021) 461-7969.]

ALGEMENE KENNISGEWING

KENNISGEWING 512 VAN 1995

DEPARTEMENT VAN JUSTISIE

GEKOSE KOMITEE OOR VERSLAG VAN SA REGSKOMMISSIE OOR SURROGAATMOEDERSKAP (NASIONALE VERGADERING): KONSEPWETSONTWERP OP SURROGAATMOEDERSKAP, VOORGESTEL DEUR SUID-AFRIKAANSE REGSKOMMISSIE

Hierby word vir algemene inligting bekendgemaak dat die Verslag van die Suid-Afrikaanse Regskommis-sie oor Surrogaatmoederskap op 19 April 1993 by die Parlement ingedien en op 26 Augustus 1994 na die Gekose Komitee oor Verslag van SA Regskommis-sie oor Surrogaatmoederskap (Nasionale Vergadering) vir ondersoek en verslagdoening verwys is. Die Verslag bevat ook 'n Konsepwetsontwerp wat deur die Suid-Afrikaanse Regskommis-sie voorgestel is.

Die Gekose Komitee versoek dat alle persone en instellings wat verhoë oor die Konsepwetsontwerp (vervat in Bylae A van die Verslag) wil lewer, sodanige verhoë skriftelik teen nie later nie as 30 Julie 1995 aan die Komitee voorlê (indien moontlik, moet 30 afskrifte voorsien word). Indien enige persoon of instelling die Komitee ter aanvulling van sodanige skriftelike verhoë wil toespreek, moet 'n versoek te dien effekte teen nie later nie as 30 Julie 1995 aan die Komitee gerig word. Daar moet onthou word dat die Komitee hom die reg voorbehou om aan persone en instellings die geleentheid te bied om voor hom te verskyn.

Alle briefwisseling in hierdie verband moet gerig word aan die Sekretaris van die Parlement, Aandag: Mnr. M. Philander, Posbus 15, Kaapstad, 8000 [Faks: (021) 461-7969.]

SCHEDULE A**PROPOSED BILL ON SURROGATE
MOTHERHOOD****BILL**

To regulate the legal consequences of human reproduction by the artificial fertilisation of women acting as surrogate mothers.

To be introduced by the Minister of Justice

BE IT ENACTED by the President and the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context otherwise indicates—

“**artificial fertilisation**” means the artificial fertilisation of a female person as defined in section 1 of the Human Tissue Act, 1983 (Act No. 65 of 1983);

“**commissioning parents**” means spouses who enter into a surrogate motherhood agreement with a surrogate mother;

“**court**” means a provincial or local division of the Supreme Court of South Africa;

“**gamete**” means gamete as defined in section 1 of the Human Tissue Act, 1983;

“**surrogate mother**” means a woman who enters into a surrogate motherhood agreement with commissioning parents;

“**surrogate motherhood agreement**” means an agreement between a surrogate mother and commissioning parents in which it is agreed that the surrogate mother will let herself be artificially fertilised for the purpose of bearing a child for the commissioning wife and in which the surrogate mother undertakes to hand over the child to the commissioning parents upon its birth or within a reasonable time thereafter.

Surrogate motherhood agreement must be in writing and confirmed by court

2. No surrogate motherhood agreement shall be valid unless—

- the agreement is in writing and is signed by all the parties thereto;
- the agreement is entered into in the Republic of South Africa;
- the commissioning parents, the surrogate mother and her husband, if any, are at the time of entering into the agreement domiciled in the Republic of South Africa; and
- the agreement is confirmed by a court within whose area of jurisdiction the surrogate mother is domiciled or habitually residing.

Qualifications of surrogate mother

3. No surrogate motherhood agreement shall be valid unless the woman who is to become the surrogate mother has already given birth in a natural way to at least one child and is at the time of the entering into the agreement a married woman, divorced or a widow.

BYLAE A**VOORGESTELDE WETSONTWERP OP
SURROGAATMOEDERSKAP****WETSONTWERP**

Om die regsgevolge van menslike voortplanting deur die kunsmatige bevrugting van vroue wat as surrogaatmoeders optree, te reguleer.

Ingedien te word deur die Minister van Justisie

DAAR WORD BEPAAL deur die President en die Parlement van die Republiek van Suid-Afrika, soos volg:—

Woordomskeywing

1. In hierdie Wet, tensy uit die samehang anders blyk, beteken—

“**gameet**” ’n gameet soos omskryf in artikel 1 van die Wet op Menslike Weefsel, 1983 (Wet No. 65 van 1983);

“**hof**” ’n provinsiale of plaaslike afdeling van die Hooggeregshof van Suid-Afrika;

“**kunsmatige bevrugting**” die kunsmatige bevrugting van ’n vroulike persoon soos omskryf in artikel 1 van die Wet op Menslike Weefsel, 1983;

“**opdraggewende ouers**” gades wat ’n surrogaatmoederskapooreenkoms met ’n surrogaatmoeder sluit;

“**surrogaatmoeder**” ’n vrou wat ’n surrogaatmoederskapooreenkoms met opdraggewende ouers sluit;

“**surrogaatmoederskapooreenkoms**” ’n ooreenkoms tussen ’n surrogaatmoeder en opdraggewende ouers waarby ooreengekom word dat die surrogaatmoeder haarself kunsmatig sal laat bevrug met die doel om ’n kind vir die opdraggewende eggenote te baar en waarby die surrogaatmoeder onderneem om die kind by geboorte of binne ’n redelike tyd daarna aan die opdraggewende ouers te oorhandig.

