

A "Parenting Licence" Granted by One's Existing Children? Critical Analysis of the Judgment in *Ex Parte JCR 2022 5 SA 202 (GP)*

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Abstract

In *Ex Parte JCR* the Pretoria High Court sought to introduce new requirements for all surrogacy applications in South Africa. The court considered the psychological impact of surrogacy on the children of both the surrogate parents and the commissioning parents and the need to put in place procedures "for preparing them for this process [of not bringing the surrogate baby home]" or "for a new addition to their family", respectively. The court ordered the mandatory psychological assessment of the existing children of the surrogate mother and commissioning parents. A report emanating from such an assessment would ostensibly assist the court in determining the best interests of the existing children of the parties to the surrogate motherhood agreement.

The position taken in this article is that the mandatory psychological evaluation of the existing children of the parties to a surrogate motherhood agreement fundamentally upsets the balance between the interests of the persons affected by the surrogacy process. In fact, it shifts the balance of power almost entirely into the hands of the existing children, such that they may be said to decide whether their parents are allowed to have any more children. The court's position that such psychological evaluations would be in the best interests of existing children is based on a misunderstanding of the court's duty in this regard. In fact, the mandatory psychological evaluation requirement is more likely to *undermine* children's interests. Furthermore, the mandatory psychological evaluation requirement violates the commissioning parents' constitutional rights to dignity, equality, reproductive autonomy, privacy, and access to reproductive healthcare.

Keywords

Surrogacy; best interests; reproductive health rights; equality; dignity; privacy.

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1 Introduction

In ancient Roman art, the virtue of *iustitia* is often personified as a blindfolded woman wielding a sword and a set of scales. The scales held by this iconic figure, commonly referred to as "Lady Justice", represent the role of the court in acting as an unbiased decision-maker, whose judgment must equitably weigh all competing facts, interests, and considerations against one another.

In making decisions pertaining to medically assisted reproduction (MAR), the courts are engaged in a similarly delicate balancing exercise: On the one hand, the courts must respect the interests and rights of prospective parents who are entitled to make use of MAR. On the other hand, the courts must also uphold their duty to promote the best interests of children who do not yet exist. In some cases, this balancing exercise is made even more complex by the involvement of third parties – as is the case with surrogacy. In seeking to balance the rights and interests of all parties concerned, our courts have, over time, built upon the requirements for surrogacy applications. In this article, we reflect on the most recent judgment which attempts to build upon these requirements: *Ex Parte JCR*.¹ We explore whether the decision in this judgment strikes a just balance.

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In this case, the Pretoria High Court per Neukircher J seeks to introduce new requirements for surrogacy agreements in South African law. The introduction of these new requirements is based, ostensibly, on the following statement from the judgment:

It is this very principle [of the best interests of the child] which has woven itself into the fabric of the Act and which stands behind all judgments that relate to section 295 [of the *Children's Act*]. However, every single surrogacy application affects not only the rights and interests of the unborn child but also those of the children that are already part of the family unit of the surrogate and (sometimes) the commissioning parents.²

The Judge was animated by the psychological impact of surrogacy on the children of both the surrogate parents and the commissioning parents and the need to implement procedures "for preparing them for this process [of not bringing the surrogate baby home]" or "for a new addition to their family", respectively.³ To this end, the court ordered the psychological assessment of the existing children of the surrogate parents "with specific attention paid to the effect on them (if any) of the third applicant's pregnancies and the fact that she does not bring home any of the children to which she gives birth".⁴ The judgment concludes that these assessments should be obtained in all surrogacy cases, and should include assessments of the existing children of the commissioning parents.

We take the position that requiring the psychological evaluation of the existing children of the parties to a surrogate motherhood agreement fundamentally upsets the balance between the interests of the parties involved in the surrogacy process. In fact, it shifts the balance of power almost entirely into the hands of the existing children, such that they may be said to decide whether their parents are allowed to have any more children. This situation arose because the court in *Ex Parte JCR* took the view that it is the best interests of existing children to conduct and consider

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¹ *Ex Parte JCR* para 4.

² *Ex Parte JCR* paras 17 and 18.

³ *Ex Parte JCR* para 19.

such a psychological evaluation, but this conclusion is based on a fundamental misunderstanding of what the court's duty to protect the "best interests of the child" means. In this article, we highlight this misunderstanding, and show that instead of promoting the interests of children, this new requirement is more likely to *undermine* these children's interests. We also argue that this new requirement violates the commissioning parents' constitutional rights to dignity and equality, and their rights to reproductive autonomy, privacy, and access to reproductive healthcare.

In making our arguments, we begin by outlining the current legal regime relating to surrogacy – briefly outlining relevant legislation and case law. We then review the *Ex Parte JCR* judgment, and discuss our criticisms thereof based on the court's misguided utilisation of the concept of the best interests of the child, as well its failure to consider the weight of the rights of prospective commissioning parents.

