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Back to the future –
In light of present-day research, would *AB v Minister of Social Development* have been decided differently?

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I, Aliki Edgcumbe (nee Divaris), declare that:

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ABSTRACT

This study investigates whether the case of *AB v Minister of Social Development* would be decided differently in 2020. The *AB* case was heard in 2015 and revolved around the 'no-double-donor' requirement, which is a condition for a valid surrogate motherhood agreement. This prerequisite, contained in section 294 of the Children's Act, excludes those who are 'pregnancy' and 'conception' infertile from accessing surrogacy as a means to have a child – a limitation justified as being in the resultant child's best interests. The empirical studies in 2015, which investigated children up to the age of ten, cast doubt on the established belief in the importance of genetic relatedness for the positive well-being of children. Consequently, the constitutionality of the impugned provision was successfully challenged in the High Court; however, the applicants failed to convince the majority in the Constitutional Court, who rejected the empirical findings, fearing psychological harm would result in children who lacked certainty regarding their genetic origins. The research in 2015 could not conclusively respond to this concern as it was clearly deficient in examining *adolescence* – the key stage in a child's identity formation. Since then, the best available empirical research includes the adjustment of adolescents – and the results now confirm that, despite lacking a biological and gestational link to their parents, donor-conceived surrogate children are well-adjusted and exhibit high self-esteem. The new evidence shows the fears of the majority to be unfounded. In the absence of a rational link between section 294 and the child's best interests, the Court should declare the impugned provision unconstitutional. This study clearly shows that the no-double-donor requirement of section 294 fails to fulfil a legitimate government purpose. Nevertheless, the remaining regulations are not adequate to provide the necessary clarity nor the safeguards to protect the interests of all parties should the impugned provision be struck down. New regulations will need to be fashioned which are better suited to the regulation of double-donor surrogacy, such as permitting it only in the case of full surrogacy. These decisions are undeniably policy choices, which must be left to the Legislature.

KEY WORDS AND PHRASES

Adolescence
Assisted reproductive technologies
Best interests of the child
Bionormative
Blood-ties
Double-donor gametes
Embryo donation
Full surrogacy
Gamete
Genetic origins
In vitro fertilization
Partial surrogacy
Psychological adjustment
New family forms
Reproductive donation
Surrogate mother
Surrogate motherhood agreement

LIST OF ABBREVIATIONS

ARTs assisted reproductive technologies

CCL Centre for Child Law

IVF *in vitro* fertilization

SAG Surrogacy Advisory Group

SALC South African Law Commission – also referred to as the SALRC (South African Law Reform Commission)

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CHAPTER 1 –
INTRODUCTION

I PROBLEM STATEMENT

It is estimated that over eight million children have been born through assisted reproductive technologies ('ARTs') since the birth of the first baby via *in vitro* fertilization ('IVF') in 1978.[1] The 'traditional' family model typically denotes a heterosexual couple raising genetically related children.[2] 'New families', on the other hand, are families formed through assisted reproduction, including sperm, egg or embryo donation – and surrogacy.[3]

Often viewed as the most controversial of ARTs,[4] surrogacy is where a woman gestates a pregnancy for another person or couple.[5] It has often been suggested that the creation of families through ARTs, where children lack a genetic or gestational link with their parents, may be harmful to positive family functioning.[6] Hence, differing opinions regarding the ethics of allowing surrogacy – and under what circumstances – have long been debated by ethicists, psychologists and legal experts around the globe with countries, and often states within countries, holding opposing views.[7] South Africa is a country governed by a constitution[8] – one which upholds the Bill of Rights guaranteeing human dignity,[9] equality before the law,[10] non-discrimination,[11] privacy[12] and the right to make decisions regarding reproduction,[13] amongst others. Any regulation of surrogacy must be made in light of these constitutional rights

[1] S Imrie and S Golombok 'Impact of New Family Forms on Parenting and Child Development' (2020) 2 *Annual Review of Developmental Psychology* annurev-devpsych-070220-122704 at 13.2.
[2] Ibid.
[3] Ibid.
[4] D Meyerson 'Surrogacy, geneticism and equality: the case of AB v Minister of Social Development' (2019) 9 *Constitutional Court Review* 317–41.
[5] Imrie and Golombok 'Impact of New Family Forms on Parenting and Child Development' op cit note 1.
[6] S Golombok, E Ilioi, L Blake, G Roman and V Jadva 'A longitudinal study of families formed through reproductive donation: Parent-adolescent relationships and adolescent adjustment at age 14' (2017) 53 *Developmental Psychology* 1966–77 at 1966.
[7] For a discussion on the 'Identity Formation Argument' in surrogacy, see Meyerson 'Surrogacy, geneticism and equality' op cit note 4 at 326-42. For a comparative study on the vastly differing views and laws governing commercial surrogacy, see L Maré *The feasibility of compensated surrogacy in South Africa: a comparative legal study* (unpublished LLM thesis, University of South Africa, 2016).
[8] Constitution of the Republic of South Africa, 1996.
[9] Ibid s 9(1).
[10] Ibid s 9(3).
[11] Ibid s 28(2).
[12] Ibid s 14.
[13] Ibid s 12(2)*(a)*.

– and, to add to this, the best interests of the prospective child must receive careful consideration.[14]

Surrogacy is governed by Chapter 19 of the Children's Act 38 of 2005. Although surrogacy is not specifically defined in the Children's Act, surrogate motherhood agreements are. A surrogate motherhood agreement is 'an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilized for the purpose of bearing a child for the commissioning parent'.[15] While surrogacy is allowed in South Africa, it is strictly regulated – for instance, the Children's Act prohibits commercial surrogacy, and only allows surrogacy in cases of infertility. Another restriction is found in section 294 of the Children's Act, which provides:

> '**Genetic origin of the child**
> No surrogate motherhood agreement is 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 due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person.'

The inclusion of this provision under the heading 'genetic origin of the child' seems to suggest that, in cases of surrogacy, the legislature sought to guarantee genetic relatedness – or, at the very least, some certainty regarding the genetic origins of the resultant child – by insisting that the commissioning parents contribute gametes to the prospective child's conception. This provision is in line with prevailing beliefs that genetic relatedness ensures a bond between parent and child, and that certainty regarding genetic origins is important to the psychological well-being of a child. A strong parent-child bond and ensuring the development of a healthy state of psychological well-being are, unquestionably, in the resultant child's 'best interests'.

However, the effect of this provision on prospective parents who are both unable to carry a child ('pregnancy infertile') and unable to contribute their gametes to conception ('conception infertile'), is that these particular individuals become a 'sub-class' of infertile persons excluded from using surrogacy in order to have a child. [16] Surrogacy would, for those

[14] Ibid s 28, 'A child's best interests are of paramount importance in every matter concerning the child.'
[15] Children's Act 38 of 2005 chap 1: '…and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.'
[16] *AB and Another v Minister of Social Development* [2016] ZACC 43 para 19.

who fall into this sub-class, not be an option. Is this differentiation between those who can and those who cannot contribute their own gametes reasonable and justifiable?

This was the question before the court in the case of *AB v Minister of Social Development*.[17] The case centred around the plight of the first applicant, referred to only as 'AB'. AB was a single woman who wished to make use of a surrogate in order to have a child. Being conception and pregnancy infertile, AB had no choice but to make use of both a sperm and egg donor (and thereby making use of 'double-donor gametes') in the creation of the child to be carried by a surrogate.[18] She was successful in her constitutional challenge in the High Court, relying on the latest available evidence regarding donor-conceived children and their adjustment. At the time, research was available of children up until the age of ten.[19] The then-current research placed before the court suggested that the genetic link between parents and children did not seem to matter as much as once thought. In fact, children conceived by means of donor gametes and surrogacy agreements were generally well-adjusted and had good relationships with their parents.[20] This research cast doubt on the once strongly held views regarding the desirability of genetic relatedness in families. Hence, there seemed to be no rational connection between section 294 and the child's best interests. Consequently, the High Court declared the impugned provision invalid, finding that it violated the commissioning parent's right to dignity.[21]

AB sought to have this decision confirmed by the Constitutional Court. On 1 March 2016, the Constitutional Court heard her application; however, the majority felt that the High Court had erred in its reasoning. Citing the risk to 'children's self-identity and self-respect (their dignity and best interests)' as being unquestionably 'all important,[22] the Constitutional Court reasoned that the High Court had 'overemphasised the interests of the commissioning parent(s) and overlooked the purpose of the impugned provision and the best interests of children'.[23] Therefore, in the opinion of the majority of the Constitutional Court, section 294 was rationally connected to a legitimate government purpose. Furthermore, the majority held that AB's rights were not infringed by the impugned provision.

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[17] *AB v Minister of Social Development* 2016 2 SA 27 (GP); [2016] ZACC 43 para 19.
[18] Ibid.
[19] V Jadva, L Blake, P Casey, and S Golombok 'Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins' (2012) 27 *Human Reproduction* 3008–14.
[20] Ibid.
[21] *AB v Minister of Social Development* 2016 2 SA 27 (GP).
[22] *AB* supra note 16 para 294.
[23] *AB* supra note 16 para 293.

This was a disappointing end for AB. The evidence the applicants placed before the Court consisting of expert opinions and psychological studies was the best available evidence at the time. Yet, the shortcoming of the evidence was that the studies regarding child adjustment were still in their early stages. This was indeed pointed out in the papers filed by the Minister.[24] The researchers at the time of judgment had studied families with children up to the age of ten, and at that point could only predict that these well-adjusted children would most likely become well-adjusted teenagers.[25] Adolescence, however, is a distinct time of identity formation[26] and the available evidence could not conclusively show that once these children reached adolescence (armed with a greater understanding of genetics, biology and heritage) they would not suffer from a profound loss of self.

Research in this area of psychology is, however, on-going and ever-changing.[27] With continual advancements in technology and a growing body of research, the Court is far better placed now than it was five years ago to make a decision regarding the child's best interests. Will new research undermine or strengthen the significance placed on the genetic link within families?

II PURPOSE OF THE STUDY

The purpose of this study is to ascertain whether – by taking into account present-day studies – *AB* would have been decided differently in 2020. In order to determine this, I will investigate the most relevant, reliable and currently available research regarding the adjustment of adolescents who were born via surrogacy and whose parents made use of donor gametes in their conception. The aim of this investigation is to establish whether the research findings strengthen or undermine the belief that genetic relatedness is a critical consideration in safeguarding the surrogate child's best interests. Since adolescence is an important stage in a child's development of identity, it is a vital piece in the evidential puzzle which was missing in 2015.

In doing so, this study further seeks to investigate the reasoning of the courts in the *AB* case, and determine whether the new research findings would provide sufficient evidence to call into question the underlying premise of the Constitutional Court's majority. How much

[24] Minister's answering affidavit to AB founding affidavit para 8.31 (record 1435).
[25] Jadva, Blake, Casey, and Golombok 'Surrogacy families 10 years on' op cit note 20.
[26] Golombok, Ilioi, Blake, Roman, and Jadva 'A longitudinal study of families formed through reproductive donation' op cit note 6.
[27] Imrie and Golombok 'Impact of New Family Forms on Parenting and Child Development' op cit note 1.

weight should be given to genetic relatedness when determining the child's best interests in surrogacy agreements? In light of the recent findings of psychological studies, I will suggest possible changes to section 294 which may better balance the various rights and interests in surrogate motherhood agreements, especially in cases where individuals or couples are unable to provide their own gametes for conception.

If one is to properly protect and uphold the constitutional rights of all citizens, it is essential that underlying assumptions which undermine the outworking of constitutionally protected rights are thoroughly scrutinised against the best available evidence. The interests of commissioning parents and their intended children must be brought into a win-win scenario in our law. There should be no need to sabotage the dreams and deepest desires of individuals who wish to become parents, especially where the beliefs which prohibit these persons from utilising surrogacy are baseless and speculative at best. Appropriate changes may allow more conception and pregnancy infertile individuals and couples to access surrogacy as a means of having children, without compromising on the prospective child's best interests.

III RESEARCH METHODOLGY

A review of the latest, relevant and available literature will be conducted. Local and international journals, articles, legislation and case law will be consulted. The envisaged research will explore the psychological adjustment of adolescents born via surrogacy or conceived as a result of donor gametes. The main focus will be on research conducted by Prof Golombok and Dr Jadva of the Cambridge group, who are the respected leaders in this area of psychology.[28] In respect of their longitudinal study, they are uniquely placed to provide invaluable insight into the well-being of children conceived through ARTs and how these families function in reality. The research will then be applied to the *AB* case, placing it within the South African context. A close analysis of the *AB* case and of the available research will be carried out in order to ascertain whether the court's decision would differ in light of fresh findings.

[28] Imrie and Golombok 'Impact of New Family Forms on Parenting and Child Development' op cit note 1.

IV LITERATURE REVIEW

In this section, I first summarise some of the key concerns around the constitutionality of section 294 before it was challenged in court. Secondly, I provide a brief overview of the critical responses to the *AB* case by academics. Thirdly, I introduce recent findings which are relevant to the case.

First, before section 294 was challenged in the *AB* case, academics questioned the constitutionality of the impugned provision on numerous grounds. For instance, Lewis challenged the notion that the genetic link requirement lowers the potential risk that a surrogate mother may later refuse to relinquish a surrogate child. Lewis argued that the restrictive effects of section 294 on infertile persons were unwarranted given that there was no conclusive evidence which showed that the surrogate mother was less likely to relinquish the child in instances where there was an absence of a genetic link between the commissioning parents and the surrogate child.[29] Lewis further argued that although it may be in the child's bests interests to be genetically related to his or her parents, it was not in contravention of the child's best interests standards to be genetically unrelated. For example, in cases of adoption or foster families, the absence of a genetic link between the parent and the child did not mean that the child's best interests had been disregarded.[30]

Similarly, Louw argued that despite section 294 perhaps being justifiable for a number of reasons, including the promotion of a bond between the child and the commissioning parents, section 294 could be considered unconstitutional insofar as it violates the rights of infertile persons to dignity and privacy.[31]

Moreover, van Niekerk opined that the genetic link on the part of the commissioning parents should be immaterial.[32] Where there is a concern about the improper motives of individuals wishing to make use of surrogacy, this could be ascertained by the court, which was already responsible for vetting surrogacy applications.[33] Van Niekerk opined that what is – and should be – important is the commissioning parent's suitability to parent. This could be

[29] S V Lewis *The constitutional and contractual implications of the application of Chapter 19 of the Children's Act 38 of 2005* (unpublished LLM thesis, University of the Western Cape, 2011) at 93.
[30] Ibid at 124.
[31] A S Louw *Aquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009) at 383.
[32] C Van Niekerk, 'Section 294 of the Children's Act: Do roots really matter?' (2015) 18 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 397 at 408.
[33] Ibid.

ascertained by considering relevant evidence, including their intention to parent; ultimately, genetics provide no guarantee for the welfare of the child.[34]

Therefore, a challenge to section 294 was to be expected. Following the High Court's decision to strike down the impugned provision in the *AB* case, Boniface opined that the High Court's ruling illustrated that the genetic link 'is not the alpha and omega when it comes to the formation of a family'[35] and trusted that the Constitutional Court would confirm the High Court's decision declaring section 294 invalid. This, in Boniface's view, would affirm social parents as being of equal importance to biological parents, while acknowledging that families may be formed in a variety of ways.[36] This, however, was not the case; the Constitutional Court's majority later ruled in favour of the retention of section 294.

Thaldar, in his analysis of the Constitutional Court's judgment, and especially regarding the Court's handling of the evidence placed before it by the applicants, was deeply critical of the Court's reasoning.[37] Thaldar asserts that the question before the Court was not whether section 294 sought to serve a legitimate government purpose – it indisputably endeavours to achieve the legitimate government aim of safeguarding the child's best interests – rather, the question was whether a *rational nexus* exists between section 294 and the best interests of the child.[38] Thaldar argues that without being informed by credible data, the Court could not establish whether the impugned provision indeed served its intended purpose. Relying on the expert psychological evidence of Golombok, Jadva and Rodrigues, Thaldar answers the question of rationality:

> '… [I]n the context of surrogate motherhood, does the best interests of the child require that such a child must be conceived from the gamete(s) of the commissioning parent(s)? The psychological evidence – which was indeed based on credible, empirical data – clearly answered this question in the negative. The psychological evidence shows that there is *no rational nexus* between s 294 and the best interests of the child.'[39]

Meyerson, equally critical of the Court's reasoning, opines that both the minority and majority were too quickly satisfied that section 294 passed the section 9(1) constitutional test

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[34] Ibid at 421.
[35] Ibid at 206.
[36] Ibid at 206.
[37] D W Thaldar 'Post-truth jurisprudence: The case of *AB v Minister of Social Development*' (2018) 34 *South African Journal on Human Rights* 231–53 at 249.
[38] Ibid at 251.
[39] Ibid.

of rationality.[40] She contends that there were obvious discrepancies between section 294 (which requires one of the commissioning parent's gametes to be contributed to the conception) and IVF regulations[41] (which allows for the use of double-donor gametes). Meyerson proposes that a possible reason for this discrepancy is that the 'legislature might have thought that when children born of surrogacy are genetically related to at least one of their custodial parents, the bond between children and parents is stronger, and hence that these families function more successfully'.[42] Relying on the empirical research findings made by Golombok, Meyerson postulates that, should this have been the intention of section 294, the no-double-donor gamete requirement fails to meet the purpose of promoting a more loving and stable family, and so fails to satisfy the rational connection test.[43] Meyerson asserts that the only goal which is advanced by section 294's genetic requirement, is the aim of enforcing 'a bionormative conception of the family', which is not a legitimate purpose.[44]

Thaldar contextualises these norms in the South African context, and argues that 'blood ties' and kinship in family formation is a concept rooted in traditional black South African cultural precepts.[45] This, he suggests, may have influenced the justices to ignore, and even pervert, the available empirical evidence when it came to the issue of the genetic relatedness and the child's best interests. Thaldar warns that, although these cultural norms may be entrenched in certain sectors of society, they do not necessarily uphold constitutional values.[46]

While the Constitutional Court has been criticised in the academic literature for its approach to the matter, the research available in 2016 was perhaps not compelling enough to successfully challenge the cultural precepts so deeply engrained in our society.

