

Is the Writing on the Wall for the Genetic Link Requirement in Surrogacy Agreements?

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Abstract

For a valid surrogate motherhood agreement, section 294 of the *Children's Act* 38 of 2005 provides that the child born of the surrogacy arrangement must be conceived with the gamete of at least one of the commissioning parents. This ensures that a genetic link exists between a commissioning parent and the resultant child. In 2015, in the case of *AB v Minister of Social Development* 2016 2 SA 27 (GP), the constitutionality of the impugned provision was successfully challenged in the High Court; however, the applicant failed to convince the majority in the Constitutional Court (*AB v Minister of Social Development* 2017 3 SA 570 (CC)) that the removal of the genetic-link requirement would be in the resultant child's best interests. In 2023 another "double-donor" surrogacy matter is set to be decided by the High Court. The applicant's situation raises the question of whether the genetic-link requirement between commissioning parents and the resultant child should be extended to include a "sibling link". This would be applicable in situations where parents will lack a genetic link with the resultant child, but the child will still share a genetic link with an existing sibling. This article assesses the merits of the "sibling link" argument by considering the latest psychological evidence. This evidence confirms that donor-conceived surrogate children are well-adjusted and exhibit high self-esteem, despite lacking a biological and gestational link to their parents. It is argued that the reading in of a "sibling clause" into section 294 may be too narrow, and instead a reading in of a sentence that will allow the court "on good cause shown" to dispose of the genetic link requirement should be preferred.

Keywords

Best interests of the child; genetic link; sibling link; surrogacy; surrogate motherhood agreement.

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1 Introduction

What role does a genetic link between parents and their children play in the development of well-adjusted children and the formation of what society deems as "legitimate" families? Beliefs regarding the importance of a genetic link within families continue to hold influence. The recent landmark case of *Lühl v Minister of Home Affairs and Immigration*,¹ (hereafter the *Lühl* case) decided in the Namibian High Court in October 2021 centred on the eligibility of a child born via surrogacy in South Africa to acquire Namibian citizenship by descent. The applicant, Lühl, a Namibian male, together with his same-sex spouse, entered into a surrogate motherhood arrangement in South Africa after obtaining an order from the Western Cape Division of the High Court.² Following the birth, the child was issued with a South African birth certificate, recognising Lühl and his spouse as the child's parents.³ The applicant subsequently applied to the Namibian Ministry of Home Affairs and Immigration for the child to acquire Namibian citizenship by descent, since the child's father, Lühl, was a Namibian citizen by birth.⁴ The respondent, the Minister of Home Affairs and Immigration, however, requested that the applicant first prove that he was indeed the biological father of the child. This was based on the possibility that the gamete of the surrogate mother could have been fertilised by the applicant's spouse, who was not a Namibian citizen.⁵ The applicant approached the Namibian High Court for relief. The Minister, in a counter-application, demanded that Lühl subject himself and his child to a genetic test. Masuku J, finding that there was no mention of biology or genetics in matters of citizenship by descent in the Namibian Constitution,⁶ found in Lühl's favour, and the minor child was accordingly declared a Namibian citizen by descent.

While the request for a paternity test was probably based on prejudicial attitudes to same-sex couples,⁷ the reliance of the Minister on the genetic

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¹ *Lühl v Minister of Home Affairs and Immigration* (HC-MD-CIV-MOT-GEN-2019/00473) [2021] NAHCMD 481 (13 October 2021) (hereafter the *Lühl* case).

² *Lühl* case paras 8-9.

³ *Lühl* case para 10.

⁴ *Lühl* case para 11.

⁵ *Lühl* case para 5.

⁶ *Lühl* case para 33.

⁷ In *Lühl* case para 68, Masuku J opined: "It is sometimes the actions rather than the words that determine whether or not there is discrimination. The platitudes sometimes count for very little in this regard. As mentioned earlier, had the

ancestry of the child exposes a view requiring further scrutiny – that "blood ties" and genetics are essential in the establishment of "legitimate" families. This stance is not unique to Namibia. "Blood ties" have long shaped notions of family and align with prevailing beliefs that genetic relatedness within families ensures secure parent-child attachment and promotes the healthy development of a child's identity.⁸ Furthermore, many African cultures hold strongly to ancestral beliefs, where "blood ties" are particularly prized.⁹ Thus, it is not surprising that the advent and advancement of assisted reproductive technologies (ARTs) allowing for the use of donor gametes have been met with apprehension. After all, genetic relatedness is not only cherished by certain individuals and prized within particular cultures, but the assumptions are also embedded in the bedrock of our laws and have on occasion been unearthed and relied upon by courts when determining the child's best interests.¹⁰ One place where these assumptions are clearly codified into law is the regulation of surrogate motherhood agreements. Section 294 of the *Children's Act* 38 of 2005 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" suggests that, in cases of surrogacy, the legislature sought to guarantee genetic relatedness. This was the reasoning of the South African Law Commission (SALC), who were originally tasked to investigate surrogacy. 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 utilised in the creation of the embryo.¹¹ Its reasons were that it was "convinced that in order to promote the bond between the child and its

circumstances of the minor child been different, namely he was born to a heterosexual couple, this is a case that would not have been before court. It would have been resolved by the Minister in his office without further ado."

⁸ Meyerson 2019 *CCR* 317-341.

⁹ Thaldar 2019 *CCR* 343-361.

¹⁰ *Constitution of the Republic of South Africa*, 1996, s 28: "A child's best interests are of paramount importance in every matter concerning the child."

¹¹ SALC *Surrogate Motherhood* 179-180. 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."