Surrogaatmoederskapooreenkoms moet skriftelik wees en deur hof bekragtig word

2. Geen surrogaatmoederskapooreenkoms is geldig nie tensy—

- die ooreenkoms op skrif gestel is en deur al die partye daarby onderteken is;
- die ooreenkoms in die Republiek van Suid-Afrika gesluit is;
- die opdraggewende ouers, die surrogaatmoeder en haar eggenoot, indien sy een het, tydens die sluiting van die ooreenkoms in die Republiek van Suid-Afrika gedomisileerd is; en
- die ooreenkoms bekragtig is deur ’n hof binne wie se regsgebied die surrogaatmoeder gedomisileerd of gewoonweg woonagtig is.

Kwalifikasies van surrogaatmoeder

3. Geen surrogaatmoederskapooreenkoms is geldig nie tensy die vrou wat die surrogaatmoeder sal wees, by die sluiting van die ooreenkoms reeds op natuurlike wyse aan minstens een lewende kind geboorte gegee het en sy getroud, geskei of ’n weduwee is.

Commissioning parents shall be married

4. No person except a husband and wife who are lawfully married to each other and who act jointly as a couple shall be competent to conclude a valid surrogate motherhood agreement.

Genetic origin of child

5. (1) No surrogate motherhood agreement shall be valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible, at least one of the commissioning parents.

(2) The gametes of the surrogate mother or her husband may not be used to effect the conception of the child contemplated in the surrogate motherhood agreement.

Confirmation by court

6. (1) A court shall not confirm a surrogate motherhood agreement unless it is satisfied that—

- (a) the commissioning wife is not able to give birth to a child and that condition is permanent and irreversible;
- (b) the commissioning parents—
 - (i) are in terms of this Act competent to enter into the agreement;
 - (ii) are in all respects suitable persons to accept the parenthood of the child that is to be conceived;
 - (iii) understand and accept the legal consequences of the agreement and this Act and their rights and obligations thereunder;
- (c) the surrogate mother—
 - (i) is in terms of this Act competent to enter into the agreement;
 - (ii) is in all respects a suitable person to act as surrogate mother;
 - (iii) understands and accepts the legal consequences of the agreement and this Act and her rights and obligations thereunder;
- (d) the husband of the surrogate mother, if she is married, has given his written consent to the agreement and is a party of the agreement;
- (e) the non-material interests of any child of any of the parties would not be prejudiced by the execution of the agreement;
- (f) in the opinion of the court, the agreement includes adequate provisions for the custody, care, upbringing and general welfare of the child that is to be born in the event of the death of the commissioning parents or one of them, or their divorce before the birth of the child;
- (g) in general, having regard to the personal circumstances and family situations of all the parties concerned, but above all the interest of the child that is to be born, the agreement should be confirmed.

Opdraggewende ouers moet getroud wees

4. Niemand behalwe 'n eggenoot en eggenote wat regtens met mekaar getroud is en wat gesamentlik as 'n egpaar optree, is bevoeg om as opdraggewende ouers 'n geldige surrogaatmoederskapooreenkoms te sluit nie.

Genetiese afkoms van kind

5. (1) Geen surrogaatmoederskapooreenkoms is geldig nie tensy die verwekking van die kind beoog in die ooreenkoms bewerkstellig staan te word deur die gebruik van die gamete van albei opdraggewende ouers, of waar dit nie moontlik is nie, van ten minste een van die opdraggewende ouers.

(2) Die gamete van die surrogaatmoeder of haar eggenoot mag nie gebruik word om die verwekking van die kind beoog in die surrogaatmoederskapooreenkoms te bewerkstellig nie.

Bekragtiging deur hof

6. (1) 'n Hof bekragtig nie 'n surrogaatmoederskap ooreenkoms nie tensy hy oortuig is dat—

- (a) die opdraggewende eggenote nie in staat is om aan 'n kind geboorte te gee nie en dat daardie toestand permanent en onomkeerbaar is;
- (b) die opdraggewende ouers—
 - (i) ingevolge hierdie Wet nie onbevoeg is om die ooreenkoms te sluit nie;
 - (ii) in alle opsigte geskikte persone is om die ouerskap van die kind wat verwek staan te word, te aanvaar;
 - (iii) die regsgevolge van die ooreenkoms en van hierdie Wet en hulle regte en verpligtinge daarkragtens begryp en aanvaar;
- (c) die surrogaatmoeder—
 - (i) ingevolge hierdie Wet nie onbevoeg is om die ooreenkoms te sluit nie;
 - (ii) in alle opsigte 'n geskikte persoon is om as surrogaatmoeder op te tree;
 - (iii) die regsgevolge van die ooreenkoms en van hierdie Wet en haar regte en verpligtinge daarkragtens begryp en aanvaar;
- (d) die eggenoot van die surrogaatmoeder, indien sy getroud is, 'n party by die ooreenkoms is en skriftelik tot die ooreenkoms toegestem het;
- (e) die nie-materiële belange van geen kind van enige van die partye deur die uitvoering van die ooreenkoms benadeel sal word nie;
- (f) na die oordeel van die hof, die ooreenkoms genoegsame bepalinge bevat wat voorsiening maak vir die toesig en beheer oor en die versorging, opvoeding en algemene welsyn van die kind wat gebore staan te word in die geval van die dood van die oordraggewende ouers of een van hulle, of hulle egskeding voor die geboorte van die kind;
- (g) in die algemeen, met inagneming van die persoonlike en gesinsomstandighede van al die betrokke partye, maar bowenal die belange van die kind wat gebore staan te word, die ooreenkoms bekragtig behoort te word.