Since then, Golombok and her team have concluded studies examining the experiences of adolescents.[47] Do these studies shed greater light on the adjustment of children – and is it persuasive enough to rewrite what we think about family?

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[40] Meyerson op cit note 4.
[41] See *Regulations Relating to Artificial Fertilisation of Persons* GN R175 of 2012, s 19 which states that '[n]o person may disclose the identity of any person who donated a gamete or received a gamete' and read with s 11(2)(a)*(ii)* which allows for embryos from 'an individual male and an individual female gamete donor' to be used for the purposes of IVF.
[42] Meyerson op cit note 4.
[43] Meyerson op cit note 2 at 329.
[44] Meyerson op cit note 2 at 329.
[45] D Thaldar, 'The constitution as an instrument of prejudice: a critique of AB v Minister of Social Development' (2019) 9 *Constitutional Court Review* 343–61.
[46] Ibid at 360.
[47] See Golombok, Ilioi, Blake, Roman, and Jadva 'A longitudinal study of families formed through reproductive donation' op cit note 6 and Golombok, Ilioi, Blake, Roman, and Jadva, 'A longitudinal study of families formed through reproductive donation' op cit note 6.

V OVERVIEW OF THE DISSERTATION

In chapter 2, I provide a brief introduction to surrogacy. Section 294 of the Children's Act, and how it relates to the child's best interests, will be explored in detail. In chapter 3, the handling of the *AB* case by the High Court and Constitutional Court will be scrutinized. The reasoning of the courts relating in particular to the child's best interests will be unpacked and weighed up against the available evidence at the time. Chapter 4 will closely investigate the current findings and, particularly, how it pertains to the child's best interests. In chapter 5, these new findings will be hypothetically proffered to the Constitutional Court, and I will propose the way the *AB* case would have been decided in light of the newly available evidence. Finally, I conclude with recommendations.

CHAPTER 2

BACKGROUND TO SECTION 294 OF THE CHILDREN'S ACT

I INTRODUCTION

The purpose of this chapter is to ground section 294 of the Children's Act[48] into the greater historical context of surrogacy in South Africa. This chapter begins by outlining the relevant terminology and then proceeds with a brief discussion of the regulations which could have been applied to surrogacy prior to the enactment of the Children's Act. This is followed by an exploration of the reasoning of the South African Law Commission ('SALC') and Ad Hoc Committee on Surrogate Motherhood's recommendations regarding the need to explicitly regulate surrogacy through targeted legislation. There will be a specific focus on their recommendations regarding the regulation of donor gametes being used by commissioning parents in surrogacy agreements. The extent to which these recommendations were incorporated into section 294 of the Children's Act will be outlined, followed by a brief discussion on the child's best interests and how section 294 has been interpreted in light of 'the best interests' standard.

II RELEVANT TERMINOLOGY

Surrogacy can be defined as an arrangement in which a woman carries and delivers a child for another couple or person.[49] Section 1(1) of the Children's Act defines a surrogacy 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 a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent'.

The Act further defines 'artificial fertilisation' as 'the introduction, by means other than natural means, of a male gamete into the internal reproductive organs of a female person for

[48] Act 38 of 2005.
[49] *Ex parte WH* 2011 6 SA 514 (GNP) para 1.

the purpose of human reproduction' and includes *in vitro* fertilization ('IVF'), a process where the fertilization happens outside of the body and the embryo is thereafter placed in the womb of the woman.[50] A gamete is defined as 'either of the two generative cells needed for human reproduction' – that is, either the sperm or egg cell.[51]

The Act defines a 'surrogate mother' as the 'adult woman who enters into a surrogate motherhood agreement with the commissioning parent'.[52] The surrogate mother agrees to be the 'gestational mother', willingly carrying the child but without the intention to raise the child; rather the child is handed over to the commissioning parent(s) to raise.

The 'commissioning parent' is defined in the Act as the person who 'enters into a surrogate motherhood agreement with a surrogate mother'.[53] It may be more helpful to define the commissioning parent as the parent who intends to raise the child.[54]

In South Africa, two types of surrogacy are recognised – namely, full and partial surrogacy. First, full surrogacy is where the surrogate mother is merely the gestational mother; her gamete is not used in the artificial fertilisation, so she is not the genetic mother.[55] Partial surrogacy, on the other hand, is achieved by means of the artificial insemination of the surrogate mother with the gametes of the commissioning husband or partner or donor. In this case, the surrogate mother is both the genetic and gestational mother since her egg has been utilized in the process of creating the embryo.[56]

In terms of infertility, an infertile person may be 'conception infertile' or 'pregnancy infertile'. A person is 'conception infertile' when the individual is unable to contribute a gamete to the creation of an embryo.[57] Commissioning parents may make use of donor gametes, such as the surrogate's egg or a male donor's sperm. A person who is 'pregnancy infertile' is an individual who is permanently and irreversibly unable to carry a pregnancy to term.[58]

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[50] See the Report of the Parliamentary Ad Hoc Committee on the South African Law Commission Report on Surrogate Motherhood (1999) at 7, para 5: '"In vitro fertilization - (IVF)" means the placing of the product of a union of a male and female gamete or gametes, which have been brought together outside the human body, in the womb of a female person for the purpose of human reproduction.'
[51] Children's Act, s 1*(1)*.
[52] Ibid. Surrogate means 'substitute' or 'stand-in' – an apt description as the surrogate is the woman who 'stands in' for another person who is unable to successfully carry a child.
[53] Children's Act, s 1(1).
[54] Lewis op cite note 30 at 13. In fact, commissioning parents are often referred to as the 'intended parents', which is precisely what they are – those intending to parent the child born to the surrogate.
[55] Ad Hoc Committee op cit note 61 at 8.
[56] Ibid.
[57] *AB* [ZACC] supra note 16 at 6-7 fn 9.
[58] Ibid.

III SURROGACY BEFORE THE CHILDREN'S ACT

Before the enactment of the Children's Act, no legislation explicitly governed surrogacy in South Africa.[59] It was neither overtly allowed nor was it prohibited. The existing legislation – such as the Human Tissue Act 65 of 1983, the Child Care Act 74 of 1983, the Children's Status Act 82 of 1987, and the Births, Marriages and Deaths Registration Act 81 of 1963 – could be applied to surrogacy agreements, but often with bizarre or unintended effects.

The Human Tissue Act, for instance, broadly defined 'artificial fertilization of a person',[60] without stipulating into whose womb the embryo must be placed. It was, therefore, submitted by the SALC that the embryo could lawfully be transferred to the womb of a surrogate mother.[61] Furthermore, the Act did not specify whose gametes were to be used, so the SALC deduced that either the gamete of a woman's husband or that of a donor may be used.[62] This legislation, therefore, could be applied to cases of surrogacy.

The Children's Status Act was another relevant piece of legislation, but its application resulted in consequences that were undesirable. Section 5(2) in particular posed a challenge. This section provided that the woman who gives birth to the child must be regarded as the child's mother and her husband as the child's father irrespective of whose gametes were used for the artificial insemination of the woman. The SALC and the Ad Hoc Committee submitted that the effect of section 5 would be 'especially harsh' on full surrogacy as the surrogate mother, who gives birth to the child, would be regarded as the child's mother, despite the surrogate merely acting as the 'hostess' mother and sharing no genetic relationship with the child.[63] The commissioning couple, who are the child's genetic parents, would be regarded as the donors and as such would not have any parental power over the child – which was certainly not the intention of the parties to the surrogate motherhood agreement.[64]

Should section 5 not be complied with, the common law would apply, and the child could be considered the extra-marital child of the surrogate.[65] This still does not accomplish the intentions of the parties.

The need for specific legislation that would govern the very unique circumstances and needs of surrogate motherhood agreements particularly came to the fore in the first recognized

[59] Ad Hoc Committee op cit note 61 at 10.
[60] As amended by the Human Tissue Amendment Act 51 of 1989.
[61] South African Law Commission Report on *Surrogate Motherhood* Project 65 (1992) at 82.
[62] Ibid.
[63] SALC Report op cit note 72 at 92; Ad Hoc Committee op cit note 61 at 10.
[64] SALC Report op cit note 72 at 94; Ad Hoc Committee op cit note 61 at 10.
[65] Ad Hoc Committee op cit note 61 at 10.

case of surrogacy in South Africa, that of Karen Ferreira-Jorge of Tzaneen in 1987.[66] Ferreira-Jorge requested the assistance of her mother, Pat Anthony, to be a surrogate to her children. Anthony was implanted with the ova of her 25-year-old daughter, Ferreira-Jorge, that had been inseminated artificially with her son-in-law's sperm. This resulted in the successful gestation and birth of triplets on 1 October 1987, a few weeks before the Children's Status Act came into force.[67]

The triplets' birth resulted in much excitement – and with it legal problems, as the media debated whose children the triplets would be.[68] If the Children's Status Act had come into operation before the triplets' birth, they would have been regarded as the legal children of the surrogate, their biological grandmother, and all links between them and their biological parents would have been severed. Their biological mother would instead be their sister. [69]

While provision was made for adoption, this was by no means ideal. Adoption is a gradual process that lacks certainty of the outcome being successful[70] and is fraught with problems.[71] Furthermore, since there was little clarity on the validity of surrogate motherhood agreements, it was uncertain whether the parties would be able to use ordinary contractual principles in the event of a breach of agreement by either the surrogate mother or the commissioning parent or parents.[72]

The need for legislation which governed surrogacy and resulted in certainty for all the parties involved was greatly apparent. The court in *Ex parte WH* opined: 'This issue was clearly a concern as it could impact directly on the best interests of the child as uncertainty regarding the parents could impact negatively on the child.'[73] It was for these reasons that an investigation was launched into surrogacy.

IV REASONS FOR THE INCLUSION OF SECTION 294

The questionnaire on surrogacy administered by the SALC produced a wide range of responses. Most religious groups were found to be against surrogacy in principle. Interestingly, the Family

[66] T Filander *The enforceability of international surrogacy in South Africa: How would a South African court proceed in determining an international surrogacy case?* (unpublished LLM thesis, University of the Western Cape, 2016).
[67] The Children's Status Act 82 of 1987 came into force on 14 October 1987.
[68] Ad Hoc Committee op cit note 61 at 96.
[69] Ibid at 97.
[70] Ibid.
[71] Filander op cit note 77 at 21.
[72] Ad Hoc Committee op cit note 61 at 12.
[73] *Ex parte WH* supra note 60 para 57.

and Marriage Association of South Africa ('FAMSA') raised the concern that the psychological effects on the resulting children were uncertain and argued that '[i]t will only be possible to really evaluate results when children born to surrogate mothers reach puberty.'[74]

The use of donor gametes was seen to be particularly problematic, despite the fact that it was already permissible under the Human Tissue Act and was regarded as an acceptable and effective method in many circles. The Department of National Health and Population Development had no objections to a child being born to a couple where neither of the couple's gametes had been used. On the other hand, the use of donor gametes was strictly condemned in the ethical-theological field, with the Catholic Church, for instance, rejecting artificial fertilization even in marriage. Although the SALC considered the theological views, it nevertheless submitted that, as was the case with artificial fertilization, a couple was free to decide whether surrogacy was in accordance with their personal beliefs before choosing to make use of it.

As a result, the SALC proposed that the use of donor gametes should be permitted, but with the proviso that a gamete from at least one of the commissioning parents be made use of in the creation of the embryo.[75] Its reasons were that it was 'convinced that in order to promote the bond between the child and its commissioning parents it is desirable, in the best interest of such a child, that the gametes of at least one of the commissioning parents should be used.'[76] It also opined that this would 'restrict undesirable practices such as shopping around with a "view to creating" children with particular characteristics.' [77]

The Ad Hoc Committee was called on to review the findings of the SALC. In its final recommendations, the Ad Hoc Committee endorsed the SALC's position, and proposed that it would be in the best interests of all the parties concerned if the commissioning parent(s) were to be genetically related to the child.[78] This recommendation was incorporated into section 294 of the Children's Act in its entirety:

> **'Genetic origin of child**
>
> 294. No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both

[74] Ad Hoc Committee op cit note 61 at 118.
[75] Ibid at 179-80. The SALC's draft regulations were worded as follows under the heading 'Genetic origin of child': '5. (1) No surrogate motherhood agreement shall be valid unless the conception of the child contemplated in the agreement is 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 a child contemplated in the surrogate motherhood agreement.'
[76] Ibid at 151.
[77] Ibid.
[78] Ad Hoc Committee op cit note 61 at 17.

commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person.'

The section clearly prohibits the use of surrogacy where there is no contribution of a gamete by at least one of the commissioning parents to the conception of the resultant child. The underlying premise of the SALC and the Ad Hoc Committee is that by prohibiting individuals from 'commissioning children' who are genetically unrelated to them, they are protecting the child's best interests. However, due to the severe impact this provision has on those who are conception infertile, this premise begs thorough inspection before it should be accepted. While it is clear that the inclusion of section 294's 'genetic origin' requirement sought to safeguard children's constitutionally protected right to have their interests considered paramount in all matters affecting them, the question of whether this provision effectively advances these interests has to be scrutinised.

V RESPONSES TO SECTION 294 IN LIGHT OF THE CONSTITUTION

Section 28 of the Constitution outlines the rights pertaining to children, with section 28(2) providing that '[a] child's best interests are of paramount importance in every matter concerning the child.' The 'best interests' standard is echoed in section 7 of the Children's Act.

In considering the wording of this constitutional provision, the court in *S v M (Centre for Child Law as Amicus Curiae)*[79] held that the language is both 'comprehensive and emphatic', and indicates that law enforcement must always be 'child-sensitive' and that 'statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children'.[80] Thus, the courts are called on to act in a manner which always shows the necessary respect for children's rights.[81]

Section 28(2) mandates courts to play an active role in raising and securing children's best interests.[82] The best interest principle has not, however, been given an exhaustive content, but rather the standard is flexible to allow for an individualised approach based on the specifics

[79] *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC).
[80] Ibid para 15.
[81] Ibid.
[82] J. Sloth-Nielsen 'Children's rights jurisprudence in South Africa — a 20 year retrospective' (2019) 52 *De Jure* at 516.

of the situation.[83] This is a fundamental feature in the conservation of children's rights, as it considers individual circumstances rather than allowing for arguments based on legal technicalities.[84] This was emphasised in *S v M* where the court asserted:

> 'A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.'[85]

The court further clarified that the 'best interests' of the child is by no means an 'overbearing and unrealistic' trump over all rights, and may be limited appropriately.[86] The paramountcy principle must be applied in a meaningful way which does not needlessly obliterate other valuable and constitutionally protected interests.[87] However, it remains a right which is granted a degree of privilege in the balancing of rights.[88] Additionally, the need for the 'best interests' inquiry presupposes that courts have sufficient information at their disposal to understand the impact of their decision upon children.[89]

The child's best interests must, therefore, also be carefully applied to surrogate motherhood agreements. The inclusion of section 294 reflects the generally held assumption that the purpose of surrogacy is to enable an infertile couple to have a child which is genetically related to them.[90] However, some commentators have questioned the necessity of this stipulation.