2 Legislative and judge-made requirements for surrogacy

2.1 Regulatory framework requirements

The practice of arranging to have children through another person seems to have existed under the Torah, the Hammurabi Code and African Customary Law.⁵ Until 1 April 2010,⁶ South Africa did not have comprehensive legislation regulating surrogacy. Instead, parties to a surrogacy agreement relied on the terms of the agreement set out in a written contract.⁷ Whether or not such surrogacy agreements were valid and enforceable, remained uncertain.⁸ There was a need to create certainty, to set the parameters and protect the parties to the surrogacy agreement. The building blocks of what today is the regulatory framework for surrogacy agreements in South Africa were first laid in 1987 when the South African Law Commission (SALC), as it was then called, initiated an investigation into surrogate motherhood. When the SALC released its report in 1992, it recommended, among other things, that surrogacy not be banned or criminalised but be recognised and regulated by legislation, and that it be

⁵ See *AB v Minister of Social Development* 2017 3 BCLR 267 (CC) paras 35 and 36, and also *Ex Parte WH* 2011 6 SA 514 (GNP) para 2 (hereafter *AB* and *Ex parte WH* respectively.)

⁶ The commencement date of, *inter alia*, ch 19 of the *Children's Act* 38 of 2005 (hereafter the *Children's Act*).

⁷ SALC *Report on Surrogate Motherhood* para 4.7.1.

⁸ SALC *Report on Surrogate Motherhood* paras 2.9.2 and 4.7.3.

permitted for married couples only.⁹ In this regard, the SALC went on to craft a proposed Bill of Surrogate Motherhood, which Bill was never passed.¹⁰

Following a political sea change that took place in 1994, South Africa became a constitutional democracy. In relation to surrogacy, a Parliamentary Ad Hoc Committee (the Ad Hoc Committee) was established to inquire into and report on the SALC Report. The scope of the work of the Ad Hoc Committee was initially limited to the report of the SALC on Surrogate Motherhood. Based on, *inter alia*, that the SALC was inappropriately constituted in terms of gender and race at the time of the investigation, and that some of the recommendations were not in line with the *Constitution*, and that the consultation process did not include a majority of the people, the Ad Hoc Committee widened the scope to include its own research. Protection of the surrogate mother was cited as a major concern due to the possibility of exploitation of women, in particular the surrogate mother.¹¹ In 1999, when the Ad Hoc Committee released its report, it recommended, *inter alia*, the inclusion of unmarried couples and single persons. The report went on to require that there be a report on the physical and psychological suitability of all parties involved to determine whether they are fit and proper persons to enter into a surrogacy agreement. Of note, is that no reference was made to obtaining reports about children – either of the commissioning parent(s) or of the surrogate mother.

When the report of the Ad Hoc Committee was tabled in parliament in 1999, the SALC had already commenced with a review of the *Child Care Act* 74 of 1983.¹² The Ad Hoc Committee envisioned having a single comprehensive children's statute. The recommendations of the Ad Hoc Committee were eventually incorporated – with some changes – into the Children's Bill as a chapter on surrogate motherhood, and subsequently were enacted into law as Chapter 19 of the *Children's Act*.

As per Khampepe J in *AB v Minister of Social Development*, "Chapter 19, spanning sections 292 to 303 of the *Children's Act*, delineates the procedural and substantive boundaries of surrogate motherhood agreements".¹³ These provisions deal with, among others, the requirement that the surrogate motherhood agreement must be in writing and confirmed

⁹ See the SALC *Report on Surrogate Motherhood*.

¹⁰ See Schedule A appended to the SALC *Report on Surrogate Motherhood* 162-183.

¹¹ PMG 1999 <https://pmg.org.za/committee-meeting/6785/>.

¹² SALC *Review of the Child Care Act*.

¹³ *AB* para 39.

by the High Court;¹⁴ the consent of husband, wife or partner;¹⁵ the genetic origin of the child;¹⁶ confirmation by the court;¹⁷ the effect of a surrogate motherhood agreement on the status of a child;¹⁸ the issue of termination of a surrogate motherhood agreement;¹⁹ the effect of termination of a surrogate motherhood agreement;²⁰ termination of pregnancy;²¹ prohibition of payment in relation to surrogacy;²² and the identity of the parties.²³ Note that Chapter 19 does not refer to the requirements listed by the court in *Ex Parte JCR* in relation to the best interest of the children who are already part of the family units – of either the surrogate mother or the commissioning parents, in part because the children involved are not party to the agreement.

2.2 Requirements as per case law

In jurisdictions that support altruistic surrogacy, such as South Africa, the courts have been animated by the need to supplement existing regulations in legislation where they are deemed necessary. Indeed, pre-conception assessments of the fitness of the prospective surrogate and commissioning parents have become accepted in many jurisdictions on the basis of the claim that such assessments protect the prospective child from abuse and exploitation and ensure that the child is raised in "conditions that serve their best interests".²⁴ In South Africa, the legislature left a wide discretion to the presiding officers to make a determination as to whether or not the surrogate is a "suitable person"²⁵ to act as such, including in relation to what evidence is to be considered to make such a determination. Psychological assessment of the proposed surrogate is not expressly legislatively

¹⁴ Sections 292 and 296 of the *Children's Act*.

¹⁵ Section 293 of the *Children's Act*.

¹⁶ Section 294 of the *Children's Act*.

¹⁷ Section 295 of the *Children's Act*. Subs (e) goes on to state that: "A court may not confirm a surrogate motherhood agreement unless in general, having regard to the personal circumstances and family situations of all the parties concerned, but above all *the interests of the child that is to be born*, the agreement should be confirmed" (emphasis added).

¹⁸ Section 297 of the *Children's Act*.

¹⁹ Section 298 of the *Children's Act*.

²⁰ Section 299 of the *Children's Act*.

²¹ Section 300 of the *Children's Act*.

²² Section 301 of the *Children's Act*.

²³ Section 302 of the *Children's Act*.