(2) In order to enable the court to properly consider the application for confirmation, conclusive evidence should be submitted with regard to—

- (a) the incapacity of the commissioning wife to give birth to a living child and the permanency and irreversibility of that incapacity;
- (b) the physical and psychological suitability of the surrogate mother to act as such;
- (c) the psychological suitability of the commissioning parents to accept parenthood of the child;
- (d) the family circumstances of the parents; and
- (e) the interests of any descendant or adopted child of the commissioning parents.

(3) The surrogate motherhood agreement shall be submitted to the court.

Artificial fertilisation of surrogate mother

7. (1) No artificial fertilisation of the surrogate mother shall take place—

- (a) before the surrogate motherhood agreement is confirmed by the court;
- (b) after the lapse of 12 months from the date of the confirmation of the agreement in question by the court.

(2) Any artificial fertilisation of a surrogate mother in execution of an agreement contemplated in this Act shall be done in accordance with the provisions of the Human Tissue Act, 1983.

Effect of surrogate motherhood agreement

8. (1) The effect of a valid surrogate motherhood agreement shall be that—

- (a) any child born as a result of the artificial fertilisation of the surrogate mother in accordance with the agreement shall for all purposes be the child of the commissioning parents as if the commissioning wife had given birth to the child within her marriage to the commissioning husband;
- (b) the surrogate mother shall be obliged to hand the child over to the commissioning parents as soon as is reasonably possible;
- (c) the surrogate mother or her husband shall have no rights of parenthood or custody of or access to the child;
- (d) subject to section 9, no surrogate motherhood agreement may be terminated after the artificial fertilisation of the surrogate mother has taken place;
- (e) without derogating from the generality of paragraph (a), but subject to the provisions of section 6 (1) (f), the child shall have no claim for maintenance or of succession against the surrogate mother, her husband or any of their relatives.

(2) Ten einde die hof in staat te stel om die aansoek om bekragtiging van die ooreenkoms na behore te oorweeg, moet afdoende getuienis voorgelê word betreffende—

- (a) die onvermoë van die opdraggewende eggenote om aan 'n lewende kind geboorte te gee en die permanentheid en onomkeerbaarheid van daardie onvermoë;
- (b) die fisieke en geestelike geskiktheid van die surrogaatmoeder om as sodanig op te tree;
- (c) die sielkundige geskiktheid van die opdraggewende ouers om die ouerskap van die kind te aanvaar;
- (d) gesinsomstandighede van die betrokke partye; en
- (e) die belange van enige afstammeling of aangenome kind van die opdraggewende ouers.

(3) Die surrogaatmoederskapooreenkoms moet aan die hof voorgelê word.

(4) Die hof is bevoeg om die bekragtiging van die ooreenkoms aan voorwaardes wat hy goedvind, onderworpe te stel.

Kunsmatige bevrugting van surrogaatmoeder

7. (1) Geen kunsmatige bevrugting van die surrogaatmoeder mag plaasvind nie—

- (a) alvorens die surrogaatmoederskapooreenkoms deur die hof bekragtig is;
- (b) na verloop van 12 maande vanaf die datum van bekragtiging van die betrokke ooreenkoms deur die hof.

(2) Die kunsmatige bevrugting van 'n surrogaatmoeder ter uitvoering van 'n ooreenkoms in hierdie Wet beoog, geskied ooreenkomstig die bepalings van die Wet op Menslike Weefsel, 1983.

Uitwerking van surrogaatmoederskapooreenkoms

8. (1) Die gevolge van 'n geldige surrogaatmoederskapooreenkoms is dat—

- (a) enige kind wat as gevolg van die kunsmatige bevrugting van 'n surrogaatmoeder ooreenkomstig die ooreenkoms gebore word, vir alle doeleindes die kind is van die opdraggewende ouers asof die opdraggewende eggenote binne haar huwelik met die opdraggewende eggenoot aan die kind geboorte gegee het;
- (b) die surrogaatmoeder verplig is om die kind so gou as redelik moontlik na geboorte aan die opdraggewende ouers te oorhandig;
- (c) die surrogaatmoeder of haar eggenoot geen regte van ouerskap of toesig of beheer oor of toegang tot die kind het nie;
- (d) behoudens artikel 9, geen surrogaatmoederskapooreenkoms beëindig kan word nadat die kunsmatige bevrugting van die surrogaatmoeder plaasgevind het nie;
- (e) sonder om aan die algemeenheid van paragraaf (a) afbreuk te doen, maar behoudens die bepalings van artikel 6 (1) (f), die kind geen reg van onderhoud of erfopvolging teenoor die surrogaatmoeder, haar eggenoot of enige van hulle familieleden het nie.

(2) Any surrogate motherhood agreement that does not comply with the provisions of this Act shall be invalid and any child born as a result of any action taken in execution of such an arrangement shall, subject to the provisions of section 5 of the Status of Children Act, 1987 (Act No. 82 of 1987), for all purposes be deemed to be the child of the woman that gave birth to that child.

Abortion

9. (1) A surrogate motherhood agreement shall be terminated by an abortion that may be carried out in terms of the Abortion and Sterilisation Act, 1975 (Act No. 2 of 1975).

(2) For the purposes of the Abortion and Sterilisation Act, 1975, the decision to undergo an abortion shall lie with the surrogate mother.

(3) Without derogating from the generality of subsection (2), the commissioning parents shall in an event contemplated in section 3 (1) (c) of the Abortion and Sterilisation Act, 1975, be informed of the circumstances and allowed to consult with the surrogate mother before an abortion is carried out.

Payments in respect of surrogacy prohibited

10. (1) Subject to the provisions of subsections (2) and (3), no person shall in connection with a surrogate motherhood agreement give or promise to give to any person, or shall receive from any person, a reward or compensation in money or kind.