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".¹² The SALC's recommendation was etched into law as section 294. The provision concurs 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. While fostering a strong parent-child bond and ensuring that a child cultivates a healthy state of psychological well-being are, undeniably, in the resultant child's "best interests", whether this is chiefly achieved through a genetic link has been called into question by recent research examining "new family forms", a term referring to families formed through assisted reproduction, including male or female donor gametes, embryo donation and surrogacy.¹³ This research was presented to the court during a constitutional challenge to section 294 in the case of *AB v Minister of Social Development (AB)*.¹⁴

2 AB's bid to beat blood-tie beliefs

The *AB* case centre on the application of the best interests of the child principle in surrogate motherhood agreements utilising donor gametes.¹⁵ The applicant in the case was a single woman, known only as "AB", who deeply wanted to have children. Unfortunately, however, AB was both unable to contribute gametes (conception infertile) and unable to carry a child (pregnancy infertile). She therefore pursued gamete donation and surrogacy to become a parent. Since AB would lack a genetic link with the intended child, section 294 of the *Children's Act* barred her from making use of surrogacy.¹⁶ AB sought to challenge the constitutionality of the "genetic link" requirement and argued that section 294 was inconsistent with the *Constitution* as it limited her rights to equality, dignity, reproductive healthcare, autonomy and privacy, and it should be declared invalid.¹⁷ The respondent was the Minister of Social Development, cited in her capacity as the Minister in charge of the administration of the *Children's Act*.¹⁸ The Minister contended that the genetic-link requirement served a legitimate government purpose – to safeguard the child's best interests.¹⁹

¹² SALC *Surrogate Motherhood* 151.

¹³ Imrie and Golombok 2020 *Annual Review of Developmental Psychology* 295-316.

¹⁴ *AB v Minister of Social Development* 2016 2 SA 27 (GP) (hereafter *AB GP*); *AB v Minister of Social Development* 2017 3 SA 570 (CC) (hereafter *AB CC*).

¹⁵ Thaldar 2018 *SAJHR* 231-253.

¹⁶ *AB GP* paras 18-19.

¹⁷ *AB GP* paras 8, *AB CC* para 33(b).

¹⁸ *AB GP* para 14.

¹⁹ *AB GP* para 11.

2.1 AB's success in the High Court

On evaluating the opposing arguments, the Pretoria High Court²⁰ per Basson J determined 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.²¹ 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.²² 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.²³

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).²⁴ Basson J opined that the legislature was obliged to redefine the traditional view of the family in the light of the advances made in fertility and reproductive technology.²⁵ Since there was found to be no rational *nexus* between section 294 and the best interests of the child,²⁶ the High Court held that section 294 be struck down.²⁷ The applicant sought to have the decision confirmed by the Constitutional Court.

2.2 AB's defeat in the Constitutional Court

On 1 March 2016 the Constitutional Court heard AB's 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",²⁸ 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.²⁹

²⁰ AB GP.

²¹ AB GP para 86.

²² AB GP para 84.

²³ AB GP para 46.

²⁴ AB GP para 87.

²⁵ AB GP para 46.

²⁶ AB GP para 87.

²⁷ AB GP paras 100-106.

²⁸ AB CC para 294.

²⁹ AB CC para 293.

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. Despite the applicant placing compelling evidence before the Constitutional Court that challenged the importance of genetic relatedness,³⁰ the majority ultimately rejected the evidence.

There has been much speculation regarding the adjustment of children born via surrogacy and children who are conceived using donor gametes.³¹ However, it is critical to assess whether these assumptions are supported by *facts*. There are times when a society must test the values it mines from its past and decide whether these values continue to hold genuine worth, or if they should be discarded as fool's gold. The Constitutional Court made this very point in the case of *S v Williams*,³² per Langa J:

One of the implications of the new order is that old rules and practices can no longer be taken for granted; they must be subjected to constant re-assessment to bring them into line with the provisions of the Constitution.³³

The golden opportunity to test the assumptions that continue to emphasise genetic relatedness has landed in the lap of the Mpumalanga High Court in the case of *KB v Minister of Social Development (KB)*.³⁴ Although the matter is still to be decided by the court, it has already generated enough interest³⁵ to warrant a discussion on the merits of the applicant's argument. This article presents the argument as set out in KB's founding affidavit in her application for direct access to the Constitutional Court. After her application was rejected, she filed an application at the Mpumalanga High Court – and it is this court that is currently tasked with deciding the matter. I will assess the merits of KB's argument against existing case law and the latest and most compelling research available.

3 A new development in the genetic-link debate: The sibling link

3.1 The facts of the KB case

The case of *KB* centres on the plight of a couple wishing to extend their family via double-donor surrogacy. The applicant in the matter is "KB", a 46-year-old married woman. Her husband joins as the second applicant. The

³⁰ AB GP; AB CC.

³¹ Imrie and Golombok 2020 *Annual Review of Developmental Psychology* 295-316.

³² *S v Williams* 1995 3 SA 632 (CC) (hereafter the *Williams* case).

³³ *Williams* para 8.

³⁴ *KB v Minister of Social Development* CCT 182/21 (to be decided) (hereafter *KB*).

³⁵ The University of KwaZulu-Natal's School of Law hosted a virtual workshop on 2 March 2022 entitled: *Is It Time to Reconsider the Genetic Link for Surrogacy?* (University of KwaZulu-Natal 2012 <https://law.ukzn.ac.za/workshop-is-it-time-to-reconsider-the-genetic-link-requirement-for-surrogacy>).

couple has been in a committed relationship since 2007 and were married in 2011.³⁶ At the time of the couple's marriage KB had no children, while her husband had two adult children from a previous marriage.³⁷ The couple was eager to start a family together, despite knowing it would be a difficult undertaking. KB had struggled with uterine growths and had undergone four myomectomies.³⁸ Previously her husband had undergone a vasectomy which he later reversed, and in 2000 he had been diagnosed with and was treated for testicular cancer.³⁹ Against this backdrop, the couple tried to conceive a child.