²⁴ University of Chicago Law School 2019 https://chicagounbound.uchicago.edu/ihr/10_71.

²⁵ Section 195(2)(c)(iii) of the *Children's Act*.

mandated in South Africa, yet, as explained below, this has become practice in the screening process.²⁶

Case law on surrogacy seems to suggest that judges are at liberty to add to the requirements which commissioning parents and surrogate mothers must comply with before the agreement can be confirmed by the court at will. For instance, Wepener J in *Ex Parte Applications for the confirmation of Three Motherhood Agreements*²⁷ remarked in passing:²⁸

As upper guardian one would expect to know in detail who the commissioning parents are, what their financial position is, what support systems, if any, they have in place, what their living conditions are and how the child will be taken care of. A good practice is also found regarding adoptions where expert assessment reports from social workers are required and in practice a police clearance is obtained in order to demonstrate the suitability of the adoptive parents. This can be applied to the commissioning parents with very good results. An expert report can also address the suitability of the surrogate mother.

To give direction on issues of surrogacy and to create some certainty, the Deputy Judge President of the Gauteng Division constituted a court with two judges to provide guidelines on surrogacy applications.²⁹ The court specified a number of requirements that applicants in a surrogacy application must comply with.³⁰ In relation to the best interests of the child, the court cautioned:³¹

Thus when a court considers the question of the best interests of the child care should be taken that the rights of the commissioning parents in terms of the Bill of Rights and the Promotion of Equality and Prevention of Unfair Discrimination Act, Act no 4 of 2000 are not violated by unnecessary invasion of the privacy of commissioning parents or by setting the bar too high for parents whose only option is to have a child by way of surrogacy. This will entail a value judgment by the court taking into consideration the circumstances of the particular case.

The court further indicated that judges in these applications must guard against subjective influence as a result of their own "individual idiosyncrasies", nor should they purport to or rely on what is perceived to be a dominant or prevailing view in society.³² Indeed, the court confirmed that

²⁶ *Ex Parte WH* paras 67 and 77.3.

²⁷ *Ex Parte Applications for the Confirmation of Three Motherhood Agreements* 2011 6 SA 22 (GSJ) (hereafter *Three Motherhood Agreements*).

²⁸ *Three Motherhood Agreements* para 17.

²⁹ See *Ex Parte WH* para 9.

³⁰ *Ex Parte WH* paras 67 and 69.

³¹ *Ex Parte WH* para 63.

³² *Ex Parte WH* para 69.

the test in determining suitability of parents is objective.³³ Commentary on that case takes issue with the court's insufficient scrutiny of the evidence before it which undermines the need for strong safeguards against commercial surrogacy and international reproductive tourism.³⁴

The next milestone in the judicial development of guidelines for surrogacy applications was the judgment in *Ex Parte KAF 2*.³⁵ After the court expressed concerns about the suitability of an intended surrogate mother in *Ex Parte KAF 1* and dismissed their application,³⁶ the same parties returned to the court with supplemented papers in *Ex Parte KAF 2*. Their supplemented papers did not only address the specific concerns raised, but also made recommendations regarding how the suitability of an intended surrogate mother should in general be assessed. This was based on a joint expert opinion by three psychologists, who formulated and provided reasons for eight criteria for a suitable surrogate mother. The court in *Ex Parte KAF 2* effectively adopted the criteria suggested by the psychologists,³⁷ and in the particular case ruled that based on the supplemented papers it was satisfied with the suitability of the intended surrogate mother.

Important for current purposes, one of the criteria laid down in *Ex Parte KAF 2* was that the intended surrogate mother must be emotionally available for her own child or children, which includes her readiness to discuss the surrogate pregnancy with her child or children, depending on their ages and levels of comprehension.³⁸ This, we suggest, is clearly motivated by a concern for the well-being of the surrogate mother's child or children. However, as we highlight in more detail below, the court in *Ex Parte JCR* made no reference to either *Ex Parte KAF 2* or the criteria enunciated in *Ex Parte KAF 2*. It appears that this precedent was simply ignored or at best was an oversight.

As we can see from the above, the parties under scrutiny in surrogacy applications have always been both the prospective commissioning parents and the prospective surrogate mother. The scrutiny they are subjected to is with a view to ascertaining if it is in the best interest of the child yet to be born that the child be carried by the prospective surrogate mother and be

³³ Pillay and Zaal 2013 *SALJ* 480.

³⁴ Bonthuys and Broeders 2013 *SALJ* 495.

³⁵ *Ex Parte KAF* 2019 2 SA 510 (GJ) (hereafter *Ex Parte KAF 2*).

³⁶ *Ex Parte KAF* (14341/17) 2017 ZAGPJHC 227 (10 August 2017). Also see Thaldar 2018 *SAJBL* 35.

³⁷ Thaldar 2019 *SAJBL* 66.

³⁸ *Ex Parte KAF 2* para 29.6.

raised by the prospective commissioning parents. However, the court in *Ex Parte JCR* has added another layer by making it a requirement that before a court can confirm any surrogate agreement, there must be a report from a clinical psychologist placed before the court indicating that he or she has consulted with the existing children of the commissioning parents and of the surrogate.³⁹ The judgment, and the rationale behind this finding, are discussed below.