(2) No promise or agreement for the payment of any compensation to a surrogate mother or any other person in connection with a surrogate motherhood agreement or the execution of such an agreement shall be enforceable, except compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and the confirmation of the surrogate motherhood agreement.

(3) Any person that renders a *bona fide* professional legal or medical service with a view to the confirmation of a surrogate motherhood agreement in terms of section 6 or in the execution of such an agreement, shall be entitled to compensation therefore.

Identity of parties

11. (1) The identity of the parties to court proceedings with regard to a surrogate motherhood agreement shall not be published without the written consent of the parties concerned.

(2) No person shall publish any facts that reveal the identity of a person born as a result of a surrogate motherhood agreement.

Offences and penalties

12. (1) No person shall artificially fertilise a woman in the execution of a surrogate motherhood agreement or render assistance in such an artificial fertilisation, unless that artificial fertilisation is authorised by a court in terms of the provisions of this Act.

(2) No person shall in any way for or with a view to compensation make known that any person is or might possibly be willing to enter into a surrogate motherhood agreement.

(2) Enige surrogaatmoederskapooreenkoms wat nie aan die bepalings van hierdie Wet voldoen nie, is ongeldig, en enige kind wat gebore word as gevolg van enige optrede ter uitvoering van so 'n ooreenkoms, word behoudens die bepalings van artikel 5 van die Wet op die Status van Kinders, 1987 (Wet No. 82 van 1987), vir alle doeleindes geag die kind te wees van die vrou wat aan daardie kind geboorte gegee het.

Vrugafdrywing

9. (1) 'n Surrogaatmoederskapooreenkoms word beëindig deur 'n vrugafdrywing wat ingevolge die Wet op Vrugafdrywing en Sterilisasie, 1975 (Wet No. 2 van 1975), uitgevoer mag word.

(2) Vir die doeleindes van die Wet op Vrugafdrywing en Sterilisasie, 1975, berus die besluit om 'n vrugafdrywing te ondergaan by die surrogaatmoeder.

(3) Sonder om aan die algemeenheid van subartikel (2) afbreuk te doen, moet die opdraggewende ouers in 'n geval bedoel in artikel 3 (1) (c) van die Wet op Vrugafdrywing en Sterilisasie, 1975, oor die omstandighede ingelig word en toegelaat word om met die surrogaatmoeder te konsulteer alvorens 'n vrugafdrywing uitgevoer word.

Betaling ten opsigte van surrogaatmoederskap verbode

10. (1) Behoudens die bepalings van subartikels (2) en (3) mag niemand in verband met 'n surrogaatmoederskapooreenkoms aan enige persoon 'n beloning of vergoeding in geld of goed gee of belowe om te gee of van enige persoon ontvang nie.

(2) Uitgesonderd vergoeding van uitgawes wat direk verband hou met die kunsmatige bevrugting en die swangerskap van die surrogaatmoeder, die geboorte van die kind en die bekragtiging van die surrogaatmoederskapooreenkoms, is geen belofte of ooreenkoms vir die betaling van enige vergoeding aan 'n surrogaatmoeder of iemand anders in verband met 'n surrogaatmoederskapooreenkoms of die uitvoering van so 'n ooreenkoms, afdwingbaar nie.

(3) Iemand wat te goeder trou 'n professionele regs- of mediese diens met die oog op bekragtiging van 'n surrogaatmoederskapooreenkoms ingevolge artikel 6 of ter uitvoering van so 'n ooreenkoms lewer, is geregtig op 'n vergoeding daarvoor.

Identiteit van partye

11. (1) Die identiteit van die partye by hofverrigtinge in verband met 'n surrogaatmoederskapooreenkoms mag nie sonder die skriftelike toestemming van die betrokke partye bekendgemaak word nie.

(2) Niemand mag enige feite publiseer wat die identiteit openbaar van 'n persoon wat as gevolg van 'n surrogaatmoederskapooreenkoms gebore is nie.

Misdrywe en strawwe

12. (1) Niemand mag 'n vrou ter uitvoering van 'n surrogaatmoederskapooreenkoms kunsmatig bevrug of by so 'n kunsmatige bevrugting hulp verleen nie, tensy daardie kunsmatige bevrugting ingevolge die bepalings van hierdie Wet deur 'n hof gemagtig is.

(2) Niemand mag teen of met die oog op vergoeding op enige wyse bekend maak dat enigiemand bereidwilling is of moontlik bereidwilling sal wees om 'n surrogaatmoederskapooreenkoms aan te gaan nie.

(3) Any person who contravenes or fails to comply with a provision of this section or section 11 shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

Short title

13. This Act shall be called the Surrogate Motherhood Act, 19.....

SCHEDULE B

MEMORANDUM IN EXPLANATION OF THE PROPOSED BILL ON SURROGATE MOTHERHOOD (SCHEDULE A)¹

Clause 1

The definitions of "gamete" and "artificial fertilisation" are derived from the Human Tissue Act, 1983, in the interest of legal certainty.

"Commissioning parents", "surrogate mother" and "surrogate motherhood agreement" are widely defined to include all agreements and arrangements relating to surrogacy. It should be read with clause 2.

Clause 2

Any "surrogate motherhood agreement" is invalid (cf the definition in clause 1) unless it complies with the Act.