On considering the child's best interests as applied to surrogacy agreements, the court in *Ex parte WH* saw its role as two-fold: 'On the one hand the court's role is that of facilitator of surrogate agreements and, on the other, it plays the role of gatekeeper and protector of the rights of the parties and the children born as a result of the agreement.'[91] So, while on the one hand the court has the responsibility to advance the spirit and objectives of the Children's Act in a way that does not unnecessarily burden the litigants; it must, on the other hand, act as the upper guardian of all minor children.[92] The court cautioned that in considering the best interests of the child, care must be taken that it does not unnecessarily invade the privacy of the

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[83] *Ex parte WH* supra note 60 para 61.
[84] Sloth-Nielsen 'Children's rights jurisprudence in South Africa' op cit note 93 at 516.
[85] *S v M* supra note 90 para 24.
[86] Ibid para 26.
[87] Ibid para 25.
[88] Sloth-Nielsen 'Children's rights jurisprudence in South Africa' op cit note 93 at 517.
[89] Ibid at 516.
[90] Louw *Aquisition of parental responsibilities and rights* op cit note 33 at 341.
[91] AS Louw 'Surrogacy in South Africa: Should We Reconsider the Current Approach' (2013) 76 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)* 564–88 at 567.
[92] *Ex parte WH* supra note 60 para 72.

commissioning parents, and so violate their rights in terms of the Bill of Rights and the Promotion of Equality and Prevention of Unfair Discrimination Act.[93] The court opined that '[t]his will entail a value judgment by the court taking into consideration the circumstances of the particular case.'[94]

Considering that 'for most people there are no restrictions or prohibitions on their ability to procreate,' the court warned against setting unreasonably high standards for commissioning parents.[95] When deciding on the suitability of a parent, the court suggested that 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 child' while always having due regard for constitutional principles.[96]

Although in most other areas, the legislature cautiously steers clear of imposing what constitutes the child's 'best interests' and wisely leaves it to the courts to determine on a case-by-case basis under the guidance of broad principles, the inclusion of section 294 appears to buck this trend. Perhaps this reveals that the importance of genetic relatedness for a child's positive development is widely accepted. However, the inclusion of this provision fortifies the assumptions of what constitutes 'family' and could be seen to establish the traditional notions of genetics and blood ties as the accepted norm. Are these views tenable in our constitutional democracy?

Louw, on evaluating section 294, felt that despite the provision being justified for a number of valid reasons, it may be considered unconstitutional in so far as it infringes on the rights of an infertile person to make decisions concerning reproduction, as well as a person's right to dignity and privacy.[97]

The SALC contended that the inclusion of the 'genetic origin' provision would be in the best interests of all the parties concerned. It saw surrogate motherhood and the regulation thereof as having advantages and disadvantages. With proper consideration being given to the medical, psychological and legal issues that arise, the official stance of the medical world was that surrogacy should be regarded as a last resort. Furthermore, there were still serious questions among psychologists and social workers as to the protection and preservation of the best interests of the child in cases of surrogacy. The commission noted that 'in such

[93] Act 4 of 2000.
[94] *Ex parte WH* supra note 60 para 63.
[95] Ibid para 70.
[96] Ibid.
[97] Louw *Aquisition of parental responsibilities and rights* op cite note 33 at 383.

circumstances it is very difficult to find a balance that does justice to the expectations of society, the interests and desires of infertile couples and the best interests of the child.'[98] The SALC saw the regulation of surrogacy as the best way forward, and suggested the need for a careful approach with the best interests of the child being 'the overriding factor'.[99]

Van Niekerk opined that while the inclusion of this requirement appeared to be for a 'noble cause', the reasoning was not sound.[100] First, responding to the assertion that the genetic link limited 'undesirable practices' – such as the commodification of children – van Niekerk argued that the presence of a genetic link did not necessarily protect children from these harms and that there were far less restrictive means to achieve this purpose. To this end, van Niekerk proffered that since the courts were already responsible for vetting all surrogate motherhood agreements, they could presumably vet the motives of commissioning parents who possessed no genetic link.

Van Niekerk ventured that reliable research suggested that there was a compelling link between *infertility* and the best interests of the resulting children. Moreover, since society places such significance on fertility and procreation, being infertile has a negative impact on a person's self-worth. Hence, in van Niekerk's opinion, a distinction made between infertile persons who can and those who cannot contribute a gamete fails to 'promote human dignity, equality and freedom in an open and democratic society.'[101] Instead of focusing on genetic relatedness, van Niekerk proffered that what should be important is the commissioning parent(s) suitability to parent, which can be measured by considering a number of factors, including their desire to parent.[102]

It has, however, been argued that conception infertile individuals have other options to become parents available to them. The Ad Hoc Committee, concurring with the SALC's stance, submitted that in instances where both the gametes used in the creation of the embryo were donor gametes, it would result in a situation similar to adoption, in that the child would not be genetically linked to the commissioning parent or parents. In its view, adoption of a child would satisfactorily serve the needs of the infertile person or couple concerned and so 'obviate the need for surrogacy'.[103]

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[98] SALC Report op cit note 72 at 146.
[99] Ibid.
[100] Van Niekerk 'Section 294 of the Children's Act' op cit note 34 at 409.
[101] Ibid.
[102] Ibid.
[103] Ad Hoc Committee op cit note 61at 15-16.

Lewis questions why persons who are unable to provide gametes for the purposes of conception must make use of adoption if they are able to find a surrogate willing to give birth to their child.[104] Since a person has the right to make decisions regarding reproduction, and surrogacy is an available form of assisted reproduction to infertile persons, these individuals should be permitted to make use of it.

Van Niekerk, in response to the 'adoption' reasoning, argues that adoption is not a comparable alternative to surrogacy; in fact the two are 'vastly dissimilar'.[105] First, adoption has limitations of its own, often excluding certain individuals from becoming parents. Secondly, adoption can result in different outcomes, for instance, the adoption of a new born is not a guarantee, unlike in surrogacy where the parents are assured a baby from birth. Thirdly, surrogacy arrangements commence before birth, while adoption is usually initiated after birth.

Lewis contends that the Act unfairly discriminates against infertile persons and argues that, without conclusive evidence to support the claims made by the SALC and Ad Hoc Committee, the restrictive effect of section 294 is unjustified and disproportionate to the benefit it aims to achieve.[106] Lewis further opines that although it may be in the child's best interests to be genetically related to the commissioning parents, not being genetically linked does not contravene the best interests standard.[107] In cases of adoption or fostering where there is no genetic link, the best interests of the child are not disregarded.[108] Referencing *S v M*, Lewis contended that the 'precise real-life' situation of the child[109] which the courts must consider is that the child was brought into the world by commissioning parents who had a real desire to have the child.[110]

These arguments sufficiently cast doubt on the validity of the Ad Hoc Committee's submissions. This in turn calls into question whether denying commissioning parents who are conception infertile from accessing surrogacy is indeed justifiable, especially where there is no equivalent alternative. The opinion that this provision is in the child's best interests must be carefully scrutinised.

The next chapter investigates the case of *AB v Minister of Social Development*[111] and critiques the court's response to the challenge of this provision.

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[104] Lewis op cit note 30 at 92.
[105] Van Niekerk 'Section 294 of the children's act' op cit note 34 at 415.
[106] Lewis op cit note 30 at 93.
[107] Ibid at 124.
[108] Ibid.
[109] *S v M* supra note 90 para 24: 'A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved.'
[110] Lewis op cit note 30 at 122.
[111] *AB* GP supra note 16; *AB* ZACC supra note 17.

CHAPTER 3

THE *AB* CASE AND THE CHILD'S BEST INTERESTS

I INTRODUCTION

The previous chapter focused on the background of section 294 of the Children's Act[112] and how the genetic link requirement was incorporated into South African law. This condition was consistent with the firm beliefs of the SALC and the Ad Hoc Committee both of which asserted that a genetic link between parents and children fostered positive familial bonds – and that this was, undeniably, in the resultant child's best interests.[113] Nevertheless, many scholars took issue with this supposition, and suggested that there were question marks over the rationality of the provision.[114] There was some doubt as to whether section 294 would withstand the scrutiny of a constitutional challenge.[115]

The constitutional challenge arrived in 2013 in the case of *AB v Minister of Social Development* ('*AB*').[116] The first applicant a single woman, AB, was both conception and pregnancy infertile and wished to make use of a surrogate in order to have a child; [117] she went head-to-head with the Minister of Social Development, who opposed her application.[118] While AB argued that section 294 was inconsistent with the Constitution and should be declared invalid,[119] the Minister contended that it served a legitimate government purpose – one to safeguard the child's best interests.[120]

Thus, it was in *AB* that the highly anticipated battle regarding the contentious section 294 took centre stage. Finally the courts had a chance to weigh in on the matter of whether the genetic link requirement was in fact crucial in defending the child's best interests. Would section 294 survive this constitutional challenge, or would it be struck down?

In this chapter, I unpack the *AB* case. First, I begin with the factual background in order to provide the relevant context. Secondly, I present the pertinent evidence placed before the High Court and Constitutional Court which related specifically to 'the child's best interests'. I

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[112] Act 38 of 2005.
[113] See Report by the Parliamentary Ad Hoc Committee op cit note 61.
[114] See Filander op cit note 77; Lewis op cit note 30; Louw *Aquisition of parental responsibilities and rights* op cit note 33; Louw 'Surrogacy in South Africa' op cit note 102; and Van Niekerk op cit note 34.
[115] Ibid.
[116] *AB* GP supra note17.
[117] Ibid para 18–19.
[118] Ibid para 14.
[119] Ibid para 8.
[120] Ibid para 11.

evaluate the extent to which the evidence convincingly answers the question of whether the genetic link requirement is in the best interests of the child. Thirdly, I examine the High Court and the Constitutional Court majority and minority judgments, and assess the reasoning of each court.

II THE PARTIES AND FACTUAL BACKGROUND TO THE CASE

In accordance with a court order obtained to protect her identity, the first applicant in the matter was referred to only as 'AB'.[121] She was a 55-year-old woman[122] who, over a ten-year period spanning 2001 to 2011, underwent eighteen IVF cycles in an attempt to achieve pregnancy.[123] Initially, AB made use of her own eggs and her husband's sperm.[124] However, since she was already in her early forties at the time, the quality of her eggs soon proved deficient. Consequently, her gynaecologist advised her that it would not be feasible to continue to harvest her own eggs.[125] After a careful selection from a local donor database, AB began to use anonymous donor eggs from her third IVF cycle onwards.[126]

From her fifth IVF cycle onwards, AB utilized anonymous donor sperm after her relationship with her husband of nearly twenty years ended in divorce. Again, this was after she carefully picked her preferred donor from a local database.[127] Of the eighteen IVF cycles AB undertook, sixteen IVF cycles utilized donor gametes that had no genetic link to her, and fourteen made use of both male and female anonymous donor gametes.[128]

In 2009, AB sought out the assistance of Dr Cassim, a gynaecologist practicing at a different fertility clinic, who had come highly recommended.[129] After two failed pregnancies, Dr Cassim advised AB that it was extremely unlikely that further IVF attempts would be fruitful and recommended that she consider surrogacy as an alternative means to have a

[121] Ibid para 12: 'Consequent upon an anonymity order the first applicant will not be identified in any way whatsoever in the papers or in the judgment. The first applicant is therefore merely identified as "AB".'; Order dated 28 June 2013 per Ledwaba DJP (record 60–3).
[122] AB founding affidavit para 8 (record 9).
[123] Ibid para 8.
[124] Ibid para 9.
[125] Ibid para 9.1.
[126] Ibid.
[127] Ibid para 9.2.
[128] Ibid para 10.
[129] Ibid para 11.

child.[130] Through an organization called *Baby2Mom,* AB was placed in contact with a woman who agreed in principle to act as a surrogate mother for her.[131]

AB subsequently sought legal advice from an attorney, and it was with 'a mixture of shock, sadness and bafflement'[132] that she received the news that the law on surrogacy forbids single infertile persons who cannot contribute their own gametes for conception, from making use of surrogacy.[133] This did not make sense to her since she had already made use of donor gametes for several years in her attempts to achieve pregnancy through IVF.[134]

Thus, AB sought to challenge the constitutionality of the genetic link requirement in court on the basis that it infringed the rights of prospective commissioning parents.[135] AB argued that while she accepted that most people preferred to use their own gametes in order to have a genetic bond with their child, she contended that there was no reason to legally enforce this preference on everyone.[136] To this end, she maintained that

> '…while persons outside the surrogacy context have a *choice* whether to use their own gametes or – through IVF – make use of donor gametes for any personal reason that they might consider convincing, in the context of surrogacy, the Genetic Link Requirement removes this choice.'[137]

AB proffered that infertile persons who were unable to contribute their own gametes to conception, and who were not involved in a sexual relationship with a person who may make such a contribution, formed part of a specific subclass of prospective commissioning parents. AB asserted that these individuals were simply prohibited from using surrogacy as a means to have a child[138] and that this was an infringement of their rights.[139] The purpose of her constitutional challenge was to request the court to strike down the 'Genetic Link Requirement'[140] in her own interests,[141] on behalf of all prospective commissioning parents[142] and in the public interest.[143]

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[130] Ibid.
[131] Ibid para 12.
[132] Ibid para 14.
[133] Ibid para 13.
[134] Ibid para 14.
[135] Ibid para 28.
[136] Ibid para 27.
[137] Ibid.
[138] Ibid para 29.
[139] Ibid para 30.
[140] Ibid para 34.
[141] Ibid 38.1; Constitution of the Republic of South Africa 1996, s 38(a).
[142] Ibid 38.2; Constitution of the Republic of South Africa 1996, s 38(c).
[143] Ibid 38.3; Constitution of the Republic of South Africa 1996, s 38(d).

The second applicant was the Surrogacy Advisory Group ('SAG'), a voluntary association of medical lawyers and individuals experienced in the field of infertility and surrogacy, who volunteer their time to provide free education, advice and support to women considering surrogacy.[144] The SAG joined the proceedings on AB's side and sought to act on behalf of prospective commissioning parents as a class, and the public interest.[145]

The respondent who opposed the application was the Minister of Social Development, cited in her capacity as the Minister in charge of the administration of the Children's Act.[146] The Centre for Child Law ('CCL') joined as amicus curiae. The CCL sided with the Minister.[147]

III EVALUATION OF THE AVAILABLE EVIDENCE

In this section, I evaluate some of the relevant evidence placed before the court relating to the child's best interests. While it is important to understand that section 294 was challenged on several constitutional grounds, the crux of the case centred on 'the best interests of the child' principle as applied to surrogacy agreements.[148]

The applicants, in approaching the topic of 'the child's best interests', appropriately considered the history of section 294 in order to ascertain the relevant context and reasoning behind the decision of the legislature to include it.[149] In essence, the SAG proffered that both the SALC and the Ad Hoc Committee advised against the use of double-donor gametes in the context of surrogacy in the belief that a genetic link between the commissioning parent and the child would 'promote the bond between the child and its commissioning parents'. This in turn would be 'in the best interest of such a child.'[150]

It appears to this end that the SALC and Ad Hoc Committee were firmly of the opinion that a genetic link was integral to securing a strong bond between parents and their children. If this is an accurate assessment of the SALC and the Ad Hoc Committee's reasoning – and I argue that, based on their respective reports,[151] it clearly is – then determining whether their opinion is rooted in reliable evidence, and not merely social beliefs, is critical to determining the legitimacy of the provision. Thaldar, therefore, framed the central legal question as follows:

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[144] Thaldar 'Post-truth jurisprudence' op cit note 48 at 234.
[145] *AB* GP supra note 17 para 13.
[146] Ibid para 14.
[147] Ibid para 15.
[148] Thaldar 'Post-truth jurisprudence' op cit note 48 at 232.
[149] SAG founding affidavit para 40-57 (record 1334–40).
[150] Ibid para 64 (record 1343).
[151] AB op cit note 133.

'*In the context of surrogate motherhood, does the best interests of the child require that the child must be the genetic child of the commissioning parent or parents?*'[152]

In answering this question, I first outline some of the key psychological arguments regarding identity formation and the well-being of children born via surrogacy and/or gamete donation that were relied upon by the applicants. Secondly, I briefly outline the counter-argument presented by the respondents. Thirdly, I evaluate further evidence submitted by the applicants in response. I will assess the validity of the evidence at each stage of the discussion.

(a) Expert opinions submitted by the applicants

First, the most compelling evidence presented by the applicants came in the form of the expert opinion of Prof Golombok of the Centre for Family Research at the University of Cambridge.[153] She led a group conducting pertinent research in the area of new family forms, which is a term used to describe families formed by means of ARTs.[154] At the time, Golombok had over a decade of empirical studies under her research team's belt, the reports of which were published in respected academic journals.[155] She was, therefore, suitably qualified to give the court an expert opinion on the well-being of children born via surrogacy.[156]

The relevant research took the form of a longitudinal study initiated in 2000 with the aim of ascertaining how well new family forms functioned. There was much concern around the adjustment of children conceived by means of ARTs, so the study included surrogacy children and those who had been conceived using donor gametes. At the time of *AB,* the research team had examined children from the age of one to ten. I will discuss her expert opinion as well as two of the group's most relevant studies presented to the court.