3 Facts and judgment in *Ex Parte JCR*

Ex Parte JCR was an application for the confirmation of a surrogate motherhood agreement. It was brought by four applicants: the first, a woman, "JCR", who was permanently and irreversibly infertile;⁴⁰ the second, her husband; the third, the intended surrogate mother; and the fourth, the intended surrogate mother's husband.⁴¹ Interestingly, this was not the first application brought by these same parties; the applicants had previously entered into a surrogate motherhood agreement, duly confirmed by the court in 2020.⁴² A child was born of that surrogacy arrangement in 2021.⁴³ Following this successful surrogate motherhood agreement, the commissioning parents, intending to have a second child through surrogacy, approached the same surrogate mother.⁴⁴

On assessing the parties' *Ex Parte* application, the court was satisfied that the commissioning parents had been in a committed relationship since 2001 and were financially stable.⁴⁵ In evaluating their suitability as parents, the court noted that the couple's child born of the previous surrogacy arrangement was at that point 10 months old.⁴⁶ The court found that the family functioned as a stable family unit in every respect, and was satisfied that the commissioning parents would provide for any prospective child financially, emotionally and physically.⁴⁷ Thus, the court was convinced that any child born of the surrogacy arrangement would have his or her best interests catered for.⁴⁸

³⁹ *Ex Parte JCR* para 36.

⁴⁰ *Ex Parte JCR* para 10.

⁴¹ *Ex Parte JCR* para 14.

⁴² *Ex Parte JCR* para 11.

⁴³ *Ex Parte JCR* para 11.

⁴⁴ *Ex Parte JCR* para 12.

⁴⁵ *Ex Parte JCR* para 13.

⁴⁶ *Ex Parte JCR* para 13.

⁴⁷ *Ex Parte JCR* para 13.

⁴⁸ *Ex Parte JCR* para 13.

The intended surrogate mother was a married woman with two children of her own; they were aged 7 and 10 years old.⁴⁹ The intended surrogate mother had acted as a surrogate mother on three previous occasions, and this application was her fourth.⁵⁰ She had undergone four caesarean sections and had delivered the commissioning parents' child six months prior to the filing of the current application.⁵¹ The intended surrogate mother had successfully delivered three healthy children and had experienced one miscarriage in a three-year period.⁵² However, the judge was not satisfied with the medical and psychological report submitted to the court and raised concern about the physical effects of multiple pregnancies on the intended surrogate mother's body, given the frequency of her pregnancies.⁵³ The court also questioned what psychological effects the intended surrogate mother's children could suffer as a result of their mother acting as a surrogate mother – since they would witness her pregnancy but not thereafter welcome a baby into their family.⁵⁴ The court sought to ascertain:⁵⁵

[H]ow healthy, psychologically, is it for children of surrogates to go through this process, and what procedures are put in place for preparing them for this process? Should a mechanism be put in place for children of surrogate parents to receive the necessary counselling and therapy to prepare them for the inevitable process that follows?

The court was mindful that the commissioning parents' child was currently too young to understand the surrogacy process. Nevertheless, the court questioned whether children of commissioning parents are adequately prepared for the arrival of a new baby.⁵⁶ As a result, the court did not confirm the surrogacy arrangement and instead requested that the intended surrogate mother undergo additional psychological and medical evaluations to be conducted by a clinical psychologist and an obstetrician/gynaecologist, in order to specifically assess her suitability to act as a surrogate for a fourth time.⁵⁷ Furthermore, the intended surrogate mother's children were required to undergo a psychological assessment to

⁴⁹ *Ex Parte JCR* para 14.

⁵⁰ *Ex Parte JCR* para 14.

⁵¹ *Ex Parte JCR* para 16.

⁵² *Ex Parte JCR* para 16.

⁵³ *Ex Parte JCR* para 16.2.

⁵⁴ *Ex Parte JCR* para 16.

⁵⁵ *Ex Parte JCR* para 17.

⁵⁶ *Ex Parte JCR* para 18.

⁵⁷ *Ex Parte JCR* para 19.

ascertain the effects of their mother's pregnancies on their psychological well-being.⁵⁸

After considering the additional medical and psychological reports submitted to the court, the court was satisfied that these detailed assessments revealed that the intended surrogate mother was indeed suitable both physically⁵⁹ and emotionally⁶⁰ to again act as a surrogate mother. The psychological assessment of the intended surrogate mother's minor children revealed that the children "have a good understanding of the process of surrogacy"⁶¹ and were found to be supportive of their mother's decision to assist other couples to have children.⁶² Accordingly, based on the supplementary papers placed before the court, the court confirmed the surrogate motherhood agreement.⁶³

Importantly, the judgment in *Ex Parte JCR* has ramifications for all subsequent surrogacy applications. The court observed that while section 295 of the *Children's Act* requires courts to consider the best interests of the child to be born of the surrogacy arrangement, the *Children's Act* makes no specific mention of the best interests of the existing children – the intended surrogate mother's children or those of the commissioning parents.⁶⁴

The Centre for Child Law, as *amicus curiae*, submitted – without any evidence in support – that the psychological assessment of the intended surrogate mother's minor children advanced the rights of these children. Building on this submission, the Centre further submitted that it was "an oversight that the legislature did not specifically provide for the best interests of [the surrogate's] children"⁶⁵ to be considered in the approval of a surrogate motherhood agreement. As the upper guardian of all children, the court has the authority to request any relevant information in protecting the interests of all children affected by the surrogacy arrangement.⁶⁶ The *amicus curiae* therefore proposed that the effect of the surrogacy on the intended surrogate mother's children should as a general rule be submitted to the court whenever a court considers surrogate motherhood

⁵⁸ *Ex Parte JCR* para 19.