- (a) The agreement should be in writing. The surrogate mother's husband should therefore also sign it [cf clause 6 (1) (d)]. Notarial execution would amount to unnecessary costs, therefore this is not required although the parties may of course do so. **(8.2.11)**
- (b) Since the agreement has to be concluded and executed in South Africa, a reference to the *lex loci contractus* is deemed unnecessary. **(8.3.7)**
- (c) Domicile is set as a requirement. Because the court has to confirm the agreement before it becomes valid it follows naturally that the domicile on confirmation should still be the Republic. **(8.2.11, 8.3.7)**
- (d) The agreement is invalid without the confirmation of the court. **(8.2.14, 8.3.2)**

Clause 3

The surrogate mother should be married. Provision is however made that in suitable cases the court of confirmation may allow a divorcee or widow to act as surrogate mother. **(8.2.10)** It is a precondition that the surrogate should have completed a normal pregnancy. **(8.2.9)**

¹ The numbers in brackets (and printed bold) denotes the corresponding paragraph in Chapter 8.

(3) Iemand wat 'n bepaling van hierdie artikel of die bepalings van artikel 11 oortree of versuim om daaraan te voldoen, is aan 'n misdryf skuldig en by skuldigbevinding strafbaar met 'n boete van hoogstens R20 000 of met gevangenisstraf vir 'n tydperk van hoogstens een jaar of met sowel daardie boete as daardie gevangenisstraf.

Kort titel

13. Hierdie Wet heet die Wet op Surrogaatmoederskap, 19.....

BYLAE B

MEMORANDUM TER VERDUIDELIKING VAN DIE VOORGESTELDE WETSONTWERP OP SURROGAATMOEDERSKAP (BYLAE A)¹

Klousule 1

Die omskrywing van "gameet" en "kunsmatige bevrugting" word ter wille van regsekerheid deur verwysing ontleen aan die Wet op Menslike Weefsel, 1983.

"Opdraggewende ouers", "surrogaatmoeder" en "surrogaatmoederskapooreenkoms" is wyd omskryf om alle ooreenkomste en reëlins in verband met surrogasie te ondervang. Dit moet gelees word met klousule 2.

Klousule 2

Enige "surrogaatmoederskapooreenkoms" is ongeldig (vgl. die omskrywing in klousule 1) tensy dit aan die Wet voldoen.

- (a) Die ooreenkoms moet skriftelik wees. Die surrogaatmoeder se eggenoot moet dit dus ook onderteken [vgl. klousule 6 (1) (d)]. Notariële verlyding sal onnodige koste meebring, dus word dit nie vereis nie alhoewel die partye dit natuurlik wel kan doen. **(8.2.11)**
- (b) Aangesien die ooreenkoms in Suid-Afrika gesluit en uitgevoer moet word, word 'n verwysing na die *lex loci contractus* onnodig geag. **(8.3.7)**
- (c) Domisilie word as vereiste gestel. Vanweë die feit dat die hof die ooreenkoms moet bekragtig voor dit geldig word, volg dit vanself dat die domisilie by bekragtiging steeds die Republiek moet wees. **(8.2.11, 8.3.7)**
- (d) Sonder die hof se bekragtiging is die ooreenkoms ongeldig. **(8.2.14, 8.3.2)**

Klousule 3

Die surrogaatmoeder moet getroud wees. Daar word egter voorsiening gemaak dat die hof van bekragtiging in 'n gepaste geval 'n geskeide vrou of weduwee kan toelaat om as surrogaat op te tree. **(8.2.10)** Dit is 'n vereiste dat die surrogaat 'n normale swangerskap voltooi het. **(8.2.9)**

¹ Die nommers tussen hakies (en vet gedruk) dui die ooreenstemmende paragraaf in Hoofstuk 8 aan.

Clause 4

The commissioning couple should be married and enter into the agreement jointly. (8.2.2, 8.2.11)

Clause 5

- (1) Legal surrogate motherhood is available only when the gametes of both commissioning parents are used or, when this is not possible, at least of one of them. (8.2.2, 8.2.6)
- (2) The gametes of the surrogate or her husband may not be used. (8.2.7)

Clause 6

- (1) The court should be satisfied that the surrogate motherhood agreement is desirable, and has to use its discretion in respect of—
 - (a) the permanent medical unsuitability or incapacity of the commissioning wife to give birth to a healthy, living child; (8.2.4)
 - (b) the compliance with provisions such as clauses 2 (a), (c) and 4;
 - (ii) the physical health, psychological disposition and financial means of the commissioning parents to be parents (the interests of the child demand this); (8.2.3, 8.2.14)
 - (iii) the "informed" conduct of the commissioning parents; this entails that they have the intention to raise the child as their own and realise the parental rights and obligations resulting from the birth; (8.2.12)
 - (c) (i) compliance with clauses 2 (a) and (c) by the surrogate and her husband;
 - (ii) the physical and psychological suitability of the surrogate mother to act as such; (8.2.3)
 - (iii) the "informed" consent of the surrogate; (8.2.11)
 - (d) the consent of the surrogate's husband; (8.2.11)
 - (e) the protection of the interests of any living child of any of the commissioning parents (8.2.5) and also the interests of the children of the surrogate mother; (8.2.9)
 - (f) the care of the child if one or both parents should die suddenly or they become divorced (the latter possibility will to a considerable extent be prevented by strict screening). The parties may for example agree that if both commissioning parents would die, the surrogate would be the guardian of the child; (8.2.12, 8.2.14) and
 - (g) the best interest of the child; the court should therefore finally consider all the issues above and take its decision in the interest of the child. (8.2.3)

Klousule 4

Die opdraggewende egpaar moet getroud wees en gesamentlik die ooreenkoms aangaan. (8.2.2, 8.2.11)

Klousule 5

- (1) Wettige surrogaatmoederskap is slegs beskikbaar waar die gamete van albei opdraggewende ouers of, waar dit nie moontlik is nie, van minstens een van hulle gebruik word. (8.2.2, 8.2.6)
- (2) Die gamete van die surrogaat of haar eggenoot mag nie gebruik word nie. (8.2.7)