A study of seven-year olds, which explored parenting and the adjustment of the children in new family forms, is of particular interest.[157] For the purpose of this study, 30 surrogate families, 31 egg donation families and 35 donor insemination families were recruited, and compared to 53 natural conception families. The researchers found that children conceived through reproductive donation[158] did not differ from naturally conceived children. It was significant, however, that surrogacy children presented with elevated levels of child adjustment

[152] Thaldar 'Post-truth jurisprudence' op cit note 48 at 232.
[153] Golombok expert opinion (record 737–45).
[154] Imrie and Golombok 'Impact of New Family Forms' op cit note 1.
[155] Susan Golombok *Curriculum vitae* (record 746–70).
[156] Ibid; see also Thaldar 'Post-truth jurisprudence' op cit note 48 at 235.
[157] S Golombok, L Blake, P Casey, G Roman, and V Jadva 'Children born through reproductive donation: a longitudinal study of psychological adjustment: Children born through reproductive donation' (2013) 54 *Journal of Child Psychology and Psychiatry* 653–60.
[158] Conception achieved through the use of donated sperm, a donated egg or a donated embryo.

issues. Nevertheless, the authors reiterated that this was not indicative of psychological disorder as these children were still well within the normal range.[159]

The follow-up study, focusing on 42 families formed through surrogacy, was the first study of its kind to present the children's own views about their surrogate birth.[160] These children had been followed from age one; they were ten at the time of the study.[161] Regarding the parent-child relationships and the psychological adjustment of the child, these families were found to be functioning well.[162] The findings further showed that by age ten, most children were positive about their surrogacy birth. The adjustment issues noticed when they were seven ceased to be evident at the age of ten. The authors cautioned, however, that at this age, the children's narratives about surrogacy would likely be influenced by the way it had been explained to them by their parents. They submitted that it was 'essential' to explore how these children felt as they entered adolescence, when issues relating to identity become of prime importance.[163]

While further research was evidently needed, these early findings strongly suggested that surrogacy children and those conceived via donated gametes were well adjusted and had good relationships with their parents. In her expert opinion, Golombok summarised her research as follows:

> 'The absence of a genetic and/or gestational link between parents and their child does not appear to have a negative impact on parent—child relationships or the psychological well-being of mothers, fathers or children.'[164]

Golombok further opined that based on the evidence, '[t]he desire for parenthood appear[ed] to be more important than genetic relatedness for fostering positive family relationships'[165] and concluded that the adjustment of children conceived through donor conception and born via surrogacy may once have been a topic of much speculation; now, however, it could be understood in light of empirical evidence.[166]

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[159] Golombok, Blake, Casey, Roman, and Jadva 'Children born through reproductive donation' op cit note 168 at 657.
[160] Jadva, Blake, Casey, and Golombok 'Surrogacy families 10 years on' op cit note 20 at 3009.
[161] Ibid at 3009.
[162] Ibid at 3013.
[163] Ibid.
[164] Golombok expert opinion para 9.4 (record 743).
[165] Ibid para 9.5 (record 743).
[166] Ibid para 11 (record 744).

The applicants' argument was further supported by Mandy Rodrigues, a Johannesburg-based clinical psychologist specialising in the psychology of infertility.[167] In her expert opinion, Rodrigues asserted that donor conception was a widely accepted practice in South Africa and that several gamete banks and agencies existed.[168] Rodrigues maintained that people strongly preferred using their own gametes, and generally only elected to utilise donor gametes in cases of, for instance, infertility, genetic diseases, or for social reasons, such as being a single woman.[169] She further contended that the decision to make use of donor gametes was taken seriously by prospective parents. As a result, these individuals devoted much time to the selection of a donor, viewing this as a matter of 'great personal importance'.[170] Rodrigues suggested that the careful selection process was perceived as the non-genetic parent's 'constructive contribution'[171] to the conception of the child.[172] In her opinion, donor selection established the 'psychological link' between the prospective parents and their prospective children.[173]

Thaldar, in his analysis of the *AB* case, proffered that the expert opinions of Golombok and Rodrigues complemented each other and addressed the concerns about the parent-child bond – a positive parent-child bond does not require a genetic link. [174] I agree with this assertion. In my opinion, the evidence presented by the applicants sufficiently called into question the views expressed by the SALC and the Ad Hoc Committee. If they were concerned that the absence of a genetic link may undermine the parent-child bond, it was clear from the available evidence that their reservations were unfounded. Positive familial bonds can be successfully forged in families both with *or without* genetic or gestational ties. Furthermore, Rodrigues's evidence underscored the importance prospective parents place on the process of selecting a gamete donor. This process undeniably fostered a 'powerful' and positive bond between the non-genetic parent and prospective child.[175]

In light of these two expert opinions, the argument that the lack of a genetic link was harmful to the formation of positive familial bonds – and was, therefore, not in the child's best interests – had been convincingly challenged by the applicants. It was now up to the Minister and the CCL to counter this argument.

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[167] Rodrigues expert opinion (1) para 1 (record 853).
[168] Ibid para 12 (record 856).
[169] Ibid para 13 (record 856).
[170] Ibid para 14 (record 857).
[171] Thaldar 'Post-truth jurisprudence' op cit note 48 at 236
[172] Rodrigues op cit 178 para 21 (record 860).
[173] Ibid.
[174] Thaldar 'Post-truth jurisprudence' op cit note 33 at 237.
[175] Rodrigues op cit 178 para 21 (record 860).

(a) The respondent's arguments

In order to counter the applicants' argument, the respondents sought to reframe the 'child's best interests' debate in terms of a new narrative: 'a child's right to know his or her genetic origins'.[176] In support of this position, the Minister offered the expert opinion of Prof van Bogaert, an ethicist based at the University of Limpopo.[177] The Minister, moreover, sought to cast doubt on the expert opinion of Golombok.[178]

First, in the High Court – and in support of the reframed narrative – the Minister relied exclusively on the evidence of van Bogaert, who contended that it was immoral to 'intentionally create children who will not know both of their genetic parents'[179] since, she opined, knowing one's genetic origins was critical for a child's identity formation and self-respect.[180] In line with this argument, the retention of section 294 ensured that children born via surrogacy would know at least one of their genetic parents,[181] thereby safeguarding their rights and protecting their interests.[182]

However, the link between not knowing one's genetic parents and psychological harm surely requires credible evidence from the sphere of psychology.[183] Van Bogaert's assertions as an ethicist clearly dipped into the realm of psychology; yet, she was not suitably qualified to offer such an expert opinion.[184] Conceding that the evidence submitted by van Bogaert was flawed, the Minister abandoned this line of reasoning in the Constitutional Court, offering no further evidence in support of these claims.[185]

Unlike the Minister, the CCL in its submissions continued to argue that children had the right to know their genetic parents, contending that 'children who are aware that they are donor conceived suffer psychologically when they are denied information about their origins and identity'.[186] In support of their claim, the CCL relied on two academic sources. The first

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[176] Thaldar 'Post-truth jurisprudence' op cit note 48 at 237.
[177] Van Bogaert supplementary affidavit (record 1452–529).
[178] Minister's answering affidavit op cit note 25 para 8.31 (record 1435).
[179] *AB* ZACC supra note 16 para 200.
[180] Minister's answering affidavit op cit note 25 para 1.13.3 (record 1418) and para 1.14.1 (record 1419).
[181] *AB* ZACC 16 supra note 68 para 294.
[182] *AB* GP supra note 17 para 62 (i). The respondent identified nine purported purposes of the genetic link requirement in support of its view that a rational nexus existed between the purpose and the genetic link requirement. One purpose was the best interests of the child.
[183] See SAG op cit note 160 paras 71–72 (record 1570–1571).
[184] Ibid; see also Pretorius expert opinion 16 (record 2449). Prof H Pretorius, the Vice Chairperson of the Professional Board for Psychology of the Health Professions Council of South Africa (HPCSA) at the time, was called upon by the applicants to assess whether Prof Van Bogaert was suitably qualified to give an opinion in psychological. To this end she confirmed: 'Prof Van Bogaert is not qualified to express expert opinions in the field of psychology.'
[185] *AB* ZACC supra note 16 para 202.
[186] Ibid para 203.

was an article by L Frith, who concluded that '[a]t present, perhaps all that we can say is that it is not possible to reach any definite conclusions about the effects of secrecy and anonymity on the [psychological] welfare of donor offspring'.[187] The other, an article by M Cowden, argued in favour of disclosing identifying information to donor-conceived children, but the article was premised on the assumption that the child had already been born.[188] Neither of these articles provided conclusive, or simply relevant, backing for the assertions made by the CCL.[189] Moreover, it would be difficult to argue that these two sources were, in fact, *evidence*.[190] Without an expert opinion, academic articles merely fall into the realm of argument, and cannot be relied upon as *proof* of any particular position.[191] Nevertheless, the crux of CCL's argument could be summed up as follows:

> '…the fact that South African laws have not yet formalized the realization of the right to know [the identity of] one's genetic parents, is one of the reasons why section 294 is constitutionally defensible. The requirement that a child should be able to know the identity of at least one parent provides a measure of protection of the child's right to know his or her identity.'[192]

Secondly, as to the critique of Golombok's expert opinion, the Minister contended that Golombok's research group was the only group carrying out this type of research. She asserted, therefore, that no other studies corroborated their findings.[193] In addition, the Minister argued that their studies comprised of surrogacy children up to the age of twelve, which meant future studies that included surrogacy children in their teenage years, might contradict their current findings.[194] The SAG would need to answer these concerns convincingly in order to maintain the integrity of their main expert.

How would the applicants answer the new 'child's best interests' narrative and successfully defend their most important expert?

(b) Further submissions by the applicants

First, in response to the child's 'right to know' his or her 'genetic origins', the SAG emphasized that there was no legal authority for the purported 'right' and, moreover, regarded such a 'right'

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[187] L Frith 'Gamete donation and anonymity: The ethical legal debate' (2001) 16 *Human Reproduction* 821, quoted in *AB* supra note 68 para 203.
[188] M Cowden '"No Harm, No Foul": A Child's Right to Know their Genetic Parents' (2012) 26(1) *International Journal of Law, Policy and the Family* 102, in *AB* supra note 68 para 204.
[189] *AB* ZACC supra note 16 paras 203–4.
[190] Thaldar 'Post-truth jurisprudence' op cit note 48 at 243.
[191] Ibid. See Thaldar's application of Rule 31(1) of the Rules of the Constitutional Court in this regard.
[192] *AB* ZACC supra note 16 para 205.
[193] Minister's answering affidavit op cit note 25 para 8.30 (record 1432–4).
[194] Ibid.

to be contrary to the donor anonymity scheme of both the Children's Act and the National Health Act 61 of 2003.[195]

Secondly, in defence of the reliability of Golombok and her group's research findings, Dr Jadva, an expert in new family forms at Cambridge University and a colleague of Golombok, was called upon by the SAG to offer her expert opinion.[196] Jadva contended that Golombok was a pioneer and a respected leader in the area of new family forms.[197] Jadva examined Golombok's and her group's psychological research findings, alongside additional empirical studies conducted by other research groups.[198] Notably, these studies read together included children up to the age of eighteen.[199] Jadva concluded that not knowing one's genetic origins did not appear likely to impact negatively on one's psychological well-being.[200] To this end, she asserted 'that biological relatedness between parents and children – whether genetic or gestational — is not essential for positive child adjustment'.[201] Furthermore, Jadva remarked that identity formation is a gradual process that occurs throughout childhood and particularly in adolescence.[202] A variety of factors in a child's environment have an impact on identity formation – some factors complicating the process more than others. Nevertheless, these factors 'do not necessarily diminish a child's psychological well-being.'[203] This, Jadva opined, appeared to be the case with being anonymous donor-conceived; although a child not knowing his or her genetic origins may complicate identity formation, it is unlikely to cause psychological harm to a child.[204] Consequently, children's best interests cannot be said to require knowledge of their genetic origins.

The opinion of Jadva was obtained to counter the contentions of both the Minister and the CCL. It presented Golombok as a credible expert in the field of psychology – principally respected as a pioneer in the requisite sub-field of child adjustment in new family forms – and confirmed that her research findings were in fact corroborated by studies conducted by other research groups. Secondly, it sought to undermine the defendants' assertion that the knowledge of the child's genetic origin was critical to the psychological well-being of the child. The

[195] See SAG op cit note 160 paras 303-5 (record 1648-9). The SAG submits: 'Our law explicitly provides that while donor-conceived children have the right to access medical and other information about their gamete donors, the identity of gamete donors may not be disclosed.'
[196] Jadva expert opinion para 3 (record 1796).
[197] Ibid para 66 (record 1818-9); para 78 (record 1823).
[198] Ibid paras 68-9 (record 1820-1).
[199] Ibid paras 20–28 (record 1804–7).
[200] Ibid para 27 (record 1807).
[201] Ibid para 68 (record 1820).
[202] Ibid para 29 (record 1808).
[203] Ibid.
[204] Ibid.

applicants appeared to have challenged the new narrative persuasively – effectively calling into question the rationality of section 294. Still, did the evidence go far enough to convince the court?

IV THE COURT'S FINDINGS

(a) The High Court

On evaluating the opposing arguments, the Pretoria High Court per Basson J determined[205] that there was no convincing evidence before it which supported the claim that it was in a child's best interests to know the identity of his or her genetic parents.[206] Moreover, the High Court concluded that there was no evidence that the lack of a genetic link between a parent and child in the context of surrogacy would have a damaging effect on the child's psychological well-being.[207] The High Court asserted that at its core, the issue was how one defined 'a family'. To this end, Basson J remarked:

> 'A family cannot be defined with reference to the question whether a genetic link between the parent and the child exists. More importantly, our society does not regard a family consisting of an adopted child or adopted children as less valuable or less equal than a family where children are the natural or genetically linked children of the parents. A family can therefore not be defined by genetic lineage.'[208]

Accordingly, the High Court held that 'the child's best interests' in the context of surrogacy did not require a child to be conceived from the gamete(s) of the commissioning parent(s).[209] Basson J opined that the legislature was obliged to redefine the traditional view of the family in light of the advances made in fertility and reproductive technology.[210] Since there was found to be no rational nexus between section 294 and the best interests of the child,[211] the High Court held that section 294 be stuck down.[212]

Thus, the applicants had convincingly won the battle of section 294 – but the war was not yet over. The SAG applied to the Constitutional Court for confirmation of the High Court judgment, and the Minister, appealing against the judgement, now had a second bite at the

[205] *AB* GP supra note 17.
[206] Ibid para 86.
[207] Ibid para 84.
[208] Ibid para 46.
[209] Ibid para 87.
[210] Ibid para 46.
[211] Ibid para 87.
[212] Ibid para 100–6.

apple. To this end, the Minister sought to argue that the High Court had overemphasised the interests of the parents and should instead have focused more on the best interests of the child. The CCL persisted in advancing the argument that children had the right to know their genetic parents.

(b) The Constitutional Court

The application was heard before eleven justices on 1 March 2016.[213] The Constitutional Court was divided and, consequently, delivered two judgments. The minority judgment was written by Khampepe J (three justices concurring); this was followed by the majority judgment, written by Nkabinde J (six justices concurring). I begin with the minority judgment.

The court analyzed the evidence in support of the claim that 'psychological harm' would result in children who did not know their genetic parents. The minority noted that the Minister had ceased to rely on van Bogaert's opinion – which was the Minister's only support for this argument. During proceedings, the counsel for the Minister admitted that van Bogaert's opinion was blatantly flawed, and, that as an expert of ethics, she was not qualified to offer an expert opinion in psychology.[214] The minority asserted that, even if it were to consider van Bogaert's views from a strictly ethical standpoint, it would still be inappropriate in a multicultural society 'to adopt a single moral view'.[215] The minority then examined the only remaining sources in support of the claim of psychological harm – which were the two academic articles submitted by the CCL. The court concluded that neither of these articles provided the necessary support.[216] Consequently, the minority held that neither the Minister nor the CCL had persuasively proved psychological harm. By all accounts, section 294 appeared unreasonable. The minority, to this end, remarked:

> 'Section 294 privileges one factor to the exclusion of all others. For example, a child that could be brought into a loving and stable family environment that would enable her physical, intellectual, emotional, social and cultural development would be prevented from being born purely because she could never know the identity of her genetic parents.'[217]

[213] *AB* ZACC supra note 16.
[214] Ibid para 202.
[215] Ibid.
[216] *AB* ZACC supra note 16 paras 203-4; Frith op cit note 198; Cowden op cit note 199.
[217] *AB* ZACC supra note 16 para 196.