The next five years were a gruelling, uphill battle; falling pregnant proved to be a herculean task. The couple used *in vitro* fertilisation (IVF) and intrauterine insemination (IUI); however, notwithstanding their immense efforts to conceive using their gametes, they were repeatedly met with bitter disappointment.⁴⁰ The couple refused to give up and resolved to consult another fertility expert. It was then that they were informed of the low prospect of success using their gametes due to KB's advanced age and low AMH levels and her husband's compromised sperm. After careful consideration and under medical advisement, the couple decided to use donor gametes. They found suitable donors, and seven viable embryos were successfully produced.

Hereafter the first embryo was transferred into KB's uterus, resulting in the successful pregnancy and birth of the couple's minor child, ESB, in 2018. KB described her pregnancy as difficult; her son was born prematurely via emergency caesarean section at 33 weeks.⁴¹ ESB was most certainly a child hard won. Wanting to provide ESB with a sibling, KB and her husband eagerly sought to grow their family using the remaining embryos. Once KB was medically cleared, a second embryo transfer into her uterus resulted in another successful pregnancy. However, tragically, at 23 weeks, after suffering life-threatening complications, KB had to undergo an emergency hysterectomy. In the process the couple not only faced the traumatic loss of their daughter M, but also the devastating reality that KB would be unable to carry any of the remaining embryos.⁴²

The couple had developed a profound connection to the embryos and saw them as their very own children who just needed to "come home".⁴³ They also longed to see their son, ESB, grow up with siblings genetically related

³⁶ KB's Founding Affidavit para 7.

³⁷ KB's Founding Affidavit para 8.

³⁸ KB's Founding Affidavit para 9.

³⁹ KB's Founding Affidavit paras 9, 10.

⁴⁰ KB's Founding Affidavit para 11.

⁴¹ KB's Founding Affidavit paras 12-13.

⁴² KB's Founding Affidavit para 14.

⁴³ KB's Founding Affidavit para 23.

to him. The only option available that would allow them to realise these hopes was surrogacy. Hence, the couple has approached the court to challenge section 294 of the *Children's Act*, which requires that to conclude a valid surrogate motherhood agreement, there must be a genetic link between at least one of the commissioning parents and the prospective child.

Conscious that the Constitutional Court's majority has already ruled that the genetic link was in the child's best interests, KB differentiates her facts from the facts of *AB*. To this end, she argues that the genetic-link requirement is in the child's best interests and should therefore be extended to instances of a shared genetic link between siblings. KB asserts that since it would be in their minor son's best interests to have genetically related siblings, and since the best interests of the child are of paramount importance in all matters concerning the child, it follows that section 294 offends her minor child's rights. By precluding surrogacy in cases where it would result in a genetically linked sibling, section 294 denies children a sibling genetically related to them, which in turn undermines their rights to dignity and equality.

3.2 The remedy sought by KB

To remedy the section, the applicants propose reading in the following clause into section 294: "or where the genetic origin as contemplated in the agreement of the child is the same as that of any of her siblings". Thus, the suggested rereading of the section will be as follows:

No surrogacy 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, *or where the genetic origin as contemplated in the agreement of the child is the same as that of any of her siblings.*⁴⁴

3.3 Is KB's argument sound?

In anchoring her argument in her minor son's rights to enjoy a genetically significant relationship with a sibling, KB could be seen to be taking the most sensible approach. By entreating the courts to make a seemingly minor and logical extension to section 294 to include genetically related siblings, KB avoids rocking the boat on firmly established beliefs regarding the significance that genetics plays in the formation of familial bonds. However, will her position withstand scrutiny? A careful reading of the *AB* judgement may reveal that KB is not set for smooth sailing.

⁴⁴ KB's Founding Affidavit para 38 (emphasis added).

First, the minority judgment per Khampepe J explained that the "genetic link" requirement in section 294

does not merely require a genetic link, it requires a gamete from at least one commissioning *parent*. If a genetic link were to suffice, certain family members of would-be commissioning parents could donate gametes for the purposes of artificial fertilisation.⁴⁵

Therefore, in respect of the genetic link between a commissioning parent and the intended child, KB does not differ from AB; both concern double-donor surrogacy, where the intended child will lack a genetic and gestational tie to a prospective parent. Even KB's reliance on her minor child's rights misses the mark. Section 295 of the *Children's Act* comprises the factors which the court must consider before confirming a surrogate motherhood agreement. Considerations include "the personal circumstances and family situations of all the parties concerned", which may take into account the interests of any children already born – but, explicitly, before approving a surrogate motherhood agreement, the court must consider "above all the interests of the child that *is to be born*".⁴⁶ This means that while the interests of ESB are not irrelevant to the court's decision, chiefly the court is to concern itself with the interests of the prospective child.

Furthermore, the majority per Nkabinde J explained that the role of the genetic link is to create

a bond between the child and the commissioning parents or parent. The creation of a *bond is designed to protect the best interests of the child-to-be born* so that the child has a genetic link with its parent(s).⁴⁷

In the case of IVF "the 'host mother' [...] retains a gestational link to the child as a result of carrying the child", despite the lack of a genetic link.⁴⁸ The court differentiated this from surrogacy, where despite the lack of a gestational link, "a genetic link is created between the child-to-be and the commissioning parents or parent."⁴⁹ Most significantly, the Constitutional Court majority held that the lack of a genetic link risks "children's self-identity and self-respect (their dignity and best interests)."⁵⁰

Therefore, it is difficult to see how the *AB* judgment convincingly supports KB's position. Her reliance on the "genetic sibling link" fails to address the key issue: the best interests of the *prospective* child. Thus, despite ESB sharing a sibling link with the prospective child, KB may still need to challenge the underlying beliefs which assume a genetic or gestational link

⁴⁵ *AB CC* para 46.