⁵⁹ *Ex Parte JCR* para 23.

⁶⁰ *Ex Parte JCR* para 24.

⁶¹ *Ex Parte JCR* para 25.4.

⁶² *Ex Parte JCR* para 25.4.

⁶³ *Ex Parte JCR* paras 35 and 37.1.

⁶⁴ *Ex Parte JCR* paras 32-33.

⁶⁵ *Ex Parte JCR* para 27.

⁶⁶ *Ex Parte JCR* para 27.

agreements.⁶⁷ The court held that the assessment of the intended surrogate mother's children highlighted the importance of adequately preparing an intended surrogate mother's children for the pregnancy and the eventuality that the child born will not be a member of their family.⁶⁸

Shockingly, however, the judgment makes no mention of *Ex Parte KAF 2* or the criteria enunciated in *Ex Parte KAF 2*. Before giving credence to arguments about "an oversight [of] the legislature" – which is a strong claim – it would have been appropriate to consider all applicable case law, including *Ex Parte KAF 2*. The *Ex Parte KAF 2* criterion that a surrogate mother must be emotionally available to her children directly speaks to the concern about preparing these children for their mother's surrogate pregnancy. Yet, by ignoring *Ex Parte KAF 2*, the oversight seems to be with the court and the Centre – not with the legislature.

Convinced by the Centre's submissions, the court proceeded to lay down additional guidelines for courts seized with applications to confirm surrogacy arrangements. According to the judgment in *Ex Parte JCR*, the court must give special attention to the existing children of commissioning parents and those of the intended surrogate mother.⁶⁹ The court must also require a thorough medical assessment of the intended surrogate mother.⁷⁰ These guidelines supplement those already in place for the confirmation of surrogacy agreements. With relation to the existing children, the new requirements were formulated as follows by the court:⁷¹

- 36.1 that a clinical psychologist has consulted with the child(ren) of the commissioning parents to:
 - 36.1.1 prepare the child(ren) for the surrogacy and the outcome;
 - 36.1.2 to make any recommendation that is in the interests of the child(ren) including whether they may need further therapy;
 - 36.1.3 report on the effect that any previous surrogacy has had on the children;
- 36.2 that a clinical psychologist has consulted with the child(ren) of the surrogate parents to:
 - 36.2.1 prepare the child(ren) for the surrogate's pregnancy and the outcome;
 - 36.2.2 to make any recommendation that is in the interests of the child(ren) including whether they may need further therapy;
 - 36.2.3 report on the effect that any previous surrogacy has had on the children.

⁶⁷ *Ex Parte JCR* para 28.

⁶⁸ *Ex Parte JCR* para 26.

⁶⁹ *Ex Parte JCR* para 35.

⁷⁰ *Ex Parte JCR* para 36.3.

⁷¹ *Ex Parte JCR* paras 36.1–36.2.

In the following sections, we analyse this judgment. Our analysis commences with a discussion of the (mis)interpretation of the all-important best interests of the child principle, and then proceeds to the violations of the parents' rights.

4 The best interests of the child

The mandating of psychological evaluation of the families' existing children unmask the court's potential heteronormative bias made most evident in its doubting of the fitness of surrogate parents or commissioning parents to parent *existing* children well enough to prepare them for the surrogacy process.⁷² Implicit in the court's finding is the idea that surrogacy is so "other" and foreign, that intervention by a healthcare professional is necessary. As Nejaime, Siegel and Barak-Erez identify, this kind of thinking is often at the root of how surrogacy is regulated:⁷³

The fact that a woman deliberately gestates a child she does not intend to raise creates unease, as it so fundamentally violates the role-expectations for pregnant women, who are understood to have duties as mothers.

The duty of mothers or parents to emotionally prepare their existing children for possible changes in their family structure under the *Ex Parte JCR* requirements, would become subject to psychological scrutiny by experts and judicial regulation in surrogacy cases. The justification proffered in the judgment for this expansion, as we elaborate below, is inappropriate, and is not clearly linked to existing legal standards (domestic or international).

In our view, the finding of the court in *Ex Parte JCR* is misdirected for at least two reasons: (i) it is founded on a fundamental misunderstanding of the best interests of the child principle – specifically insofar as it conceptually equates a requirement that *may* benefit the child's interests to one that *is* in the best interests of the child; (ii) it presumes, without evidence, that psychological evaluation is in the best interests of the existing children of the intended surrogate mother and commissioning parent(s). Each of these arguments are expanded upon below.

⁷² Van der Toorn, Pliskin and Morgenroth 2020 *Current Opinion in Behavioral Sciences* 161.

⁷³ NeJaime, Siegel and Barak-Erez 2020 <http://dx.doi.org/10.2139/ssrn.3732265> IV-4.

4.1 The fundamental misunderstanding of the best interests principle

The principle and right provided for in section 28(2) of the *Constitution* that in all matters concerning children, the best interests of the child are paramount, has seen a number of uses in our courts. Since it was first used for determining custody in divorce proceedings,⁷⁴ reference to it has been made in cases concerning a child's legal parentage,⁷⁵ adoption,⁷⁶ and the sentencing of minors.⁷⁷ As compared to these other contexts where the best interests principle has been applied, surrogacy is unique in that it entails considering the best interests of a child that does not yet exist (the prospective child). Accordingly, what is being determined in surrogacy applications is not which of a number of factual scenarios would be best for an existing child to live in, but rather whether it is in the best interests of the prospective child to be born, via surrogacy, and raised by the commissioning parents.