The minority consequently found that section 294 unreasonably and unjustifiably infringed on the rights to psychological integrity and equality of prospective commissioning parents and held that the provision should, therefore, be stuck down.[218]

The majority, however, disagreed. In her analysis of the evidence, Nkabinde J remarked:

> 'I will not place reliance on the divergent opinions of the experts in deciding the issues because this Court, as the ultimate authority on the questions regarding the validity of legislation and violation of rights, should arrive at its own independent evaluation.'[219]

Relying on the judgment in *MEC for Education: Kwazulu-Natal and Others v Pillay,*[220] the majority stressed that courts did not depend on the opinion or 'credible data' of experts when determining the constitutionality of a provision.[221] In accordance with this position, the majority rejected the High Court's demand for 'credible data' that would support the necessity of a genetic link in the context of surrogacy.[222] The majority asserted that the High Court's approach erroneously elevated the importance of empirical research above the purposive construction of the impugned provision, in establishing a legitimate government purpose. [223]

In agreement with the Minister, the majority held that the High Court had overemphasized the interests of the commissioning parents and, hence, overlooked the purpose of section 294 and the best interests of children.[224] To this end, the majority opined that section 294 irrefutably functioned to establish a genetic link between the commissioning parent(s) and the resultant child – and this, unquestionably, served a legitimate government purpose[225] of creating a bond between the resultant child and the commissioning parent(s).[226]

In support of the this view, the court relied on an African adage, '*ngwana ga se wa ga ka otla ke wa ga katsala*', which was loosely translated as 'a child belongs not to the one who provides but to the one who gives birth to the child.'[227] The court continued: 'Hence clarity regarding the origin of a child is important to the self-identity and self-respect of the child.'[228]

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[218] Ibid para 214.
[219] Ibid para 269.
[220] 2008 (1) SA 474 (CC)
[221] *AB* ZACC supra note 16 para 291.
[222] Ibid para 291.
[223] Ibid.
[224] Ibid para 293.
[225] Ibid para 293.
[226] Ibid para 287.
[227] Ibid para 294.
[228] Ibid.

The rational nexus was thereby established, and the court consequently found in favour of the Minister.[229]

The majority judgment landed a crushing blow to AB's hopes of becoming a parent. Moreover, not only was this a deeply disappointing end for AB, but its reverberations are keenly felt by all who long to become parents via surrogacy, but regrettably are incapable of contributing a gamete to the conception of the much hoped-for child. If it were indeed shown that section 294 successfully served the best interests of children, more credence could be given to the outcome. There are, however, serious reservations about the role section 294 plays in advancing a child's best interests – and with good reason.

When evaluating the majority judgment against the evidence that was presented, it is difficult to accept the court's reasoning. First, its assertion that the court would not rely on what it termed the 'divergent opinions' of experts is baffling given that the *only* expert opinions relied upon in the Constitutional Court were the ones presented by the applicants. There was no divergence in their expert opinions; rather, they *converged* into a single narrative, that donor-conceived children suffer no adverse psychological effects. No opposing expert opinion was proffered to the Constitutional Court which challenged this evidence.

Secondly, the majority's rather dubious pronouncement that the court does not require 'credible data' in order to evaluate the constitutionality of a provision – but rather must do its own 'independent evaluation' – is problematic. While it is readily recognised that the Constitutional Court is most certainly the ultimate authority on the validity of legislation and the violation of rights, an 'independent evaluation does not mean wilful ignorance of the evidence.'[230] In fact, the court in *Pillay* – which was ironically relied upon by the majority in its rejection of the evidence – made this very point: '[T]his Court must consider all the relevant evidence.'[231] To this end, Thaldar argues that the purposive construction of an impugned provision should be informed by 'credible real-world data' in order to answer the constitutional question of rationality. The question is whether 'the impugned provision *in fact* serve[s] the legitimate government purpose that it is supposed to serve'.[232]

Thirdly, although the majority categorically rejected all the empirical evidence, it remarkably saw fit to rely upon an African adage to justify its position. The adage itself is problematic in a number of key respects. First, it is not clear how it supports the claim that a

[229] Ibid 330.
[230] Thaldar 'Post-truth jurisprudence' op cit note 48 at 250.
[231] *Pillay* supra note 231 para 88.
[232] Thaldar 'Post-truth jurisprudence' op cit note 48 at 250.

child's origin is important to the 'self-identity and self-respect of the child' in the context of surrogacy. If 'the child belongs […] to the one who gives birth to the child',[233] then this adage calls into question the legitimacy of surrogacy itself, rather than simply the genetic origins of the child.[234] Furthermore, the adage is rooted in a particular culture – and not one ascribed to by all South Africans.[235] Besides, one cannot assume that all persons of a particular culture or religion ascribe to all the tenets of that culture or religion. Moreover, it can be argued that the cultural values, on which this adage is premised, are discriminatory and the law 'should not give effect to prejudice'.[236] Thus, a traditional proverb cannot be regarded as a suitable justification in a court of law seeking to uphold Constitutional principles in a multicultural society.[237]

Thaldar, in his analysis of *AB,* opined:

> 'It is apparent that the legal battle for the meaning of the best interests of the child in the context of s 294 should have been decisively won by the applicants – had the law been applied. […] What transpired in *AB* was not the rule of law but that of judges' personal beliefs regarding the importance of blood-ties, with a transparent veneer of human-rights language.'[238]

V CONCLUSION

This chapter reflected on the evidence presented in *AB*, and on the somewhat surprising outcome: the majority finding in favour of the retention of section 294. It appears that the hidden assumptions of the majority – such as beliefs about blood-ties – were too deeply imbedded to be uprooted by the research at the time. The best available evidence seemed overwhelmingly to suggest that donor-conceived children suffered no psychological harm; however, it could not *conclusively* show that this remained true once children reached adolescence. It is apparent that in order to upend such clearly entrenched beliefs, the evidence needs to be undeniable. With the inclusion of adolescence in the latest research, what was merely assumed in 2015, can now definitively be answered in 2020. In the next chapter, I

[233] *AB* ZACC supra note 18 para 294.
[234] Thaldar 'Post-truth jurisprudence' op cit note 48 at 250–1.
[235] D Thaldar 'The constitution as an instrument of prejudice : a critique of AB v Minister of Social Development' (2019) 9 *Constitutional Court Review* 343–61.
[236] Ibid at 360-1.
[237] See Thaldar 'Post-truth jurisprudence' op cit note 48 at 251; Thaldar 'The constitution as an instrument of prejudice' op cit 246 at 356–7.
[238] Thaldar 'Post-truth jurisprudence' op cit note 48 at 253.

investigate the premise of the majority's position more fully and, by introducing the latest psychological findings, assess whether the court would have decided *AB* differently in 2020.

CHAPTER FOUR

THE LATEST EVIDENCE EXPLORED

I INTRODUCTION

With the advent and advancement of ARTs, there has been much speculation regarding the adjustment of children born via surrogacy and those who are conceived using donor gametes.[239] It is a long-held assumption that genetic relatedness in the family is an important part of ensuring secure parent-child attachment as well as the healthy development of the child's identity.[240] However, compelling evidence was placed before the court in *AB*,[241] which challenged this long-standing view.

The previous chapter examined the High Court judgment and the Constitutional Court majority and minority judgments, and how the understanding of 'the child's best interests' took centre stage. As has been argued by Thaldar, when one considers the evidence before the Court, the interpretation of the best interests of the child in cases of double-donor surrogacy should have been 'clear-cut'.[242] However, the majority saw fit to reject the evidence, begging the question: 'What ideas regarding the best interests of the child were so deeply ingrained in the judicial minds of those deciding the *AB* case so as to mentally block out the evidence?'[243] From the analysis conducted in the previous chapter, it is clear that the majority of the Constitutional Court excluded the empirical evidence, and instead chose to rely upon cultural values in order to determine the case.

In this chapter, I begin by unearthing the underlying assumptions which placed unrivalled importance on genetic relatedness in familial bonds. Do these entrenched beliefs hold up to the scrutiny of the Constitution and empirical evidence? I unpack the latest evidence regarding the adjustment of adolescents in new family forms and assess whether it sufficiently calls into question the majority's reasoning. Is the current evidence enough to tip the scales in favour of the removal of section 294 of the Children's Act?

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[239] Imrie and Golombok 'Impact of New Family Forms' op cit note 1 at 13.2.
[240] Meyerson op cit note 4.
[241] *AB* GP supra note 17; ZACC supra note 16.
[242] Thaldar 'The Constitution as an instrument of prejudice' op cit note 246 at 346.
[243] Ibid.

II EXPOSING THE MAJORITY'S UNDERLYING ASSUMPTIONS

(a) Background

To recapitulate the majority's reasoning in *AB*,[244] the Court found that the purpose of section 294 was to protect the identity needs of children. It held that this was a legitimate government purpose since it functioned to protect the child's best interests,[245] as knowledge of one's genetic ancestry is essential to one's self-worth and self-respect.[246] Section 294 guarantees that the child will be related to at least one of the commissioning parents, thus securing knowledge of the child's genetic origins. The Court, consequently, ruled in favour of retaining section 294 on the grounds that it protected the best interests of the child[247] by preserving the child's right to dignity, which unquestionably would be violated if the child did not know his or her genetic origins.[248]

It is worth mentioning that the Court's reasoning has been severely criticised on numerous grounds, including: the Court flouted the rules of evidence;[249] it failed to uphold the rule of law;[250] it grounded its opinion in personal beliefs and preferences;[251] the Court overlooked constitutional issues including the right to equality as guaranteed in section 9 of the Constitution;[252] the Court misidentified the purpose of section 294;[253] and the Court was too hasty to attribute the dilemma faced by conception infertile parents to medical conditions and personal preferences (such as being single) rather than legal discrimination.[254]

Consequently, there has been speculation as to what truly motivated the Court in its decision to retain section 294. I focus on two explanations proffered by Thaldar and Meyerson, respectively. Although there are conceivably other motivations, the two selected are arguably the most persuasive and deliver the toughest societal hurdles for the current evidence to overcome. To determine conclusively whether the Court would have ruled differently in 2020 in light of new research findings, it is critical to test the currently available evidence against its

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[244] *AB* ZACC supra note 16.
[245] Ibid para 293.
[246] Ibid para 294.
[247] Ibid para 293.
[248] Ibid para 294.
[249] Thaldar 'Post-truth jurisprudence' op cit note 48.
[250] Ibid.
[251] Ibid.
[252] Meyerson op cit note 4.
[253] Ibid.
[254] Ibid.

strongest opponents – specifically, the significance of blood-ties in traditional cultures, and the unyielding belief in the superiority of biologically related families.

(b) The major motivations of the majority

First, Thaldar argued that the Court applied a 'tradition-based argument' when deciding the *AB* case. To this end, Thaldar explained that for traditional South African culture, belonging to the clan is foundational to the child's identity; it is the child's social and spiritual roots.[255] Many black South Africans still hold tightly to this traditional construct of kinship based on family blood ties; where one's genetic ancestry is critical to one's identity.[256] In situations of anonymous double-donor gametes, it would be impossible to ascertain the clan of the child since the genetic origins would be unknown, thus denying the child a foundational element of his or her identity.[257] If one applies this belief to determining whether surrogacy should be allowed in the case of anonymous double-donor gametes, it is not difficult to see how the Court could have found in favour of the Minister and CCL – for it follows that if anonymous donor-conceived children are likely to feel that they lack a foundational element of their identity, then their dignity will certainly be violated as well. It, therefore, stands to reason that section 294 protects the best interests of children and defends their constitutional right to dignity, since it functions to avoid this undesirable and harmful situation.

Thaldar, however, rejects the 'tradition-based argument' on a number of grounds, the most compelling being that 'the law should not give effect to prejudice'.[258] He contends that the tradition-based argument, which views belonging to a clan as foundational to one's identity,[259] 'constitutes *prejudice* against children based on their *social origins.*'[260] Because 'social origins' is a listed ground in section 9(3) of the Constitution,[261] the state is prohibited from unfairly discriminating, whether directly or indirectly, against a person on this basis.[262] Social origins certainly includes clan or family membership. It follows, therefore, that since

[255] Thaldar 'The Constitution as an instrument of prejudice' op cit note 246 at 351.
[256] Ibid at 353.
[257] Ibid at 359.
[258] Ibid at 358.
[259] Ibid.
[260] Ibid.
[261] Ibid at 359.
[262] Regarding discrimination on a listed ground, section 9(4) of the Constitution provides: 'No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.' Furthermore, section 9(5) provides that discrimination on a listed ground is presumptively unfair; the onus is on the state to prove otherwise: 'Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

the law 'should not give effect to such prejudice', the tradition-based argument is 'untenable in our constitutional dispensation'.[263]

Meyerson, on the other hand, argues that the real purpose of section 294 was not to serve children's identity needs – for other restrictions and permissions in the Children's Act challenge that construction as a matter of statutory interpretation[264] – rather it was enacted to 'impose a contested moral view about the inherent superiority of biological families'.[265] In support of this assertion, Meyerson argued:

> 'If the legislature had really sought to protect this putative interest, it would not have allowed commissioning parents to contribute only one gamete to conception, while simultaneously preventing the child from discovering the identity of the donor of the other gamete, and even permitting the existence of the donor to be kept secret, thereby making it possible for children born of surrogacy to be deceived about their genetic origins and to construct a spurious sense of identity.'[266]

Meyerson opines that section 294 works to prevent the deliberate creation of families deemed 'second-class' and morally inferior,[267] by entrenching a particular family form for no reason other than its 'intrinsic' value.[268] This equates to 'siding with one faction or group in society' which is a constitutionally impermissible purpose and is in breach of the right to equality, guaranteed in section 9(1) of the Constitution.[269] Meyerson, consequently, describes the Court's understanding of the constitutional right to equality as 'unattractive'.[270]

While the Court's reasoning has come under intense scrutiny in academic literature, the majority's blatant rejection of empirical evidence and reliance on traditional viewpoints certainly conforms to many other legal systems, which are equally suspicious of new family forms. As explained by Golombok, '[i]t is often assumed, and in many countries written into law, that the "traditional" model remains the optimal environment for healthy child development.'[271]

The underlying assumptions of what constitutes 'the optimal environment for healthy child development' clearly swayed the Court in favour of retaining section 294, despite

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[263] Thaldar 'The Constitution as an instrument of prejudice' op cit note 246 at 360.
[264] Meyerson op cit note 4 at 332.
[265] Ibid at 324
[266] Ibid at 331.
[267] Ibid at 337.
[268] Ibid at 341.
[269] Ibid.
[270] Ibid.
[271] Imrie and Golombok 'Impact of New Family Forms' op cit note 1.

convincing evidence to the contrary. What is more, the majority's instinct to root its judgment in dominant traditional views – whether based on cultural values, or the superiority of biological families – was possibly understandable (albeit disappointing) given the lack of explicit and verifiable evidence detailing the adjustment of *adolescents* born via double-donor surrogacy. Adolescence is, undeniably, the key developmental stage regarding identity formation.[272] Conceivably, if it were conclusively shown that children born via surrogacy and/or conceived through donor gametes grew to be well adjusted adolescents, this would surely have challenged the prevailing attitudes of the majority. Recognising the majority's hidden motivations assists in determining whether the latest evidence truly carries more weight or holds greater significance. Would the majority, presented with the evidence available in 2020, be induced to make a different decision?

III EXPLORING THE LATEST EVIDENCE

(a) An overview of the findings up to 2015

In order to answer the question of whether children conceived through donor gametes and/or born via surrogacy are well adjusted, one needs to turn to the realm of psychology. Within this framework, children's psychological adjustment is associated with the quality of the children's relationships with their parents.[273] Warmth, sensitivity and acceptance are all associated with positive child adjustment.[274] Conversely, conflict, hostility and rejection are linked to more negative outcomes for children.[275]

The only longitudinal study to observe parenting and child development in families formed through surrogacy was conducted by the Cambridge group.[276] Researchers recruited a representative sample of surrogacy families in the United Kingdom with a baby born between 2000 and 2002, and followed the families over 14 years.[277] In short, the study, which collected data from the families at six critical time points,[278] was part of a larger longitudinal study of

[272] Jadva, Blake, Casey, and Golombok 'Surrogacy families 10 years on' op cit note 20 at 3009.
[273] Golombok, Ilioi, Blake, Roman, and Jadva 'A longitudinal study of families formed through reproductive donation' op cit note 6 at 1967.
[274] Ibid.
[275] Ibid.
[276] Imrie and Golombok, 'Impact of New Family Forms' op cit note 1 at 13.10.
[277] Ibid.
[278] Golombok, Ilioi, Blake, Roman, and Jadva 'A longitudinal study of families formed through reproductive donation' op cit 6 at 1967. The six stages of the study were conducted when children reached ages one, two, three, seven, ten, and, lastly, fourteen.

reproductive donation[279] that sought to investigate the adjustment of children in new family forms. In order to appreciate the significance of the new research results, it is useful to first briefly contextualise the findings in light of the study as a whole.