Klousule 6

- (1) Die hof moet oortuig word dat die surrogaatmoederskap gewens is, en moet sy oordeel laat geld ten opsigte van—
 - (a) die permanente mediese ongeskiktheid of onvermoë van die opdraggewende eggenote om 'n gesonde lewende kind in die wêreld te bring; (8.2.4)
 - (b) die nakoming van bepalinge soos klousules 2 (a), (c) en 4;
 - (ii) die liggaamlike gesondheid, sielkundige ingesteldheid en finansiële vermoëns van die opdraggewende ouers om ouers te wees (die belange van die kind vereis dit); (8.2.3, 8.2.14)
 - (iii) die "ingeligte" optrede van die opdraggewende ouers; hier gaan dit daaroor dat hulle die bedoeling het om die kind as hulle eie groot te maak en die ouerlike regte en pligte besef wat uit die geboorte voortvloei; (8.2.12)
 - (c) (i) die nakoming van klousules 2 (a) en (c) deur die surrogaat en haar eggenoot;
 - (ii) die liggaamlike en sielkundige geskiktheid van die surrogaatmoeder om as sodanig op te tree; (8.2.3)
 - (iii) die "ingeligte" toestemming van die surrogaat; (8.2.11)
 - (d) die toestemming van die surrogaat se eggenoot; (8.2.11)
 - (e) die beskerming van die belange van enige lewende kind van enige opdraggewende ouer (8.2.5) asook die belange van kinders van die surrogaatmoeder; (8.2.9)
 - (f) die versorging van die kind indien een of albei ouers skielik sou sterf of hulle sou skei (laasgenoemde moontlikheid sal in 'n groot mate deur streng keuring verhoed word); so kan die partye byvoorbeeld ooreenkoms dat indien albei opdraggewende ouers sou sterf, die surrogaat die voog van die kind sal wees; (8.2.12, 8.2.14) en
 - (g) die beste belange van die kind; die hof moet dus finaal al die aangeleenthede hierbo oorweeg en sy besluit in belang van die kind neem. (8.2.3)

- (2) This clause is to a certain extent superfluous. However, from comments received it appears that it would be welcomed if more clarity could be given in the Act as to what should be submitted before the court. The matters enumerated here should simultaneously clarify that medical, psychological and social workers' reports should be submitted before the court in order to enable the court to consider the issues mentioned in clause (1). **(8.2.3)**
- (3) It goes without saying that the court needs the agreement for scrutiny, but it is *ex abundante cautela* nevertheless specifically stated that the original agreement should be submitted. **(8.3.1)**
- (4) The court is given the scope to impose certain conditions in suitable cases.

Clause 7

- (1) (a) The court must first confirm the agreement before the surrogate may be impregnated. **(8.3.2)**
- (b) If the surrogate is not impregnated within 12 months after the court's confirmation, the agreement lapses.
- (2) (a) The intention with this clause is to make it clear that the provisions of the Human Tissue Act, 1983, apply to the procedure of artificial fertilisation. **(8.2.3)**

Clause 8

- (1) (a) From a legal viewpoint the child is automatically deemed to be the legal child of the commissioning parents. This entails that it is registered as the legal child of the couple on its birth. The parents are *obliged* to care for it and to take custody, even should the child be handicapped. **(8.2.12)**
- (b) The surrogate mother is obliged to hand the child over to the commissioning parents. **(8.2.12, 8.3.10)**
- (c) What is not mentioned in (a) and (b) is emphasised here. The surrogate or her husband has no right to the child (section 5 of the Status of Children Act, 1987, is therefore neutralised). **(8.2.12)**
- (d) After the occurrence of fertilisation, no legal effect is given to any attempt to rescind from the agreement. On fertilisation the pregnancy would therefore take its course, and when the child is born its status is determined in accordance with the Act. **(8.2.2)**
- (e) Just as the surrogate and her husband have no rights in respect of the child [cf however clause 6 (1) (f)] they also have no obligations towards the child. **(8.2.12, 8.2.14)**

- (2) Hierdie klousule is in 'n mate oorbodig. Uit kommentaar wat ontvang is, blyk dit egter dat dit verwelkom sal word as meer duidelikheid in die wet gegee word oor wat aan die hof voorgelê moet word. Die aangeleenthede wat hier genoem word, behoort dit terselfdertyd duidelik te maak dat daar mediese, sielkundige en maatskaplikewerkeersverslae voor die hof gelê moet word ten einde die hof in staat te stel om die aangeleenthede in klousule (1) genoem, te oorweeg. **(8.2.3)**
- (3) Dit spreek vanself dat die hof die ooreenkoms ter insae nodig het, maar *ex abundante cautela* word nietemin duidelik gestel dat die oorspronklike ooreenkoms voorgelê moet word. **(8.3.1)**
- (4) Die ruimte word aan die hof verleen om in gepaste gevalle sekere voorwaardes op te lê.