⁴⁶ Section 295(e) of the *Children's Act* (emphasis added).

⁴⁷ *AB CC* para 287 (emphasis added).

⁴⁸ *AB CC* para 289.

⁴⁹ *AB CC* para 289.

⁵⁰ *AB CC* para 294.

between a parent and a child is critical in the formation of strong family bonds. These assumptions were challenged head-on with an arsenal of evidence in *AB*; however, the majority ultimately did not give it credence. It is worth revisiting the *AB* case to reconsider the evidence presented to the court in 2015.

4 Re-examining the evidence in *AB*

To recapitulate the majority's reasoning in *AB*,⁵¹ the Constitutional Court majority 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,⁵² as knowledge of one's genetic ancestry is essential to one's self-worth and self-respect.⁵³ 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 child⁵⁴ by preserving the child's right to dignity, which unquestionably would be violated if the child did not know his or her genetic origins.⁵⁵

It is worth mentioning that the Court's reasoning has been severely criticised on numerous grounds, including: the Court flouted the rules of evidence;⁵⁶ it failed to uphold the rule of law;⁵⁷ it grounded its opinion in personal beliefs and preferences;⁵⁸ it overlooked constitutional issues including the right to equality as guaranteed in section 9 of the *Constitution*;⁵⁹ it misidentified the purpose of section 294;⁶⁰ and it 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.⁶¹ However, the greatest criticisms were levelled at the Court's rejection of the psychological evidence provided by Professor Susan Golombok.

4.1 *Psychological evidence presented to the Constitutional Court*

Assessing the psychological well-being of donor-conceived children born via surrogacy ultimately lives in the realm of psychology. Within this framework, children's psychological adjustment is associated with the

⁵¹ *AB CC*.

⁵² *AB CC* para 293.

⁵³ *AB CC* para 294.

⁵⁴ *AB CC* para 293.

⁵⁵ *AB CC* para 294.

⁵⁶ Thaldar 2018 *SAJHR* 231.

⁵⁷ Thaldar 2018 *SAJHR* 231.

⁵⁸ Thaldar 2018 *SAJHR* 231.

⁵⁹ Meyerson 2019 *CCR* 317-341.

⁶⁰ Meyerson 2019 *CCR* 317-341.

⁶¹ Meyerson 2019 *CCR* 317-341.

quality of the children's relationships with their parents.⁶² Warmth, sensitivity and acceptance are all associated with positive child adjustment.⁶³ Conversely conflict, hostility and rejection are linked to more negative outcomes for children.⁶⁴ The only longitudinal study to observe parenting and child development in families formed through surrogacy was conducted by the Cambridge group.⁶⁵ The study saw researchers recruiting a representative sample of surrogacy families in the United Kingdom with a baby born between 2000 and 2002 and following the families over 14 years.⁶⁶ In short, the study, which collected data from the families at six critical time points,⁶⁷ was part of a larger longitudinal study of reproductive donation⁶⁸ that sought to investigate the adjustment of children in new family forms. To appreciate the significance of the new research results, it is useful to first briefly contextualise the findings in the 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.⁶⁹ Furthermore, surrogacy mothers showed more positive mother-infant relationships, and surrogacy fathers better psychological well-being, than the "traditional" comparison group.⁷⁰ 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.⁷¹

Regarding psychological adjustment, surrogacy children in early childhood did not differ from children who had been naturally conceived.⁷² However, during middle childhood, surrogacy children at age seven showed higher levels of adjustment problems compared with gamete donation families, though still within the normal range; however, this difference was no longer

⁶² Golombok *et al* 2017 *Developmental Psychology* 1966-1977.

⁶³ Golombok *et al* 2017 *Developmental Psychology* 1966-1977.

⁶⁴ Golombok *et al* 2017 *Developmental Psychology* 1966-1977.

⁶⁵ Imrie and Golombok 2020 *Annual Review of Developmental Psychology* 295-316.

⁶⁶ Imrie and Golombok 2020 *Annual Review of Developmental Psychology* 295-316.

⁶⁷ Golombok *et al* 2017 *Developmental Psychology* 1966-1977. The six stages of the study were conducted when children reached ages one, two, three, seven, ten, and, lastly, fourteen.

⁶⁸ Imrie and Golombok 2020 *Annual Review of Developmental Psychology* 295-316; see fn 4.

⁶⁹ Golombok *et al* 2004 *Developmental Psychology* 400-411.

⁷⁰ Golombok *et al* 2006 *Journal of Child Psychology and Psychiatry* 213-222.

⁷¹ Golombok *et al* 2004 *Journal of Family Psychology* 443-452; Golombok *et al* 2005 *Human Reproduction* 286-293; Golombok *et al* 2006 *Human Reproduction* 1918-1924.