The study produced some unexpected findings. First, surrogacy parents displayed lower levels of parenting stress and depression, as well as more positive parent-infant relationship quality than in the 'traditional' conception comparison group during the child's infancy.[280] Furthermore, surrogacy mothers showed more positive mother-infant relationships, and surrogacy fathers better psychological well-being, than the 'traditional' comparison group.[281] Equally, sperm and egg donation families were found to exhibit more positive parent-child relationships and higher levels of psychological adjustment in the preschool years than in the 'traditional' comparison group.[282]

Regarding psychological adjustment, surrogacy children in early childhood did not differ from children who had been naturally conceived.[283] However, during middle childhood, surrogacy children at age seven showed higher levels of adjustment problems than gamete donation families, though still within the normal range, but this difference was no longer present at age ten.[284] In addition, it was found that sperm and egg donation families continued to exhibit good family functioning, and revealed no differences between gamete donation families and the 'traditional' comparison group – neither in child adjustment, nor mother-child[285] and father-child relationship quality.[286] Interviews with children in middle childhood who had been told about their method of conception established that most children had positive

[279] Imrie and Golombok 'Impact of New Family Forms' op cit note 1 at 13.8, see fn 4.
[280] S Golombok, C Murray, V Jadva, F MacCallum, E Lycett 'Families created through surrogacy arrangements: parent-child relationships in the 1st year of life' (2004b) *Dev. Psychol.* 40(3):400–11.
[281] S Golombok, F MacCallum, C Murray, E Lycett, and V Jadva 'Surrogacy families: parental functioning, parent-child relationships and children's psychological development at age 2' (2006) 47 *Journal of Child Psychology and Psychiatry* 213–22.
[282] S Golombok, E Lycett, F MacCallum, V Jadva, C Murray 'Parenting infants conceived by gamete donation' (2004a) *Journal of Family Psychology* 18(3):443–52; S Golombok, V Jadva, E Lycett, C Murray, F MacCallum 'Families created by gamete donation: follow-up at age 2' (2005) *Human Reproduction* 20(1):286–93;
S Golombok, C Murray, V Jadva, E Lycett, F MacCallum, J Rust 2006b. 'Non-genetic and non-gestational parenthood: consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at age 3' (2006b) *Human Reproduction* 21(7):1918–24.
[283] Golombok, MacCallum, Murray, Lycett, and Jadva 'Surrogacy families' op cit note 292.
[284] S Golombok, L Blake, P Casey, G Roman and V Jadva 'Children born through reproductive donation: a longitudinal study of psychological adjustment' (2013) 54 *Journal of Child Psychology and Psychiatry* 653–60.
[285] Ibid; S Golombok, J Readings, L Blake, P Casey, L Mellish, A Marks and V Jadva 'Children conceived by gamete donation: psychological adjustment and mother-child relationships at age 7' (2011) *Journal of Family Psychology* 25(2):230–39
[286] Imrie and Golombok 'Impact of New Family Forms' op cit note 1 at 13.8

feelings about their donor conception.[287] Notably, children born through gamete donation reported affectionate and close relationships with their parents.[288]

(b) New evidence – adolescent adjustment in new family forms

This sets the scene for the next phase of the study – *adolescence*. Perhaps this research will finally provide the conclusive evidence necessary to satisfy the Court in *AB*. The researchers, though, were not convinced that the previous positive findings would be repeated once children of assisted reproduction reached adolescence. This was based on previous studies of adoption, where it has been found that the transition into adolescence presents particular challenges for adopted children – especially regarding the development of 'a secure sense of identity'.[289] It was, therefore, suggested that this issue may equally be evident in children of assisted reproduction lacking a genetic and/or gestational link to their parents.[290] They hypothesised that 'parenting issues would become more marked in surrogacy than in gamete donation families, and in egg donation than in donor insemination families.'[291] Should this be the case, it might negatively impact the child's identity development, psychological adjustment, as well as relationships with their parents.[292]

At its sixth phase, the longitudinal study included 87 families with a child born through reproductive donation – comprising of 32 donor insemination families, 27 egg donation families, and 28 surrogacy families. The comparison group was made up of 54 'traditional' families with naturally conceived children.[293] The families were contacted as close as possible to the child's fourteenth birthday.[294]

The Cambridge group set out to answer a number of relevant questions pertaining to new family forms. First, regarding family functioning, the group investigated how families formed through egg donation, donor insemination and surrogacy fared as compared to 'traditional' families. The research suggested that these families did not differ from natural conception families[295] and, moreover, displayed positive mother-adolescent relationships and

[287] Ibid.
[288] Ibid.
[289] Golombok, Ilioi, Blake, Roman, and Jadva 'A longitudinal study of families formed through reproductive donation' op cit note 6 at 1967.
[290] Ibid.
[291] Ibid at 1968.
[292] Ibid.
[293] Ibid.
[294] Ibid.
[295] Ibid at 1973-4.

well-adjusted adolescents.[296] Interestingly, the mothers in surrogacy families particularly showed less negative parenting and reported greater acceptance of their adolescent children and fewer problems in family relationships as a whole.[297] The researchers suggested that a possible reason for this finding was that these mothers were highly motivated to have children: 'As surrogacy is not something that most prospective parents would contemplate even when faced with infertility, it is perhaps not surprising that their strong desire for a child translates into more positive parenting.'[298]

It appeared, however, that less positive relationships existed between mothers and adolescents in egg donation families as compared to those of donor insemination families – this both in terms of mothers' acceptance of their adolescents and the functioning of the family as a whole.[299] Nevertheless, it is important to note that the scores for both mothers and children in egg donation families were still indicative of high levels of maternal acceptance and family functioning;[300] egg donation families simply showed *less* positive scores.[301]

Furthermore, there were no differences observed between the various family types regarding the prevalence of emotional or behaviour problems in adolescents, nor were there differences in adolescent well-being or self-esteem.[302] In fact, the adolescents all obtained scores that reflected high levels of psychological adjustment. To add greater weight to these findings, the ratings of the interview transcripts were verified by a child psychiatrist who was unaware of the family type; her scores corroborated these findings.[303]

Overall, the study confirmed that children born through egg donation, donor insemination and surrogacy did not exhibit any raised levels of mother-adolescent relationship difficulties or adolescent adjustment problems as compared to natural conception families.[304] Moreover, while the absence of a genetic link between mothers and their children was shown to be less positive, it was not found to have an adverse effect on the quality of the mother-child relationships.[305]

Secondly, the study sought to ascertain whether children felt distressed about the circumstances of their conception or birth when they reached adolescence, as well as what they

[296] Ibid at 1974.
[297] Ibid.
[298] Ibid.
[299] Ibid.
[300] Ibid.
[301] Ibid.
[302] Ibid.
[303] Ibid.
[304] Ibid.
[305] Ibid at 1975.

thought and felt about the surrogate or donor involved.[306] Notably, the study was the first to have asked adolescents conceived through different types of reproductive donation directly for their views.[307] The researchers established that the majority of the adolescents were indifferent about their conception, and the remainder were either interested in their donor or surrogate, or enjoyed positive relations with their surrogate.[308] Most importantly, not one of the adolescents was distressed about his or her conception or birth.[309] In fact, while some felt ambivalent, others were particularly positive about their conception. The researchers commented that most of the adolescents had been told about their conception before the age of seven and that this may have played a role in their positive outlook.[310] The researchers therefore concluded:

> 'Although there has been much concern about how children conceived using reproductive donation would feel about their origins as they grow older, the adolescents in this study mainly reported being unconcerned about their conception. The fact that none of the adolescents conceived through any of the types of reproductive donation were found to feel distressed about their conception is of considerable importance given such longstanding concerns.'[311]

Consequently, the group sought to answer whether the age at which a child was told the nature of his or her conception had a bearing on the child's well-being. The findings, however, showed that there was no difference in psychological well-being or the quality of family relationships between those who were unaware of their biological origins, were naturally conceived, or were told of the circumstances of their birth at any age.[312] Still, higher levels of psychological well-being were found in adolescents who had been told at a younger age – specifically where parents started the process before the age of seven.[313] However, regardless of the age of disclosure, low levels of emotional and behaviour problems existed,[314] though earlier disclosure was associated with adolescents having a *more* positive perception of family relationships. This, in turn, was associated with higher levels of adolescent well-being.[315]

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[306] Zadeh, Ilioi, Jadva, Golombok 'The perspectives of adolescents conceived using surrogacy, egg or sperm donation' (2018) at 1100.
[307] Ibid.
[308] Ibid at 1104.
[309] Ibid.
[310] Ibid.
[311] Ibid at 1104-5.
[312] Ibid at 1105.
[313] Ibid.
[314] Ibid.
[315] Ibid.

Golombok, therefore, concluded that while it has often been assumed that the 'traditional' model is the best environment for healthy child development, 'the developmental science literature on parenting and child development in new family forms has consistently and robustly challenged these assumptions.'[316]

(c) How does the new evidence hold up?

This empirical evidence is consistent with the earlier research findings presented to the court in 2015 – and, remarkably, are in keeping with four decades of research on new family forms. The research read together confirms that 'children in new families are well adjusted and experience positive parenting and warm, supportive parent-child relationships'.[317]

Golombok opined that this finding was not surprising when one considers what the parents had to overcome on their rocky road to parenthood – infertility, legal and/or financial difficulties, and perhaps even censure.[318] It is clear, therefore, that these children were by necessity planned and extremely wanted, and often the long-awaited and much hoped-for child.[319] Notably, even in instances where researchers specifically investigated predictors of child adjustment in new family forms, the findings showed that the same factors were important in both new and 'traditional' families – parenting stress, financial difficulties, supportive co-parenting, and the quality of family interactions.[320] The literature confirms that family processes, such as the quality of family relationships and the family's social environment, mattered considerably more for children's healthy psychological development, than the biological relatedness between parents and children.[321]

This certainly makes for a compelling read – and perhaps puts forward a case that would have been too powerful for the Court in *AB* to ignore, had it had access to it. There are, however, undeniable limitations to this research which must be addressed, especially regarding its dependability and application within the South African context. I focus on three major objections to the research findings.

First, while the researchers investigated families who lacked gestational and/or genetic links between parents and their children, there was no *specific* study of surrogate children conceived via double-donor gametes. While it is notable that families who clearly lacked both

[316] Imrie and Golombok 'Impact of New Family Forms' op cit note 1.
[317] Ibid at 13.13.
[318] Ibid.
[319] Ibid.
[320] Ibid.
[321] Ibid.

a gestational *and* genetic link (such as traditional surrogacy families[322]) were shown to be well-functioning, the research falls short to explicitly examine the situation prevented by section 294 of the Children's Act.

Secondly, empirical studies on new family forms are chiefly conducted with samples in Western and Northern Europe, North America and Australasia, and so the extent to which the research can be generalised to new family forms in other geographical regions, such as South Africa, is possibly limited.[323] It has been established that parent and child-reported experiences of stigma brought upon by family type is associated with poorer child adjustment, albeit in same-sex parent families.[324] Consequently, this raises the concern that children conceived through anonymous double-donor surrogacy may equally experience the negative effects of stigma associated with not knowing their genetic ancestry, especially within cultural groups in South Africa that highly prize blood ties. How applicable is the study in such a context?

Thirdly, there is a possible objection over sampling, from the sample size (arguably small) to sampling bias, in that families who are functioning better (or who perceive less stigma around their family type) are possibly more likely to participate in the research study.[325] In addition, there is a clear lack of sociodemographic diversity in the samples, as they are chiefly composed of white, financially stable, highly educated participants.[326]

Is the evidence robust enough to overcome these objections?

IV CONCLUSION

This chapter exposed the veiled presumptions of the Constitutional majority in *AB,* which seemingly motivated the Court to come to, arguably, a rather surprising conclusion. In order to defeat two formidable foes – namely, the 'tradition-base argument' which prizes 'blood ties', and the belief in the primacy of biologically related families – the evidence must be irrefutable. The most recent and best available empirical research, conducted by the Cambridge group, crucially investigated the adjustment of adolescents in new family forms. In line with the

[322] For traditional or partial surrogacy, there is no gestational link *or* genetic link with the mother; the father, however, is the genetic father as he contributes sperm to the conception.
[323] Imrie and Golombok 'Impact of New Family Forms' op cit note 1 at 13.14.
[324] Ibid.
[325] Ibid.
[326] Ibid; Golombok, Ilioi, Blake, Roman, and Jadva 'A longitudinal study of families formed through reproductive donation' op cit note 6 at 1968: 'There was no difference in the mothers' ethnic group between family types. Ninety-two percent of mothers were White, with the remaining 8% identifying as Black or Asian.'

group's previous findings, the results compellingly showed that, despite the absence of a biological and gestational link to their parents, donor-conceived surrogate children were well-adjusted and had high self-esteem – remarkably, even as they entered the turbulent teenage years. While the addition of this critical stage provides the necessary ammunition to successfully confront the attitudes of the majority, whether the findings are robust enough to overthrow these strongly held views remains to be seen. In the next chapter, I hypothetically travel back to *AB's* courtroom in 2015, armed with this 'future' research, in order to assess whether the court will decide *AB* differently.

CHAPTER FIVE

REVISITING THE *AB* CASE

I INTRODUCTION

In 2015, the Court in *AB* was tasked with assessing the constitutionality of section 294 of the Children's Act, which prohibits a surrogate motherhood agreement from being concluded where the gametes of both commissioning parents are not used or, in the case of a single commissioning parent, where the gamete of that parent is not used. The SAG sought to have section 294 struck down, thereby allowing surrogacy agreements to be concluded in situations of double-donor gametes, where the resultant child would not be biologically related to either commissioning parent. This would demand a monumental shift in how many people view the purpose of surrogacy agreements and 'family'.

The traditional notions of blood ties and the importance of genetic relatedness proved to be a formidable fortress in 2015. The available evidence used to dismantle the presumptions about the importance of genetic ties made for a credible attack on the imposing walls; nevertheless, it was not robust enough to dismantle such long-established cultural precepts. The result: after the SAG delivered an arsenal of evidence in support of its position, the firm foundations of the traditional notions of family were still boldly intact – confidently standing as citadels over what was presumed to be in the 'child's best interests'.

Having completed an exploration of the newly available evidence in the previous chapter, I revisit *AB* freshly armed and ready to supply the Court with these 'future' findings. In this chapter, I assess the probability that the Court will accept the evidence and, if accepted, the likelihood that the Court will reach a different outcome. I conclude with the implications.

II THE MAJORITY REVISITED

(a) The credibility of the new evidence

A significant objection which could be levelled against the evidence of 2015 is that the longitudinal study conducted by the Cambridge group – and on which so much of the applicant's argument relied – did not include *adolescence*.[327] The importance placed on this

[327] Minister's answering affidavit op cit note 25.

key stage in assessing the psychological adjustment of children is longstanding – with similar concerns expressed in the Ad Hoc Committee's report.[328] By the same token, the Cambridge group cautioned that, notwithstanding the positive outcomes observed in the adjustment of its ten-year-old participants, it was nevertheless 'essential' to investigate how surrogate and donor-conceived children felt as they entered adolescence, when issues relating to identity became of prime importance.[329] Thus, adolescence – accepted as the critical stage in a child's identity formation – was noticeably absent in the arsenal of evidence presented to the Court. Fears that the earlier research could be contradicted by future findings[330] conceivably made it easier for the majority to reject the empirical evidence outright – and instead fall back on established and trusted cultural values. Hence, the addition of new research findings concerning the adjustment of donor-conceived and surrogate *adolescents* gives far greater clout to an already impressive body of evidence – adequately allaying fears, and persuasively showing that donor-conceived children do not suffer psychological harm.

With this objection finally addressed, three more require response: first, the applicability of the research to anonymous double-donor surrogate children; secondly, its relevance in the South African context; and, thirdly, whether or not the samples should be relied upon. In order to assess the validity of these objections, I first briefly outline the appropriate arguments and evidence as presented by each side.

In short, the SAG argued that section 294 was unconstitutional on the grounds that no rational *nexus* existed between the impugned provision and the child's best interests. In opposition, the Minister and CCL argued that section 294 was indeed in the child's best interests, as a child knowing his or her genetic origins was vital to a child developing a positive sense of identity.

The SAG relied upon the expert opinions of Golombok, Rodrigues, and later Jadva in support of its claim – whereas, the Minister and CCL failed to supply *any* convincing evidence in defence of their position, nor could they provide any credible evidence to counter the applicant's position. The SAG submitted the expert opinion of Golombok, whose research persuasively showed that a genetic bond between parents and children was not necessary for well-adjusted children – impressively, this was corroborated by the expert opinion of

[328] See the Report of the Parliamentary Ad Hoc Committee op cit note 61 at 118. For instance, in response to the SALC's questionnaire on surrogacy, the Family and Marriage Association of South Africa (FAMSA) indicated that with regards to the psychological effects of surrogate children '[i]t will only be possible to really evaluate results when children born to surrogate mothers reach puberty.'
[329] Jadva, Blake, Casey, and Golombok 'Surrogacy families 10 years on' op cit note 20 at 3013.
[330] Minister's answering affidavit op cit note 25.