Klousule 7

- (1) (a) Die hof moet eers die ooreenkoms bekragtig voor die surrogaat beswanger mag word. **(8.3.2)**
- (b) Indien die surrogaat nie beswanger word binne 12 maande na bekragtiging deur die hof nie, verval die ooreenkoms.
- (2) (a) Die doel van hierdie klousule is om dit duidelik te stel dat die bepalinge van die Wet op Menslike Weefsel, 1983, op die proses van kunsmatige bevrugting van toepassing is. **(8.2.3)**

Klousule 8

- (1) (a) Die kind word outomaties uit 'n regsoogpunt geag die wettige kind van die opdraggewende ouers te wees. Dit behels dat hy by geboorte as die wettige kind van die egpaar geregistreer word. Die ouers is *verplig* om hom te onderhou en toesig en beheer te neem, selfs al sou die kind gestrem wees. **(8.2.12)**
- (b) Die surrogaatmoeder is verplig om die kind aan die opdraggewende ouers te oorhandig. **(8.2.12, 8.3.10)**
- (c) Hier word beklemtoon wat by (a) en (b) verswyg word. Die surrogaat of haar eggenoot het geen regte op die kind nie (artikel 5 van die Wet op die Status van Kinders, 1987, word dus geneutraliseer). **(8.2.12)**
- (d) Nadat bevrugting plaasgevind het, word geen regskrag verleen aan enige poging om uit die ooreenkoms te tree nie. By bevrugting moet die swangerskap dus sy loop neem, en word die kind gebore, word sy status volgens die Wet bepaal. **(8.2.12)**
- (e) Net soos die surrogaat en haar man geen regte op die kind het nie [vgl egter klousule 6 (1) (f)], het hulle ook geen verpligtinge teenoor die kind nie. **(8.2.12, 8.2.14)**

(2) This clause was worded as such to ensure in the first place that the agreement is executed as it was confirmed by the court, in particular with a view to the use of the correct gametes. (8.2.6)

(3) The second consequence is that the current legal position with regard to the status of children is not infringed upon. If the surrogate was unmarried or acted without her husband's consent, the child would be her extra-marital child that should be treated in accordance with the common law. If the husband consented the child would be the legal child of the surrogate and her husband. (8.2.11)

Clause 9

A legal abortion ends the agreement. Naturally, an illegal abortion would have the same effect. An illegal abortion would however first constitute a criminal offence and second not relieve the parties of any contractual obligations. The only problem with legal abortion is that there is a choice in respect of abortion when the foetus has a problem. In a normal case the parents decide whether they desire an abortion. In surrogacy however the foetus is in the body of the surrogate. The idea is that no women should be compelled to have an abortion. Compulsory consultation with the commissioning parents allows them the opportunity to have a say, but if the surrogate elects not to continue with an abortion the pregnancy continues and on birth the commissioning parents must comply with their obligations towards the child. (8.3.4)

Clause 10

- (1) This subclause imposes a total prohibition on compensation to anybody in connection with a surrogate motherhood agreement. It should discourage commercialisation and brokers in particular.
- (2) The surrogate is entitled only to expenses in connection to the fertilisation, pregnancy, birth and confirmation. This applies to legal surrogate motherhood only. No person, for example a friend or relative, may in any way receive compensation for the services rendered by the surrogate in question. (8.2.8, 8.2.13)
- (3) Only those persons that rendered professional services in connection with legal surrogate motherhood are exempted from the general prohibition on compensation. The requirement of *bona fides* is to assist professionals that rendered services in good faith with a view to confirmation by the court, which confirmation did not materialise for whatever reason.

Clause 11

Section 33 of the Human Tissue Act protects the privacy of the parties after the process of artificial fertilisation has commenced. This clause will protect the parties much earlier. Even if the parties would be willing to allow publicity of the surrogacy, this may only be done in such a way that the child cannot be identified. The identity of a child born as a result of surrogacy is protected. (8.3.5)

(2) Hierdie klousule is so bewoerd om in die eerste plek te verseker dat die ooreenkoms uitgevoer word soos dit deur die hof bekragtig is, veral met die oog op die gebruik van die regte gamete. (8.2.6)

(3) Die tweede gevolg is dat die huidige regsposisie met betrekking tot die status van kinders nie aangetas word nie. Indien die surrogaat ongetroud was of sonder haar eggenoot se toestemming opgetree het, is die kind haar buite-egtelike kind wat volgens die gemene reg behandel word. As die eggenoot toegestem het, is die kind die surrogaat en haar eggenoot se wettige kind. (8.2.11)

Klousule 9

'n Wettige vrugafdrywing beëindig die ooreenkoms. Uit die aard van die saak sal 'n onwettige vrugafdrywing dieselfde effek hê. 'n Onwettige vrugafdrywing sou egter eerstens 'n misdryf daarstel en tweedens nie die partye van enige kontraktuele verpligtinge onthef nie. Die enigste probleem by wettige vrugafdrywing is waar daar weens probleme met die fetus 'n keuse tot vrugafdrywing is. In die normale geval besluit die ouers of hulle 'n vrugafdrywing verlang. In die geval van surrogasie is die fetus egter in die liggaam van die surrogaat. Die gedagte is dat geen vrou verplig kan word om 'n vrugafdrywing te ondergaan nie. Verpligte konsultasie met die opdraggewende ouers gee hulle die geleentheid tot inspraak, maar indien die surrogaat sou verkies om nie 'n vrugafdrywing te ondergaan nie, gaan die swangerskap voort en by geboorte moet die opdraggewende ouers hulle verpligtinge teenoor die kind nakom. (8.3.4)

Klousule 10

- (1) Die eerste subklousule plaas 'n algehele verbod op vergoeding aan enige persoon in verband met 'n surrogaatmoederskapooreenkoms. Dit behoort kommersialisering en veral tussengangers te ontmoedig.
- (2) Die surrogaat is slegs geregtig op uitgawes in verband met die bevrugting, swangerskap, geboorte en bekragtiging. Dit geld slegs in die geval van wettige surrogaatmoederskap. Niemand, byvoorbeeld 'n vriend of familielid, mag enigsins vergoeding ontvang vir die diens wat die betrokke surrogaat lewer nie. (8.2.8, 8.2.13)
- (3) Slegs diegene wat professionele dienste gelewer het in verband met 'n wettige surrogaatmoederskap, word van die algehele verbod op vergoeding onthef. Die *bona fide*-vereiste is tot hulp van beroepslui wat te goeder trou dienste gelewer het met die oog op bekragtiging deur die hof, welke bekragtiging om een of ander rede nie gerealiseer het nie.