⁷² Jadva *et al* 2012 *Human Reproduction* 3008-3014.

present at age ten.⁷³ In addition, it was found that sperm and egg donation families continued to exhibit good family functioning, and there were no differences between gamete donation families and the "traditional" comparison group in child adjustment and mother-child⁷⁴ and father-child relationship quality.⁷⁵ Interviews with children in middle childhood who had been told about their method of conception established that most children had positive feelings about their donor conception.⁷⁶ Notably, children born through gamete donation reported affectionate and close relationships with their parents.⁷⁷

4.2 The majority's rejection of the evidence

If the evidence placed before the court in 2016 showed such positive outcomes for donor-conceived and surrogate children, why did the Court reject it? Relying on the judgment in *MEC for Education: Kwazulu-Natal v Pillay*,⁷⁸ the majority stressed that courts did not depend on the opinion or "credible data" of experts when determining the constitutionality of a provision.⁷⁹ Following 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.⁸⁰ 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.⁸¹ In agreement with the Minister, the majority held that the High Court had overemphasised the interests of the commissioning parents and hence overlooked the purpose of section 294 and the best interests of children.⁸² 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 purpose⁸³ of creating a bond between the resultant child and the commissioning parent(s).⁸⁴

In support of this view, the court relied on an African adage, "*ngwana ga se wa ga ka otle ke wa ga katsala*", which was loosely translated as "a child

⁷³ Golombok *et al* 2013 *Journal of Child Psychology and Psychiatry* 653-660.

⁷⁴ Golombok *et al* 2013 *Journal of Child Psychology and Psychiatry* 653-660; Golombok *et al* 2011 *Journal of Family Psychology* 230-239.

⁷⁵ Golombok *et al* 2017 *Developmental Psychology* 1966-1977.

⁷⁶ Golombok *et al* 2017 *Developmental Psychology* 1966-1977.

⁷⁷ Golombok *et al* 2017 *Developmental Psychology* 1966-1977.

⁷⁸ *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC).

⁷⁹ AB CC para 291.

⁸⁰ AB CC para 291.

⁸¹ AB CC.

⁸² AB CC para 293.

⁸³ AB CC para 293.

⁸⁴ AB CC para 287.

belongs not to the one who provides but to the one who gives birth to the child".⁸⁵ The court continued:

Hence clarity regarding the origin of a child is important to the self-identity and self-respect of the child.⁸⁶

The rational *nexus* was thereby established, and the court consequently found in favour of the Minister.⁸⁷

4.3 Analysis of the majority judgment

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 who regrettably cannot contribute 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" 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".⁸⁸ 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."⁸⁹ To this end, Thaldar argues that the purposive construction of an impugned provision should be informed by "credible real-

⁸⁵ AB CC para 294.

⁸⁶ AB CC.

⁸⁷ AB CC para 330.

⁸⁸ Thaldar 2018 SAJHR 250.

⁸⁹ *Pillay* para 88.

world data" 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.⁹⁰

Thirdly, although the majority categorically rejected all the empirical evidence, it remarkably saw fit to rely on an African adage to justify its position. The adage is problematic in several key respects. First, it is not clear how it supports the claim that a 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",⁹¹ then this adage calls into question the legitimacy of surrogacy itself, rather than simply the genetic origins of the child.⁹² Furthermore, the adage is rooted in a particular culture – and not one ascribed to by all South Africans.⁹³ 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".⁹⁴ 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.⁹⁵ In his analysis of *AB Thaldar* 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.⁹⁶

Thaldar is deeply critical of the court's reasoning.⁹⁷ He 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.⁹⁸ Thaldar argues that without being informed by credible data, the Court could not establish whether the impugned provision indeed served its intended purpose. Thaldar answers the question of rationality:

⁹⁰ Thaldar 2018 *SAJHR* 250.

⁹¹ *AB ZA* para 294.

⁹² Thaldar 2018 *SAJHR* 250-251.

⁹³ Thaldar 2019 *CCR* 343-361.

⁹⁴ Thaldar 2019 *CCR* 360-361.

⁹⁵ See Thaldar 2018 *SAJHR* 251; Thaldar 2019 *CCR* 356-357.

⁹⁶ Thaldar 2018 *SAJHR* 253.

⁹⁷ Thaldar 2018 *SAJHR* 249.

⁹⁸ Thaldar 2018 *SAJHR* 251.

...[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.⁹⁹

Equally critical of the court's reasoning, Meyerson opines that both the minority and the majority were too quickly satisfied that section 294 passed the section 9(1) constitutional test of rationality.¹⁰⁰ Relying on the empirical research findings made by Golombok, Meyerson asserts that the no-double-donor requirement fails to meet the purpose of promoting a more loving and stable family and so fails to satisfy the rational connection test.¹⁰¹ Meyerson asserts that the only goal which is advanced by section 294's genetic-link requirement is the aim of enforcing "a bionormative conception of the family", which is not a legitimate purpose.¹⁰²

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. It appears that the assumptions of the majority – such as beliefs about blood ties – were too deeply embedded to be uprooted by the research at the time, with its obvious weaknesses. The researchers 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.¹⁰³ This was indeed pointed out at the time in the papers filed by the Minister.¹⁰⁴ The best available evidence seemed overwhelmingly to suggest that donor-conceived children suffered no psychological harm; but the evidence could not conclusively show that this remained true once children reached adolescence. Adolescence is a distinct time of identity formation;¹⁰⁵ therefore, the question remained as to whether donor-conceived adolescents would suffer a profound loss of self, armed with a greater understanding of genetics, biology, and heritage.

Research in this area of psychology is ongoing and ever-changing.¹⁰⁶ With continual advancements in technology and a growing body of research, the court is far better placed now than it was seven years ago to decide the child's best interests. With the inclusion of adolescence in the latest research, what was merely assumed in 2016 can be definitively answered

⁹⁹ Thaldar 2018 *SAJHR* 251.

¹⁰⁰ Meyerson 2019 *CCR* 317-341.

¹⁰¹ Meyerson 2019 *CCR* 329.

¹⁰² Meyerson 2019 *CCR* 329.