Rodrigues, a South African psychologist specialising in infertility; Jadva, a specialist psychologist in new family forms; as well as other empirical studies. In sharp contrast, the only expert opinion offered by the Minister was that of an ethicist, Van Bogaert, whose evidence proved to be utterly unreliable and was subsequently abandoned by the Minister. The CCL relied on two academic articles, neither of which proved their position.[331]

Consequently, it appears that while there was *no* reliable evidence indicating that donor-conceived children suffered psychological harm – there was certainly convincing evidence which showed that these children were in fact well-adjusted and enjoyed good family relationships.

Turning now to the objections, despite existing concerns regarding sampling bias and even the small sample sizes, it is important to recognised that the research findings proffered by Golombok was unquestionably the *best available evidence* – for not only was it *corroborated* by other experts and studies, but it remained wholly *uncontroverted* by the respondents.

As to questions around its application in the South African context, Rodrigues notably observed that in her experience South African donor-conceived children did not demonstrate a higher incidence of psychological problems than children in the general population – which perfectly aligned with Golombok's findings.[332] Rodrigues's expert opinion illustrated that the research indeed remained both relevant and applicable in South Africa. How this answers the question of its relevance within all cultures within South Africa will be explored later in this chapter.

The final objection is that the studies do not specifically deal with situations of anonymous double-donor conceived surrogate children. While it is feasible that the research results may have differed had double-donor surrogacy families been included – the literature *repeatedly* confirmed that family processes, such as the quality of family relationships and the family's social environment, were far more important to children's healthy psychological development, than biological or gestational links between parents and children.[333] This was most clearly demonstrated in that no differences were observed between the various family types – whether egg donation, sperm donation, surrogacy or naturally conceived – regarding the prevalence of emotional or behaviour problems in adolescents, nor were there differences

[331] Thaldar 'Post-truth jurisprudence' op cite note 48 at 237.
[332] Ibid at 252.
[333] Golombok expert opinion para 9.4 (record 743).

in the adolescents' well-being or self-esteem.[334] Hence, the evidence persuasively points to anonymous double-donor conceived surrogate children being equally well-adjusted and no different to their naturally conceived peers.

The findings presented to the Court by the SAG, *even* in 2015, were arguably so compelling that the majority clearly erred in disregarding it. However, the Achilles' heel of the argument proved to be easily exploited by the respondents. With traditional notions about 'blood ties' deeply entrenched in South African society, it was not difficult to generate mistrust of any evidence that contradicts these firmly established beliefs. It appears that in order to defeat formidable cultural and societal beliefs, the evidence must be ironclad.

Notably, the empirical evidence proffered by Golombok has convincingly stood up to all the major objections. Moreover, the new findings effortlessly mend the chink in the evidential armour by contributing the necessary research regarding the psychological adjustment of donor-conceived *adolescents*. With its position clearly strengthened, the evidence is ready to battle its strongest adversaries – the traditional and societal viewpoints which, if left unchecked, threaten to hold our constitutional values captive.

The majority cannot so easily ignore the newest research. Had the Court been presented with the latest findings, I suggest it would have had no choice but to consider the constitutionality of section 294 in light of the empirical evidence. Whether the majority would be induced to make a different decision is the topic of the next section.

(b) The majority's decision in light of the new, credible evidence

Taking into consideration the fresh findings, it is clear that only the most tenuous nexus exists between the no-double-donor requirement of section 294 and the best interests of the child. In this section, I consider the majority judgment in light of the latest evidence in order to assess whether the ancient cultural cords relied upon by the majority can finally be severed.

First, the majority correctly asserted that 'the conditions in section 294 are the means to establishing a genetic link between the commissioning parents and the child to be born'.[335] However, in light of the new evidence, one might reasonably reject the Court's next assertion, 'that establishing a genetic link is a legitimate government purpose.'[336] The nexus between section 294 and the *legitimate* government purpose of safeguarding the child's best interests

[334] Golombok, Ilioi, Blake, Roman and Jadva 'A longitudinal study of families formed through reproductive donation' op cit note 6.
[335] *AB* ZACC supra note 16 para 293.
[336] Ibid para 293.

was premised on the notion that 'clarity regarding the origin of a child is important to the self-identity and self-respect of the child.'[337] This claim was supported by an African adage, perhaps a fall-back to traditional concepts of the importance of blood-ties in families;[338] however, the latest empirical findings from studies of donor-conceived children convincingly supports an opposing view – one where children are well-adjusted and experience high self-esteem despite lacking a gestational or genetic link to their parents. Our Constitution's preamble provides: 'South Africa belongs to all who live in it, united in our diversity.' According to the Constitution, therefore, it would appear that these conflicting views are equally valid in the South African context; however, they appear impossible to reconcile.

The traditional construct of kinship, which Thaldar argues was presupposed by the majority, is still strongly adhered to by many black South Africans;[339] it is conceivable that children who are brought up in these traditional communities may perceive that they lack a foundational element of their identity, since notions about blood ties will likely be internalised.[340] This may result in the child suffering harm – both psychologically and spiritually. At the same time, however, there are South Africans who subscribe to a far broader understanding of family in which biological relatedness is not essential; studies suggest that these children often grow up indifferent to their donor conception and even display a positive self-concept. How do law-makers and the Court exercise their powers to 'unite' people in their diversity, as the Constitution intends, when there are such strongly held and irreconcilable views on what individuals value?

To begin to answer this question, I turn to the argument proffered by Meyerson, who relied on the work of John Rawls. It may be helpful to put Meyerson's argument into perspective. First, Meyerson asserted that section 294 works to advance a 'particular bionormative conception of the ideal family'[341] that favours biological relatedness; hence, families lacking genetic ties are seen as 'second-class' and, thus, should not be 'deliberately created'.[342] Meyerson maintained that the purpose of preventing the creation of 'inferior' families is achieved by section 294 – but that this cannot be seen to be a *legitimate* government purpose.[343] In support, Meyerson proffered an argument based on Rawls's theoretical framework. According to this framework, it is recognised that reasonable people profoundly

[337] Ibid para 294.
[338] Ibid para 294.
[339] Thaldar 'The Constitution as an instrument of prejudice' op cit note 246 at 353.
[340] Ibid.
[341] Meyerson op cit note 4 at 336.
[342] Ibid at 337.
[343] Ibid.

differ on moral, religious, metaphysical and philosophical matters regarding what they deem is valuable in life and what gives life significance;[344] consequently, democratic societies are inevitably characterised by 'reasonable pluralism'.[345] These differing and conflicting beliefs form, what Rawls terms 'comprehensive doctrines', which cannot be relied upon as the basis of legitimate law-making – since reasonable citizens who reject the comprehensive doctrine, may view laws as forcibly imposing a particular religion on them.[346] Instead, Rawls advocates that for power to be exercised legitimately, it must be based on 'public reasons' concerning political values that all citizens might reasonably endorse – because it is not particular to any specific 'comprehensive' view.[347]

Rawls's theory is useful in assessing the legitimacy of the limitation imposed by section 294 which '[a]t its core is the power of the state to regulate the assistive reproduction opportunities available to those who are conception and pregnancy infertile.'[348] This poignant topic concerns what many hold dear – children, family, legacy, and for many South Africans, spirituality. This was recognised by the majority in *AB,* who acknowledged that it 'touches on sensitive issues that cut across cultures and for both genders: issues of infertility and the inability to conceive a child or to produce a gamete in order to meet the legal requirement to enter into a surrogate motherhood agreement.'[349] Nevertheless, the majority determined that the genetic link was critical to the self-identity and self-respect of the child, and found in favour of the retention of section 294 – as it was *in the child's best interests*. Meyerson maintained that the Court's reasoning was in fact based on a bionormative conception of family, which was 'an expression of a contested ethical and religious view' that stigmatises non-genetic families for reasons that others might reasonably reject – and consequently falls foul of Rawls's 'public reason' test.[350]

Thaldar offers an argument in a similar vein. Instead of more general notions pertaining to the superiority of biological families, Thaldar grounded his critique of *AB* specifically in African cultural beliefs (the 'tradition-based argument'), which he saw as underlying the majority's judgment. Based on the constitutional value that South Africa be 'united in […] diversity', Thaldar argued in favour of the 'right to be different', which assumes that 'persons

[344] Ibid at 338.
[345] Ibid at 339.
[346] Ibid.
[347] Ibid.
[348] *AB* ZACC supra note 16 para 237.
[349] Ibid, fn reference omitted.
[350] Meyerson op cit note 4 at 340.

should not be forced to subordinate themselves to the cultural and religious norms of others'.[351] To this end, he opined that '[t]he tradition-based argument effectively seeks to enforce one set of cultural norms (in this case traditional black South African cultural norms) on all people of our country'[352] which results in the abrogation of 'the right to be different.'[353]

Both these arguments are compelling and certainly show that the majority most likely *should* have made a different decision; however, this does not answer the question of whether they most probably *would* have – which is, of course, the purpose of hypothetically 'revisiting' the *AB* case. In this regard, although it has been persuasively argued that the law-makers and the majority most likely based their reasoning on a 'comprehensive doctrine'; I suggest that the majority's rejection of the empirical evidence gave them the necessary leeway to argue on the basis of 'political values'. After all, while the majority mentioned the African adage, the reason relied upon for the limitation in section 294 was clearly 'the child's best interests'. The majority plainly stated that 'children's self-identity and self-respect (their dignity and best interests) is, unquestionably, all important.'[354]

Founding the reason upon 'the best interests of the child' was essential for legitimising the majority's position, as this purported reason is a 'political value' which provides a 'public reason' that all reasonable citizens may endorse; moreover, it is a constitutional right that undoubtedly must be preserved. Both section 28(2) of the Constitution and section 2 of the Children's Act provide that the best interests of a child are of paramount importance in every matter concerning the child. Accordingly, the State is called upon to 'respect, protect, promote and fulfil' the rights of children.[355] For this purpose, the Children's Act was promulgated – 'to promote the protection, development and well-being of children.'[356] Consequently, the majority could be seen to be exercising its power legitimately in safeguarding children's rights.

How does the new evidence challenge this? Whereas the Court could be seen to be grounding their opinions in publicly accepted values – specifically 'the child's best interests' – the latest findings make it impossible for the court to do so credibly. Although it is still recognised that in certain communities one's identity and spirituality is inextricably linked to one's genetic ancestry; the new evidence persuasively demonstrates that children in many families (where genetic relatedness is not seen to be important) grow up unconcerned about

[351] Thaldar 'The constitution as an instrument of prejudice' op cit note 11 at 357.
[352] Ibid.
[353] Ibid.
[354] *AB* ZACC supra note 16 para 290.
[355] Preamble to the Children's Act 38 of 2005.
[356] Children's Act 38 of 2005, s 2(i).

their donor-conception and are well adjusted. This undermines the initial assumptions made by the majority. With the inclusion of this significant evidence, it is unreasonable merely to presume that the limitations imposed by section 294 are in the best interests of the child, since it is clear that this may only be true for very *specific* contexts or traditional communities. Consequently, any argument in support of the retention of section 294 on the basis of psychological well-being, and which does not offer opposing and reliable scientific research, will explicitly have to rely on some or other cultural belief regarding 'blood ties' or a similar traditional notion. Unmistakeably, this would be imposing a specific culture, religion or view on others who may reasonably disagree – and, moreover, disagree on the basis of credible, empirical data. Hence, confronted by the evidence of 2020, the majority's reasoning in its current form can no longer be seen to be an acceptable 'public reason'. Hence, the majority would have to find the no-double-donor requirement contained in section 294 *fails* to serve a legitimate government purpose.

If the majority should seek to retain section 294, it would need to rely on another suitable 'public reason', for instance, as the minority did in *AB*, who concluded that section 294 was enacted for purpose of preventing the circumvention of the adoption process.[357] However, it is doubtful that such a purpose justifies the limitation. As the minority held:

> '[A]s there is no comparable alternative to double-donor surrogacy for those who cannot provide a gamete in order to have a child, the limitation of rights in the present case is far-reaching. As already shown, double-donor surrogacy and adoption are not sufficiently similar processes. […] Ultimately, the quintessential question that lies at the heart of this matter is whether section 294, as it stands, serves a purpose which is so fundamental as to outweigh and justify the corresponding limitations of the rights in question.'[358]

On finding that section 294 'unreasonably and unjustifiably infringes the rights to psychological integrity and equality' of individuals who are pregnancy and conception infertile, the minority held this section is inconsistent with the Constitution and invalid.[359] Therefore, this reason was convincingly rejected.

However, this is not the end of the enquiry: 'The question that remains is whether this Court should suspend the declaration of invalidity in terms of section 172(1)(b) of the

[357] *AB* ZACC supra note 16 para 206: 'It bears repeating that there are good reasons for concluding that the purpose of section 294 is to prevent the circumvention of the adoption process and not to ensure that children are never born without being able to determine their genetic origins.'
[358] Ibid paras 209 and 213.
[359] Ibid para 214.

Constitution, as suggested by the Minister, in order for the Legislature to be given an opportunity to correct the defect.'[360] While the Court is not required to suspend the declaration of invalidity, it may in situations where it is found to be just and equitable to do so.[361] To this end, the SAG maintained that the only appropriate remedy was to strike down section 294 without a suspension of invalidity.[362] On considering that the striking down of section 294 would 'upset the scheme of Chapter 19',[363] the minority held that it would be 'inappropriate to deprive the Legislature of the opportunity to reformulate section 294'.[364]

Considering the long journey of 'AB' to have a child, is it really necessary for the Court to insist on a suspension of invalidity? The next section considers the implications.

III IMPLICATIONS

The aim of this section is to assess whether striking down section 294 adequately preserves the child's best interests, while maintaining the rights of infertile individuals to access double-donor surrogacy as a form of assisted reproduction. Can this purpose be achieved through simply 'deleting' section 294 from chapter 19 of the Children's Act, or are there other issues that the Legislature would do well to consider in order to guarantee the best possible outcome for surrogate children?

(a) The child's best interests and the question of 'blood-tie' beliefs

This is a worthwhile evaluation, especially with regards to one issue which begs further investigation – the potential risk to anonymous double-donor surrogate children who are raised in traditional 'blood-tie' communities. It must be recognised that even if the Court declares section 294 unconstitutional, this does not mean that the cultural values presumed by the majority will suddenly vanish. Although these 'comprehensive doctrines' may not justify limiting the reproductive rights of others, rights to religious and cultural freedoms are still protected in the Constitution.[365] It is, therefore, accepted that there will be law-makers and judges – as well as many ordinary South Africans – who will most likely continue to disapprove of anonymous double-donor surrogacy for personal, religious or cultural reasons. Since these

[360] Ibid para 215.
[361] Ibid para 215.
[362] Ibid para 217.
[363] Ibid para 223.
[364] Ibid para 224.
[365] Section 31 if the Constitution of South Africa entitles those belonging to a cultural, religious community –'(a) to enjoy their culture, practise their religion […]; and (b) to form, join and maintain cultural, religious […] associations'.

beliefs are sure to persist in our society, it is conceivable that the removal of section 294 may pose a danger to children's well-being in certain contexts. After all, a child who grows up in a community which fiercely holds to traditional 'blood ties' may indeed suffer identity loss and feel spiritually disconnected if the child is inculcated with this cultural belief. It is clear that within South Africa, two distinct realities exist – one where anonymous double-donor-conceived surrogate children may flourish; another where they may experience censure. Should law-makers, the Court and even the broader community permit such a risk to children's psychological well-being?

In answering this question, I rely on some persuasive arguments levelled by Thaldar in his critique of *AB*. Thaldar examined the likelihood that such a situation may occur. He concluded that 'common-sense probabilities' suggest that individuals who hold strongly to 'blood-tie' beliefs are extremely unlikely to resort to anonymous double-donor surrogacy in order to have a child.[366] Hence, it is highly improbable that anonymous double-donor-conceived children will be brought up in communities who subscribe to these cultural precepts. Thaldar continued that even if there was a small chance that a few individuals who live within these communities may make use of anonymous double-donor gametes; nevertheless, it would be excessive and disproportionate to prohibit *all* commissioning parents from utilising this reproductive option. Instead, he proposed that the court could continue to evaluate the best interests of a child on a case by case basis, and include in its enquiry the prospective child's social environment. This approach will result in an individualised enquiry into the *particular* prospective child's best interests, which better aligns with Constitutional Court precedent and the Constitution's proportionality principle.[367]

At first blush, this solution could suggest that section 294 may simply be deleted, since children's rights are upheld by the best interests standard already in operation. Nevertheless, while the inclusion of the prospective child's cultural environment into 'the best interests' enquiry appears to be a straight-forward solution, the implications pose genuine constitutional issues.