As alluded to earlier in this article, there are no hard and fast rules about how this determination is made, leaving much at the discretion of the court. Given the extraordinary power afforded to courts by virtue of the best interests of the child principle, it has been commonly remarked by our courts how it is important that this power be exercised in a circumscribed manner. For instance, in its discussion of the best interests of the child principle, the court in *Ex Parte WH* stated that this principle must be given application through a flexible inquiry, in terms of which "individual circumstances will determine the best interests of the child".⁷⁸ The flexible inquiry called for by Kollapen J and Tolmay J in their joint judgment requires that judges approach each case with an open mind rather than apply a strict set of rules. However, the judges also caution against the use of this discretion held by judges as a means to impose their own personal views under the guise of sound legal principles. A similar concern was raised by the Constitutional Court in *Minister for Welfare and Population Development v Fitzpatrick*, where Goldstone J noted that the indeterminate nature of the best interests of the child principle has led to its application often devolving into a moral issue, and the perceived majority view of society is oft erroneously taken to

⁷⁴ *Fletcher v Fletcher* 1948 1 SA 130 (A).

⁷⁵ *B v S* 1995 3 SA 571 (A).

⁷⁶ *Fraser v Children's Court Pretoria North* 1997 2 SA 218 (CC); *Naude v Fraser* 1998 4 SA 539 (SCA); *Du Toit v Minister for Welfare and Population Development* 2003 2 SA 198 (CC).

⁷⁷ *S v Howells* 1999 1 SACR 675 (C).

⁷⁸ *Ex Parte WH* para 61.

be equal to the child's best interests.⁷⁹ An illustration of this emerges from the case of *Ex Parte WH*, where in discussing the significance of surrogacy being accessible to same-sex couples, the judges remarked on the need to avoid discriminatory practices by excluding from parenthood family forms that would deprive the child of one parent (i.e. a mother or a father).⁸⁰ Commenting on how same-sex couples having children is commonly objected to because the child will not have a parent of a particular gender, the court stated:⁸¹

Many children grow up without a father or mother and the court should safeguard that it does not try to create a utopia for children born from surrogacy that is far removed from the social reality of society.

This remark elucidates a very important dimension that must be considered when determining the best interests of the child. This principle must not be applied in a way in which there are barriers to surrogacy for all – except for those who can provide a heteronormatively idealistic environment for the prospective child. This is supported by the Constitutional Court's statement in *AD v DW*:⁸²

[c]hild law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case.

In considering what is in the best interests of a prospective child, one must be cognisant of the present realities of society and the ever changing family form, so as not to unfairly limit the autonomy of those capable of providing what is likely to be a healthy upbringing, simply because it will be in circumstances that differ from the traditional nuclear family. Put differently, it is not the case that simply because a specific set of circumstances *may* be better for a child, such circumstances are what the best interests of the child *require*. This is illustrated with reference to case law on the sentencing of minors. While it would, without doubt, always advance the interests of a child offender not to be sentenced to jail, as Cameron J points out:⁸³

The constitutional injunction that '[a] child's best interests are of paramount importance in every matter concerning the child' does not preclude sending child offenders to jail.

⁷⁹ *Minister of Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 (CC) (hereafter *Fitzpatrick*) para 18.

⁸⁰ *Ex Parte WH* para 54.2.

⁸¹ *Ex Parte WH* para 54.2.

⁸² *AD v DW* 2008 3 SA 183 (CC) para 55.

⁸³ *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 29.

Similarly, in the context of surrogacy, although a particular course of action *may* benefit the interests of a child, it does not automatically follow that the best interests of the child principle *requires* that course of action. A number of relevant considerations must be taken into account. And what is primarily relevant in the case of surrogacy is whether or not the prospective child would be capable of having an upbringing that is comparable to what we deem acceptable for all children in society. What this usually entails, as elucidated by Thaldar and Shozi with reference to the judgment in *AB v Minister of Social Development*,⁸⁴ is that:⁸⁵

The scope of possible reproductive decisions that prospective parents may take, at least in the context of artificial reproduction, should be legally limited to exclude [only those] decisions that will cause harm to the prospective child.

Framing the best interests of the child principle in these terms is necessary to show due respect for the fundamental freedoms of those who intend to have children via surrogacy.

The dangers of the arbitrary application of the best interests principle is that if left unchecked it can be used as a basis for biased and discriminatory policies, such as the exclusion of certain societal groups or the prohibition of legitimate medical treatments for infertility.⁸⁶ As alluded to above, the effective application of the best interests of the child principle requires a thorough investigation of the relevant facts and evidence regarding the impact of a particular state action on child welfare. This simply did not happen in *Ex Parte JCR*. In this case the court had no regard for the evidence (or lack thereof) before it and, what is more, imposed a maximalist legal standard for all surrogacy applications for no other reason than the fact that it was aligned with its own utopic *ideal* for the children of surrogate mothers. This was an *ideal* rooted in the prejudicial view of surrogacy as "other" or foreign, and thus requiring intervention by professional psychologists. That this was regarded by the court as something that "advanced the best interests of the children",⁸⁷ does not mean that it is what the best interests of the child principle requires.