¹⁰³ Jadva *et al* 2012 *Human Reproduction* 3008-3014.

¹⁰⁴ Minister's Answering Affidavit to AB Founding Affidavit para 8.31 (record 1435).

¹⁰⁵ Golombok *et al* 2017 *Developmental Psychology* 1966-1977.

¹⁰⁶ Imrie and Golombok 2020 *Annual Review of Developmental Psychology* 295-316.

in 2022. Will new research undermine or strengthen the significance placed on the genetic link within families?

5 Latest findings: Is blood thicker than water?

This sets the scene for the next phase of the study – adolescence. Interestingly, the researchers 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".¹⁰⁷ 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.¹⁰⁸ 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."¹⁰⁹ Should this be the case, it may negatively affect the child's identity development, psychological adjustment, and relationship with the parents.¹¹⁰ At its sixth phase, the longitudinal study included 87 families with a child born through reproductive donation – comprising 32 donor-insemination families, 27 egg-donation families, and 28 surrogacy families. The control group was made up of 54 "traditional" families with naturally conceived children.¹¹¹ The families were contacted as close as possible to the child's fourteenth birthday.¹¹²

The Cambridge group set out to answer several relevant questions about new family forms. First, regarding family functioning, the group investigated how families formed through egg donation, donor insemination and surrogacy fared compared with "traditional" families. The research suggested that these families did not differ from natural conception families¹¹³ and moreover exhibited positive mother-adolescent relationships and well-adjusted adolescents.¹¹⁴ The mothers in surrogacy families particularly showed less negative parenting and reported greater acceptance of their adolescent children and fewer problems in family relationships.¹¹⁵ The researchers suggested that a possible reason for this finding was that these mothers were highly motivated to have children:

¹⁰⁷ Golombok *et al* 2017 *Developmental Psychology* 1967.

¹⁰⁸ Golombok *et al* 2017 *Developmental Psychology* 1967.

¹⁰⁹ Golombok *et al* 2017 *Developmental Psychology* 1968.

¹¹⁰ Golombok *et al* 2017 *Developmental Psychology* 1968.

¹¹¹ Golombok *et al* 2017 *Developmental Psychology* 1968.

¹¹² Golombok *et al* 2017 *Developmental Psychology* 1968.

¹¹³ Golombok *et al* 2017 *Developmental Psychology* 1973-1974.

¹¹⁴ Golombok *et al* 2017 *Developmental Psychology* 1974.

¹¹⁵ Golombok *et al* 2017 *Developmental Psychology* 1974.

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.¹¹⁶

It appeared, however, that less positive relationships existed between mothers and adolescents in egg-donation families compared with those of donor-insemination families – both in terms of mothers' acceptance of their adolescents and the functioning of the family.¹¹⁷ Nevertheless, it is important to note that the scores for both mothers and children in egg-donation families still indicated high levels of maternal acceptance and family functioning;¹¹⁸ egg-donation families simply showed *less* positive scores.¹¹⁹ Furthermore, there were no observed differences between the various family types regarding the prevalence of emotional or behavioural problems in adolescents, nor were there differences in adolescent well-being or self-esteem.¹²⁰ 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.¹²¹ The study confirmed that children born through egg donation, donor insemination and surrogacy did not exhibit raised levels of mother-adolescent relationship difficulties or adolescent adjustment problems compared with natural-conception families.¹²²

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 thought and felt about the surrogate or donor involved.¹²³ Notably, the study was the first to have asked adolescents conceived through different types of reproductive donation directly for their views.¹²⁴ The researchers established that most 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.¹²⁵ Most importantly, not one of the adolescents was distressed about his or her conception or birth.¹²⁶ While some felt ambivalent, others were particularly positive about their conception. The researchers commented that most of the adolescents had been told about

¹¹⁶ Golombok *et al* 2017 *Developmental Psychology* 1974.

¹¹⁷ Golombok *et al* 2017 *Developmental Psychology* 1974.

¹¹⁸ Golombok *et al* 2017 *Developmental Psychology* 1974.

¹¹⁹ Golombok *et al* 2017 *Developmental Psychology* 1974.

¹²⁰ Golombok *et al* 2017 *Developmental Psychology* 1974.

¹²¹ Golombok *et al* 2017 *Developmental Psychology* 1974.

¹²² Golombok *et al* 2017 *Developmental Psychology* 1974.

¹²³ Zadeh *et al* 2018 *Human Reproduction* 1100.

¹²⁴ Zadeh *et al* 2018 *Human Reproduction* 1100.

¹²⁵ Zadeh *et al* 2018 *Human Reproduction* 1104.

¹²⁶ Zadeh *et al* 2018 *Human Reproduction* 1104.

their conception before the age of seven and that this may have played a role in their positive outlook.¹²⁷ 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.¹²⁸

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 revealed that adolescents who had been told the circumstances of their birth at a younger age, specifically where parents started the process before the age of seven, displayed higher levels of psychological well-being. However, regardless of the age of disclosure, low levels of emotional and behavioural problems existed,¹²⁹ 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.¹³⁰

Reflecting on her findings, Golombok 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".¹³¹ This empirical evidence is consistent with the earlier research findings presented to the court in 2015. The research read together confirms that "children in new families are well adjusted and experience positive parenting and warm, supportive parent-child relationships."¹³² 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.¹³³ It is clear, therefore, that these children were by necessity planned and extremely wanted, and were often the long awaited and much hoped for child.¹³⁴ 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,

¹²⁷ Zadeh *et al* 2018 *Human Reproduction* 1104.

¹²⁸ Zadeh *et al* 2018 *Human Reproduction* 1104-1105.

¹²⁹ Zadeh *et al* 2018 *Human Reproduction* 1105.