If one accepts Meyerson's argument, that the bionormative conception of family unfairly stigmatises non-genetic families,[368] one must consider whether the potential for social stigmatisation should inform the Court's enquiry into the child's best interests at all. Could the

[366] Thaldar 'The constitution as an instrument of prejudice' op cit note 11 at 355.
[367] Ibid at 356.
[368] Meyerson 'Surrogacy, geneticism and equality' op cit note 13 at 340.

court deny prospective parents the use of anonymous double-donor gametes, simply because the resultant child might be stigmatised in traditional communities?

To this end, Thaldar opined that the 'law should not give effect to prejudice'.[369] He argued that this principle was affirmed in *Hoffman v South African Airways,*[370] albeit in a case concerning employment discrimination against persons with HIV. Here, the Constitutional Court held:

> 'The constitutional right of the appellant not to be unfairly discriminated against cannot be determined by ill-informed public perception of persons with HIV. […] Prejudice can never justify discrimination. […] Indeed, if as a nation we are to achieve the goal of equality that we have fashioned in our Constitution we must never tolerate prejudice, either directly or indirectly.'[371]

This principle can equally be applied to whether the court should consider the risk of stigmatisation as a result of anonymous double-donor conception – or even the risk that the child may suffer psychological harm brought on by the inculcated belief that he or she is lacking a foundational element of his or her identity. In assessing the child's best interests, it is worth noting that the Constitution explicitly prohibits discrimination on the basis of 'social origins', which includes clan and family membership.[372] So, while it may not be within the law's power to control the prejudicial attitudes held towards those with a more murky ancestry; nevertheless, the State must not tolerate nor give effect to prejudice against persons for such reasons.[373] Thaldar contended that the tradition-based argument relies on and bolsters cultural values that are discriminatory in nature, hence violating our Constitution's commitment to equality.[374] Therefore, in order to align with constitutional values, cultural prejudices should not inform 'the child's best interests' enquiry.

If this argument is accepted, then it would appear that section 294 could be struck down without the need for the Court to account specifically for situations of social stigmatization before confirming a surrogate motherhood agreement.[375]

Nevertheless, this does not mean that the Legislature should be denied the opportunity to reform section 294. Having said this, I do not agree with the Minister who asserted that the

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[369] Thaldar 'The constitution as an instrument of prejudice' op cit note 246 at 358.
[370] *Hoffman v South African Airways* 2001 (1) SA 1 (CC).
[371] Ibid paras 36-37, fn reference omitted.
[372] Thaldar 'The constitution as an instrument of prejudice' op cit note 246 at 359.
[373] Ibid at 360.
[374] Ibid.
[375] Children's Act 38 of 2005, s 295.

Legislature be given time to reconsider IVF regulations,[376] which allow for double-donor gametes to be utilised. She argued that the Legislature be given the opportunity to remedy the discrepancy between regulations pertaining to surrogacy agreements and IVF, by amending IVF regulations to prevent the use of double-donor gametes. Considering it has been established that the genetic link is not important to a child's psychological well-being, it would be unreasonable to limit established rights in IVF regulations, for the sake of 'equality'. As is stated by the minority, such an assertion is 'misplaced'[377] – it is clear that the surrogacy regulations are unconstitutional, regardless of IVF regulations, not because of them. [378]

However, it must be recognised that the drafters of chapter 19 of the Children's Act did not envisage the use of double-donor gametes in situations of surrogacy; therefore, there are no specific regulations which account for this possibility. The purpose of including chapter 19 in the Children's Act is to provide much-needed clarity regarding surrogate motherhood agreements and, in doing so, adequately protect the rights of all parties to the agreement – not least of all the prospective children. The removal of section 294, without special consideration of how best to regulate double-donor surrogacy, may prove to muddy the water and result in rather undesirable outcomes.

(b) The effect of removing section 294

Section 294, for all its failings, did provide the means of regulating both who *must* and who *may* contribute gametes to the conception of the prospective child. While it has been established that the genetic link is not 'the all-important requirement' for a child's well-being as previously thought, nevertheless, if the situation of double-donor gametes is not carefully regulated, it may result in uncertain and undesirable outcomes – which conceivably could impact the resultant child negatively.

The extant no-double-donor requirement of section 294 specifies that the prospective child must be conceived via the gametes of both, or at least one of the commissioning parents; and if the commissioning parent is single, that parent. Only where proved necessary, a gamete from a donor may be used – either from a known donor, such as the surrogate mother who contributes her egg; or an anonymous donor, such as sperm donor selected from a sperm bank.

The presence or absence of a genetic link between the surrogate mother and the resultant child has important implications for the parental rights of the parties to the surrogate

[376] *AB* ZACC supra note 16 para 219.
[377] Ibid para 221.
[378] Ibid.

motherhood agreement. For instance, in the case of 'traditional' surrogacy – where the surrogate mother is the genetic mother – section 298(1) of the Children's Act provides that the surrogate mother 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.' As a result of such an action, according to section 299,[379] the parental rights are vested with the surrogate mother, and her husband or partner if any, or if none, the commissioning father. Furthermore, this section provides that if the termination of the surrogate motherhood agreement happens after the birth of the child, any parental rights which the commissioning parents may have had in terms of section 297 are terminated.[380]

Notably, a surrogate mother who is not the genetic mother – such as in the case of full surrogacy – does not have the right to cancel the agreement and obtain parental rights and responsibilities over the surrogate child. Hence, the surrogate mother's rights to acquire parental rights is based primarily on her genetic, and not just her gestational, link to the child. This is clearly set out in chapter 19 of the Children's Act. Hence, prospective parents and surrogate mothers who wish to enter into traditional surrogacy agreements are cognisant of the implications and its potential impact on their parental rights. The removal of section 294, however, allows for other possibilities which chapter 19 does not regulate; I examine but one.

It is possible, for instance, that by allowing double-donors, the surrogate mother may supply her egg (and, therefore, is the genetic mother), while *her* husband may supply the sperm (thereby, making him the genetic father). A situation such as this – where there is a 'surrogate couple' – needs to be carefully considered and raises a number of complex legal questions. Since this would be the 'natural child' of the surrogate mother and her husband – and not of the prospective parents – is this situation not tantamount to 'commissioned adoption'? Would ordinary adoption not be necessary? If not, could the parental rights be challenged by the genetic father, and should he equally be entitled to cancel the surrogate motherhood agreement and obtain parental rights over the child? Current legislation goes some way to answer these questions, but its application does not satisfactorily protect the rights of all parties.

In cases where the parties to the surrogate agreement consider the biological father's contribution to be merely that of a 'sperm donor', section 17 of the *Regulations Relating to Artificial Fertilisation of Persons*[381] applies. This section clearly provides that in the case of gamete donation, once artificial fertilisation has occurred, the ownership of the gamete vests

[379] Children's Act 38 of 2005, s 299(a) – (b).
[380] Children's Act 38 of 2005, s 299(a).
[381] *Regulations Relating to Artificial Fertilisation of Persons* GN R175 of 2012.

with the recipient – and not with the donor.[382] Consequently, it could be argued that the surrogate's husband, whose intention is to act merely as a gamete donor, will possess no rights in respect of the resultant child, nor will he have the right to cancel the surrogate motherhood agreement and acquire parental rights. This highlights a bigger problem in the Regulations, as it fails to adequately differentiate between a known donor in general, and a known donor who is the husband of the woman receiving the artificial reproductive treatment. If one considers that the surrogate mother's intention to donate her egg does not undermine her rights to later cancel the surrogate motherhood agreement, would it not, similarly, be appropriate for a known biological father to be given equal opportunity to cancel the surrogate motherhood agreement should he desire to take up parental rights concerning his genetic child? Perhaps a 'commissioned adoption' is a more appropriate legal route. If applied, how would this system differ?

In the case of 'commissioned adoption', presumably the commissioning parents would apply to court for an order declaring their intention to adopt the prospective child before the intended pregnancy. In this way, they could cover the reasonable expenses of the gestational mother, without these payments being viewed as 'compensation' for the child – which is strictly prohibited in the Children's Act.[383] The prospective parent(s) could then undertake ordinary adoption processes after the birth of the child in order to acquire parental rights. In terms of section 233 of the Children's Act, a child may only be adopted if consent is given by each of the child's parents;[384] therefore, the biological father's consent, in this scenario, would most certainly be required.

Hence, while the biological mother's parental rights are protected in both surrogacy and adoption, two vastly different scenarios exist for the rights of the biological father. In double-donor surrogacy, as the 'sperm donor', he relinquishes any claim to the child from the moment of conception; in 'commissioned adoption', he enjoys full parental rights until he chooses to relinquish them.

It may be tempting to conclude that 'commissioned adoption' would be the better way forward in cases of a known sperm donor; however, in terms of the child's rights, the surrogacy framework may offer greater protections for the prospective child in general. Since surrogate

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[382] Ibid, s 17 (2).

[383] Children's Act 38 of 2005, s 249 (1) provides that '[n]o person may- (a) give or receive, or agree to give or receive, any consideration, in cash or in kind, for the adoption of a child […]' unless as stipulated in s 294 (a) 'the biological mother of a child receiving compensation for (i) reasonable medical expenses incurred in connection with her pregnancy, birth of the child and follow-up treatment; (ii) reasonable expenses incurred for counselling; or 25 (iii) any other prescribed expenses'.

[384] Children's Act 38 of 2005, s 233(1)(a).

motherhood agreements are concluded before the conception of the child, many issues are ironed out before this point. This ensures, for instance, that an assessment is carried out regarding the environment in which the child will be raised – ensuring it is a stable home – and that there is provision made for the surrogate child in the event of the death, divorce or separation of the commissioning parent(s).[385] Consequently, this lessens the chance of a surrogate child being abandoned after birth as the necessary checks into the prospective parents' suitability to parent is concluded before the child is even conceived. In the case of adoption, while similar provisions are made for ensuring the well-being of the child, these do not occur as a prerequisite for the conception of a specific 'commissioned' child. Furthermore, the adoption process only begins after the birth of the child, in which case if the prospective parents die or divorce before the adoption goes through, the child may be in an extremely vulnerable situation, left with biological parents who did not intend to raise her and prospective parents who no longer are able or may not wish to take on parental responsibilities.

There are further considerations which also make 'surrogacy' a far better framework. The surrogate mother is assessed for her suitability to be a surrogate[386] – this safeguard is clearly lacking in 'commissioned adoption', where no such criteria exist for the selection of a 'suitable mother'. Furthermore, in adoption, there is no requirement that the conception of the child must be artificial – in other words, the child in these arrangements could be naturally conceived.[387] Natural conception offers the distinct advantage of saving on the exorbitant costs of ARTs, which would make natural-conception 'commissioned adoption' more accessible. However, the requirement for artificial conception in surrogacy is useful in that it also ensures that provisions for the appropriate genetic testing of donor gametes is applied,[388] which in turn lowers the risk of the resultant child being born with a genetic condition. Again, no such requirement in cases of adoption exist.

The reason for these gaping holes in adoption regulations is, of course, obvious. Adoption is, after all, a solution applied in situations where a child – already conceived or born – cannot be cared for adequately by his or her biological family.[389] The adoption regulations

[385] Children's Act 38 of 2005, s 295 (d): '[…] the agreement includes adequate provisions for the contact, care, upbringing and general welfare of the child that is to be born in a stable home 40 environment, including the child's position in the event of the death of the commissioning parents or one of them, or their divorce or separation before the birth of the child'.
[386] Children's Act 38 of 2005, s 295 (c).
[387] Children's Act 38 of 2005, s 296.
[388] *Regulations Relating to Artificial Fertilisation of Persons* GN R175 of 2012, s 11.
[389] Children's Act 38 of 2005, s 230 (3): 'A child is adoptable if – (a) the child is an orphan and has no guardian or caregiver who is willing to adopt the child; 30 (b) the whereabouts of the child's parent or guardian cannot be established; (c) the child has been abandoned; (4 the child's parent or guardian has abused or deliberately

were not intended to apply to cases of 'commissioned adoption', where a couple willingly has a child for another.

It is, therefore, evident that since double-donor surrogacy was not originally contemplated by the Legislature, the current laws are clearly inadequate to appropriately regulate the situation of a 'surrogate couple' or 'commissioned adoption'. Therefore, section 294 could not be struck out without allowing the Legislature time to remedy the provision. As has been illustrated with this example, although current legislation can be applied to cases of double-donor surrogacy, its application is inadequate to safeguard the interests of all parties in situations of partial surrogacy with a known gamete donor. This lack of appropriate legislation, most importantly, compromises the best interests of children.

(c) Recommendations for amending section 294

The Legislature may, after investigation, choose to regulate double-donor surrogacy in a manner that prevents certain undesirable possibilities or develop the law in ways that effectively safeguard the interests of all parties by providing clear regulations better suited to the unique situation of double-donor surrogacy. In fact, even the use of an unknown donor's sperm in cases of partial surrogacy may require some careful consideration.

In light of this, I suggest that the Legislature in permitting double-donor surrogacy should do so only in cases of full surrogacy, as this will avoid a situation where the surrogate mother (and, perhaps, her husband) may have equal, if not arguably stronger, claims to the resultant child as the commissioning parents. Insisting on full surrogacy in cases where double-donor gametes are utilised avoids a number of complex issues that have a high potential for conflict – which is not in the child's interests. The full-surrogacy requirement for double-donor surrogacy is a solution that still allows those who are pregnancy and conception infertile to access surrogacy as a means to have a child, without compromising any party's rights. This, I suggest, is the most sensible approach and one which has been adopted by other countries. Greece, for instance, only permits full surrogacy, but does not specify whose egg must be used for the purpose of conception in surrogacy agreements; therefore, double-donor surrogacy is permitted so long as the egg is not the surrogate mother's.[390]

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neglected the child, or has allowed the child to be abused or deliberately neglected; or (e) the child is in need of a permanent alternative placement.'

[390] A Hatzis 'The Regulation of Surrogate Motherhood in Greece' (2010) *SSRN Electronic Journal*.
Law 3089/2002 *Medically Assisted Human Reproduction*, Article 1458: 'The transfer of a fertilized ova into the body of another woman (the ova should not be hers)'.

Undeniably, the regulation of double-donor surrogacy is a policy decision that should be left to the Legislature. Therefore, the Court will be correct to suspend the declaration of invalidity, allowing the Legislature time to remedy section 294, as striking down the impugned provision would certainly 'require the Court to engage in the details of law-making'.[391]

IV CONCLUSION

In this chapter, I have sought to finally answer the hypothetical question: 'In light of present-day research, would *AB* have been decided differently?' After confirming the credibility of the latest research findings, I concluded that the court would have had no choice but to declare section 294 unconstitutional; the no-double-donor requirement simply fails to fulfil any legitimate government purpose. Nevertheless, since double-donor surrogacy was not initially contemplated by the Legislature, the existing regulations are not adequate to provide the necessary clarity nor the safeguards to protect the interests of all parties. These decisions are undeniably policy choices, which must be left to the Legislature. While this was a hypothetical scenario, the Minister of Social Development would do well to read 'the writing on the wall'. Section 294 has been *weighed, measured, and found wanting* – I implore the Legislature to reform the impugned provision by permitting double-donor surrogacy, which will better reflect our constitutional values. This will require the careful crafting of regulations which keenly consider the impact of double-donor surrogacy on all parties – but most notably children.

[391] *AB* ZACC supra note 16 para 218.

OVERALL CONCLUSION

The case of *AB v Minister of Social Development* would have been decided differently in 2020. Influential studies around new family forms persuasively show that despite lacking a biological and gestational link to their parents, donor-conceived surrogate children exhibit high self-esteem, are generally well-adjusted and enjoy strong family relationships. The evidence convincingly challenges the strongly held suppositions of the majority – and, in light of a dearth of evidence in defence of the importance of 'blood ties' and genetic relatedness in families, these beliefs are doubtlessly defeated. However, simply striking down the impugned provision will not adequately protect the interests of all parties. While the Legislature must bring section 294 in line with constitutional principles based on empirical evidence – rather than falling back on unfounded fears – section 294, however, requires a deliberate reworking which ensures the effective safeguarding of all interests, and most especially that of children's. One suggestion is to permit double-donor surrogacy only in cases of full surrogacy. This study clearly exposes that the no-double-donor requirement of section 294 fails to fulfil a legitimate government purpose; instead it works to choke out the constitutional rights of conception and pregnancy infertile individuals under the semblance of safeguarding 'the best interests of the child'. Grounding legislation in beliefs which clearly exhibit a discriminatory attitude is untenable in our constitutional democracy. The preamble of the Constitution provides that South Africa belongs to all who live in it – and, therefore, are all equally deserving of dignity and respect. It is high time that surrogacy laws in South Africa reflect this.

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Minister's answering affidavit to AB's founding affidavit

The SAG's founding affidavit

EXPERT OPINIONS FROM THE AB CASE

Prof Golombok's expert opinion

Dr Jadva expert opinion

Mandy Rodrigues's expert opinion

Prof Van Bogaert supplementary affidavit