4.2 Is psychological examination really in the child's best interests?

The court in *Ex Parte JCR*, so taken by its imaginings of the value of psychological examination of the existing children of the intended surrogate

⁸⁴ *AB*.

⁸⁵ Thaldar and Shozi 2020 *The CRISPR Journal* 33.

⁸⁶ Blyth and Cameron 1998 *Human Reproduction* 2341.

⁸⁷ *Ex Parte JCR* para 27.

mother and commissioning parents, fully acknowledges that the best interests of siblings are not provided for,⁸⁸ but asserts that this is a lacuna in the law.⁸⁹ But is this really a lacuna? Or is there a good reason why the current legal framework has specifically excluded the existing children of intended surrogate mothers and commissioning parents from being subjected to scrutiny as part of judicial proceedings?

One obvious reason for this, which the court in *Ex Parte JCR* failed to consider, is that there are several good reasons not to subject children to psychological assessment, unless this is absolutely necessary. Here we discuss just two. First is the impact of the psychological assessment *on the child*. A psychological assessment is no minor inconvenience – it is an intrusion into the private thoughts of the child by a person who is a stranger to them. It is worth reflecting on the impact of this on the child. In the literature on the impact of psychological evaluation on children in family law matters, serious concerns have been raised about the potential adverse effects of these assessments on children.⁹⁰ Serious questions have been raised about the scientific veracity of psychological assessments of children,⁹¹ especially in light of the lack of scientific literature to support the idea that these kinds of evaluations are actually beneficial to children.⁹² Turkat argues that the psychological assessment of children may in fact be detrimental by pointing to, *inter alia*, (i) the number of claims that have been made by past participants that they were a negative experience, and (ii) the financial burden of these evaluations on the families, and how this burden potentially sets back the child's interests by diminishing the parent's financial resources.⁹³ In one study where professionals in this area were asked to express their views on the impact of the interviews on children, it is noted that:⁹⁴

[a] number of participants expressed concern that the interview has the potential for doing harm, either because the interviews themselves might be traumatic or as a result of the interview's consequences.

This is not to say that say that psychological examination of children is necessarily harmful. Indeed, the literature in this area is still contested.⁹⁵ But the fact that serious concerns have been raised about this is enough to

⁸⁸ *Ex Parte JCR* para 27.

⁸⁹ *Ex Parte JCR* para 33.

⁹⁰ Turoy-Smith *Exploring the Interviewing* 108.

⁹¹ Emory, Otto and O'Donohue 2005 *Psychological Science in the Public Interest* 1.

⁹² Turkat 2016 *Court Review* 152.

⁹³ Turkat 2016 *Court Review* 153.

⁹⁴ Turoy-Smith, Powell and Brubacher 2018 *Family Court Review* 618.

⁹⁵ Gould and Posthuma 2016 *Court Review* 160.

illustrate that a material risk of harm exists. This risk is a sufficiently good reason not to subject the existing children of an intended surrogate mother and commissioning parent(s) to psychological evaluation, without evidence that doing so is absolutely necessary. It is beyond doubt that shielding children from unnecessary harm is in their best interests.

The second reason not to subject children to non-essential psychological assessment is the potential impact of the assessment on the child's relationship with their parent(s). The child is subjected to personal questions by a psychologist in a context where considerable power is placed in the psychologist's hands – something which a child may well be aware of. Concerns have been raised in the literature that placing children in a position where they can set back their parent's interests with their utterances in family law matters can contribute to a form of parental alienation.⁹⁶ Such a concern is especially pronounced in the context of surrogacy, since children can, with a single utterance, cause their parents significant emotional duress and financial loss.

The ramifications of putting children in a position where they can confound their parent's reproductive aspirations can be better understood by considering the following hypothetical scenario: Child A, an only child, learns that her mother intends to try and have a child via surrogacy. Child A's parents explain to her that they have wanted to have a second child for a long time but her mother is unable to carry another child the way she did Child A, and so they need to make use of a surrogate. During this process, Child A is also informed by her parents that someone will talk to her to make sure she understands everything and is okay with it. Child A is thrilled at the prospect of having a sibling. But Child A is also very intelligent and understands that this process may hinge on her approval. Child A insists that her parents take her on a trip to Disneyland, or else she "will not let them have a baby". As parents should, Child A's mother and father refuse to capitulate to the demands of their child, as their family cannot afford this trip. But Child A is too young to understand this and follows through on her threat. During her conversation with the clinical psychologist, Child A vociferously and unequivocally identifies her resistance to the idea of surrogacy. Interpreting this as the child not being prepared for the surrogacy, the clinical psychologist does not recommend the approval of the application, and ultimately the court rejects it. Subsequently, Child A and her parent's relationship is adversely affected because the parents have

⁹⁶ Turoy-Smith *Exploring the Interviewing* 108.

been denied the second child they so desperately wanted, and have lost all the tens of thousands of Rand the surrogacy application cost them.

This hypothetical scenario illustrates how it is clearly not in the best interests of children that they be placed in a potentially adversarial position in relation to the interests of their parents. This is especially in circumstances where the children are left to deal with the fallout of being the reason that their parent(s) reproductive ambitions fail to materialise, so causing them to incur unnecessary losses.