¹³⁰ Zadeh *et al* 2018 *Human Reproduction* 1105.

¹³¹ Imrie and Golombok 2020 *Annual Review of Developmental Psychology* 295-316.

¹³² Imrie and Golombok 2020 *Annual Review of Developmental Psychology* 295-316.

¹³³ Imrie and Golombok 2020 *Annual Review of Developmental Psychology* 295-316.

¹³⁴ Imrie and Golombok 2020 *Annual Review of Developmental Psychology* 295-316.

and the quality of family interactions.¹³⁵ The literature confirms that family processes, such as the quality of family relationships and the family's social environment, mattered much more for children's healthy psychological development than the biological relatedness between parents and children.¹³⁶

The most recent and best available empirical research, conducted by the Cambridge group, crucially investigates the adjustment of adolescents in new family forms. In line with the group's previous findings, the results convincingly show that, despite the absence of a biological and gestational link to their parents, donor-conceived surrogate children are well-adjusted and have high self-esteem – remarkably, even as they enter the turbulent teenage years. I suggest that this evidence would allow KB to successfully contest the constitutionality of the genetic-link requirement, as the Cambridge studies convincingly answer the central issue of the prospective child's best interests. Clearly, there is no evidence that the lack of a genetic link between a parent and child is detrimental to the child's well-being. Since there is no rational nexus between section 294 and the best interests of the child, section 294 should be declared unconstitutional. If section 294 is unconstitutional, the question of how best to remedy the impugned provision remains. Should the Cambridge group's research be accepted, it stands to reason that the restriction proffered by KB would be unnecessary; ultimately there would be no justifiable reason to limit double-donor surrogacy to cases of a "sibling link". However, if the view is taken that the genetics of the child still holds relevance and thus that it is in the best interests of an existing child to have a genetically related sibling, then one needs to consider the effect of reading in KB's recommended "sibling link" as a possible solution. Next, I consider the merits of KB's solution.

6 The relief sought

6.1 *KB's remedy is too narrow*

To demonstrate the potential outworking of KB's recommendation I will apply the "sibling link" to four possible scenarios the court could face in future:

- a) A childless couple is conception and pregnancy infertile. They desire to use double-donor surrogacy and agree to utilise the same donors for all subsequent children. Surrogacy in this situation is not permissible, despite the potential for a future "sibling link" since there is no gestational link with the first child.

¹³⁵ Imrie and Golombok 2020 *Annual Review of Developmental Psychology* 295-316.

¹³⁶ Imrie and Golombok 2020 *Annual Review of Developmental Psychology* 295-316.

- b) A couple uses double-donor gametes during IVF to successfully have a child. They then become pregnancy infertile. They now need to make use of a surrogate. Unfortunately, none of the original viable embryos remain as all were used in a bid to fall pregnant. Surrogacy is not allowed since there is a need to use different donor gametes from those used in the creation of their first child, even if the couple intends to have more than one child thereafter with the assistance of a surrogate. The initial "sibling link" is absent.
- c) A surrogate is artificially inseminated with the intended father's gamete, as is the case for partial or traditional surrogacy. A few years later, after the father becomes infertile, the same surrogate is approached and is to be inseminated with a donor's gamete. Since the surrogate children will share the same genetic mother, this situation may be allowed, as the "sibling link" is partially achieved.
- d) A childless couple uses their siblings' gametes for the creation of embryos to be carried by a surrogate. They intend to have only one child but by using their siblings' gametes they seek to create certainty regarding the child's genetic origins. Furthermore, the child will be closely related to her parents and will enjoy relationships with cousins that are genetically half-siblings and will have full grandparents. This is not allowed because of the absence of a "sibling link".

Thus, it is evident that the "sibling link" would result in arbitrary application. For instance, the provision potentially allows a parent in scenario 3 to make use of surrogacy, while barring prospective parents in scenario 4, although the intended child would be raised by parents who share much stronger genetic ties than the parent in scenario 3. If genetics are deemed to be important by the court, this provision results in an irrational outworking. Similarly, the prospective siblings in *KB*, though genetic siblings, share no genetic link with their parents. The "sibling" solution will allow *KB* to access surrogacy, but not the prospective parents in scenarios 1 and 2. Again, this is difficult to justify.

KB's proffered solution to extend section 294 to include a "sibling link" is too restrictive to be applied generally by the courts in surrogacy matters. It serves *KB*'s narrow circumstances but tends to apply in a rather arbitrary manner to other equally valid situations. It fails to solve the constitutional issues present in section 294 and has the potential to result in unjustifiable discrimination, where some prospective parents are permitted, and others are barred from the use of surrogacy – despite being in very similar or equally valid circumstances. Such a solution is bound to result in further constitutional challenges.

Should section 294 be struck out? In van Niekerk's critique of section 294, she opined that the genetic link on the part of the commissioning parents should be immaterial.¹³⁷ There are, however, some reservations regarding the removal of the genetic link requirement, such as it may open the door to "undesirable practices such as shopping around with a 'view to creating' children with particular characteristics",¹³⁸ and other such fears. Van Niekerk helpfully argues that where there is a concern about the improper motives of individuals wishing to use surrogacy, this could be ascertained by the court, which was already responsible for vetting surrogacy applications.¹³⁹ Van Niekerk argued that rather than genetics, what is – and should be – important is the commissioning parent's suitability to parent. This could be determined by considering relevant evidence, including their intention to parent; ultimately genetics provides no guarantee of the welfare of the child.¹⁴⁰ Perhaps a broader approach which considers the merits of each case is a more appropriate remedy to section 294.