Klousule 11

Artikel 33 van die Wet op Menslike Weefsel beskerm die privaatheid van die partye nadat die proses van kunsmatige bevrugting begin is. Hierdie klousule sal die partye reeds baie vroeër beskerm. Selfs al sou die partye bereid wees om publisiteit aan die surrogasie te verleen, mag dit slegs op so 'n wyse gedoen word dat die kind nie geïdentifiseer kan word nie. Die identiteit van 'n kind wat ten gevolge van surrogasie gebore word, word beskerm. (8.3.5)

Clause 12

- (1) In order to discourage illegal surrogacy it is a criminal offence to do an artificial fertilisation in such a case or to assist therein. **(8.2.13)**
- (2) The advertising of surrogacy is prohibited. This prohibition affects prospective commissioning parents, surrogates and brokers. **(8.3.8)**
- (3) Contraventions of clauses 11, 12 (1) and 12 (2) are criminal offences. For medical practitioners and nurses this entails automatic disciplinary steps by their professional bodies. **(8.3.6)**
- (4) Although the penalties may seem severe, they are in accordance with the recent adjustments made in the lower courts.

Klousule 12

- (1) Ten einde onwettige surrogasie te ontmoedig is dit 'n misdryf om in so 'n geval 'n kunsmatige bevrugting te doen of daarmee behulpzaam te wees. **(8.2.13)**
 - (2) Enige advertering van surrogasie word verbied. Hierdie verbod tref voornemende opdraggewende ouers, surrogate en tussen-gangers. **(8.3.8)**
 - (3) Oortredings van klousules 11, 12 (1) en 12 (2) is 'n misdryf. Vir geneeshere en verpleegsters hou dit outomaties in dat hulle deur hulle professionele liggame gedissiplineer sal word. **(8.3.6)**
 - (4) Alhoewel die strawwe ernstig mag voorkom, is dit in ooreenstemming met die aanpassings wat onlangs in die laer howe gedoen is.
-

IMPORTANT ANNOUNCEMENT***Closing times* PRIOR TO PUBLIC HOLIDAYS for****LEGAL NOTICES**
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- ▶ **8 June**, Thursday, for the issue of Thursday **15 June**
- ▶ **3 August**, Thursday, for the issue of Friday **11 August**
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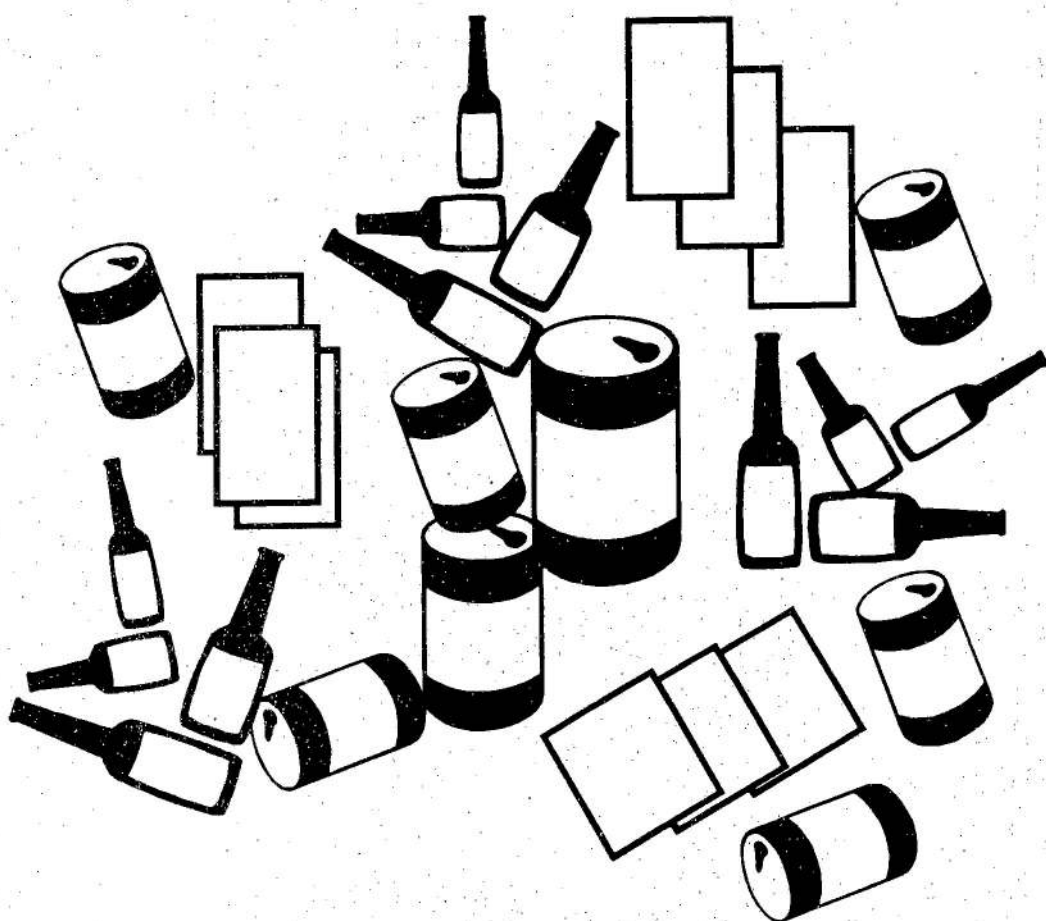
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