6.2 The relief suggested by the amici curiae provides a broader solution

Professor Thaldar and Dr Shozi, academics at the University of KwaZulu-Natal's School of Law, specialising in reproductive law, wrote to the state attorney outlining their proposed solution to *KB*.¹⁴¹ In their letter they opined that section 294 was unconstitutional based chiefly on "its harmful impact on infertile people, a group that is already suffering marginalisation in our society",¹⁴² and that the majority erred in *AB*.¹⁴³ However, instead of requesting the Court to strike out section 294, they proposed a compromise solution, where the Court reads in the following sentence at the end of the genetic-link requirement:

A court may, on good cause shown, dispose with the requirement set out in this section.¹⁴⁴

Thaldar and Shozi proffered their proposed solution as one that has many benefits. It retains the essence of the genetic-link requirement but gives the court the necessary flexibility to depart from it where "good cause is shown", such as where the court may need to demonstrate due regard for individual circumstances.¹⁴⁵ In allowing the court to decide what is in the best interests

¹³⁷ Van Niekerk 2015 *PELJ* 408.

¹³⁸ See *AB GP* para 38; here, the court referred to the Commission's report.

¹³⁹ Van Niekerk 2015 *PELJ* 408.

¹⁴⁰ Van Niekerk 2015 *PELJ* 421.

¹⁴¹ Thaldar and Shozi "Suggested Solution to *KB v Minister of Social Development (CCT 182/21)*" Letter to the State Attorney, 1 December 2022 (hereafter Letter to the State Attorney from Thaldar and Shozi) para 4.3/3/2023 12:24:00 PM

¹⁴² Letter to the State Attorney from Thaldar and Shozi para 5.

¹⁴³ Letter to the State Attorney from Thaldar and Shozi para 6.

¹⁴⁴ Letter to the State Attorney from Thaldar and Shozi para 7.

¹⁴⁵ Letter to the State Attorney from Thaldar and Shozi para 9.

of a prospective child in the unique circumstances of each case, the courts are enabled to carry out their mandate as the guardians of all children.¹⁴⁶ Given the adaptability of their solution, Thaldar and Shozi opined that it will importantly provide a "general" and "sustainable long-term legal solution" which will avoid future constitutional challenges to section 294.

This is sage advice and the Minister of Social Development should heed it. The alternative remedy to section 294 is flawed for the reasons already outlined. The strength of this solution is that it acknowledges that the court is best placed to determine the best interests of prospective children based on the unique circumstances before it. The reasons and motivations for why prospective parents may wish to make use of double-donor surrogacy will vary from one individual to the next. While the general requirement for a genetic link will remain, those who are both conception and pregnancy infertile may apply to the court to relax this requirement. The court may assess the prospective parents' situation, allowing for a more just outcome for hopeful parents facing the painful reality of infertility. As eloquently expressed in the *Lühl* case per Masuku J:

It is my experience that it is not always the case that the law and justice coincide. They may live in the same yard but certainly in different houses. The main quest for the court must be to bring both the law and justice to live together under one roof, if not in the same room.¹⁴⁷

The proffered solution allows the courts to do just that. KB has suffered immense loss on her painful path to parenthood. Her sincere wish to give her son genetically related siblings is entirely understandable, especially given the profound connection the couple have with the remaining embryos. Their deep desire to have children has kept them resolute despite the enormous obstacles they face, as they endeavour to bring their children "home".¹⁴⁸ The constitutional commitment to "progress towards being a more humane and caring society"¹⁴⁹ surely dictates that the courts should treat such individuals with particular respect, care and compassion. This is affirmed in *Williams*, per Langa J:

Courts do have a role to play in the promotion and development of a new culture 'founded on the recognition of human rights,' in particular, with regard to those rights which are enshrined in the Constitution. It is a role which demands that a court should be particularly sensitive to the impact which the exercise of judicial functions may have on the rights of individuals who appear before them; vigilance is an integral component of this role, for it is incumbent on structures set up to administer justice to ensure that as far as possible,

¹⁴⁶ Letter to the State Attorney from Thaldar and Shozi para 10.

¹⁴⁷ *Lühl* case para 2.

¹⁴⁸ KB's Founding Affidavit para 23.

¹⁴⁹ *Williams* case para 63.

these rights, particularly of the weakest and the most vulnerable, are defended and not ignored.¹⁵⁰

It is time to bring justice and the law into the same room.

7 Conclusion – The writing is on the wall

The latest influential studies investigating new family forms persuasively show that, despite the absence of 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 deeply held suppositions regarding the importance of genetics and considering a dearth of evidence in defence of blood ties and genetic relatedness in families, these beliefs are doubtlessly defeated. The evidence shows that the no-double-donor requirement of section 294 fails to fulfil a legitimate government purpose. Instead, it works to stifle the constitutional rights of conception and pregnancy infertile individuals under the semblance of safeguarding "the best interests of the child". Grounding legislation in discriminatory beliefs is untenable in our constitutional democracy.

The preamble of the *Constitution* provides that South Africa belongs to all who live in it – and therefore we are all equally deserving of dignity and respect. It is high time that surrogacy laws in South Africa reflect this. However, reading in a "sibling clause" does not provide the dynamic solution necessary to give the courts the required freedom to administer justice in the child's best interests based on the facts before them. Permitting double-donor surrogacy where good cause is shown would better reflect our constitutional values. Section 294 has been weighed, measured and found wanting. The writing is most certainly on the wall.

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List of Abbreviations

AMH	anti-müllerian hormone
ART	Assisted reproductive technology
CCR	Constitutional Court Review
IUI	intrauterine insemination
IVF	<i>in vitro</i> fertilisation
PELJ	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SALC	South African Law Commission