In conclusion, there is nothing odd about the fact that existing children are not made central to matters in surrogacy confirmation proceedings, in light of the reality that there is no factual basis to support this. The court's assertion that there is something missing in the research of the International Social Service insofar as, "they do not address the issues facing children of either the commissioning or surrogate parents" fails to consider the fact that there is no evidence that any serious issues exist.⁹⁷ Nor does it consider that serious risks arise when subjecting children to unnecessary psychological examination. Thus, to make a requirement of it would fail to align with the requirement that what is in the best interests of the child should be determined by individual circumstances.⁹⁸ The court's own report illustrates this, and yet the court felt justified in mandating psychological examinations of existing children for no other reason than that the court *imagined* a risk of psychological harm, and took the position that it was acting in the best interests of these children. Now, the welfare of existing intended surrogate mothers and commissioning parents is at risk, solely because the court in *Ex Parte JCR* failed to imagine that the requirement it was imposing may have unintended pernicious effects.

As we have outlined in the preceding section, while the requirement for psychological assessment of existing children might be described as *potentially* benefitting the interests of these children, it is not the case that their best interests *require* it. Indeed, the opposite may be true. That the best interests of the child is determined based on imagination rather than evidence is unacceptable.

⁹⁷ *Ex Parte JCR* para 32.

⁹⁸ *Fitzpatrick* para 18.

4.3 Conclusion on the best interests of the child – a prejudiced view of surrogacy and the parties to it

In reaching its conclusion regarding the best interests of the child, the court in *Ex Parte JCR* stated:⁹⁹

A court should never lose sight of the fact that sections 295(c)(vi) and (vii) provide as follows: '295 A court may not confirm a surrogate motherhood agreement unless ... (vii) has a living child of her own.' The question is therefore, what of the interests of this child? How does a surrogate pregnancy affect the surrogate mother's own child/children – this bearing in mind that they watch her pregnancy for 9 months, they know she is carrying a child, they see her going to hospital to deliver the baby (and she may be away from them for a period after giving birth) and then she comes back home without a baby in her arms. Is it important that the interests of these children be protected and, if so, how does a court do that?

With this reasoning in mind, the court expressed its concern about the psychological effects of surrogacy on the children of the intended surrogate mother and commissioning parents. However, it is worth noting that nothing in the facts before it gave the court reason to be concerned about the well-being of the children concerned.¹⁰⁰ And yet, rather than trust the third and fourth applicants as competent parents to properly prepare their children for the surrogacy, the court saw fit to order a psychological evaluation of their children.¹⁰¹

In the words of the court-appointed psychologist in her report, the children of the surrogate mother were "well informed about the surrogacies and they are proud of the fact that their mother assists other couples in becoming families".¹⁰² One might expect that this would have persuaded the court that its concerns were unfounded, and that it would be satisfied that parents like the third and fourth applicants were perfectly capable of performing their job as parents in protecting the psychological well-being of their children. Not so. Despite this positive report, the court takes the view that the report highlighted "the importance of the fact that the children of the surrogate need to be prepared for her pregnancy" – ostensibly applying the same view to the children of the commissioning parent.¹⁰³ While it is true that children should be prepared for a surrogate pregnancy, what the report does not do is highlight that the intervention of a psychologist is necessary for this to occur. Quite the opposite in fact – it shows that the intended surrogate

⁹⁹ *Ex Parte JCR* paras 5-6.

¹⁰⁰ *Ex Parte JCR* paras 17-18.

¹⁰¹ *Ex Parte JCR* para 19.

¹⁰² *Ex Parte JCR* para 25.3.

¹⁰³ *Ex Parte JCR* para 26.

mother, the commissioning parents and their families were perfectly capable of preparing their children for the surrogacy process. Yet, perplexingly, the court concludes that psychological evaluation of the existing children of the surrogate and the commissioning parent is necessary because it:¹⁰⁴

would go a long way to alleviating any possible anxiety that may come with the process and prepare the child/children for the pregnancy, confinement of their mother and the fact that the child that is born will not be part of their own family.

It is again worth emphasising that the court had no facts before it to suggest that the children in question had any such anxiety, nor that a psychological evaluation (or intervention of sorts) was necessary to alleviate it. Indeed, the report of the psychologist showed that the parents of the existing children had been perfectly capable of dealing with any such anxieties. Nevertheless, the court disregarded all this and concluded that "it is in the best interests of that child(ren) for purposes of confirmation of the agreement that they be assessed".¹⁰⁵ The court's reasoning is based on nothing more than prejudice – negative assumptions about surrogacy and the parenting ability of the parties involved.

5 Equality and dignity

As discussed in section 4 above, the courts are required to advance the spirit and the objectives of Chapter 19 of the *Children's Act*¹⁰⁶ without creating or placing additional obstacles in the path of litigants who seek relief as identified earlier.¹⁰⁷ In 2010, with the enactment of Chapter 19 of the *Children's Act*, the previous legal position relating to surrogacy was radically altered. Prior to the commencement of these provisions of the Act, commissioning persons in a surrogacy relationship had to adopt the artificially conceived child.¹⁰⁸ With justification, the legislature sought to ensure that there was a legitimate government purpose served by regulating surrogacy, while not regulating natural reproduction, in order to protect the child and to prevent the exploitation of the parties to the contract. The statutory scheme provided by Chapter 19 of the *Children's Act* created legal certainty for all parties involved and appeared to allay concerns about the possible exploitation of women.¹⁰⁹ To further this aim, Chapter 19 imposes

¹⁰⁴ *Ex Parte JCR* para 26.

¹⁰⁵ *Ex Parte JCR* para 35.

¹⁰⁶ Chapter 19 of the *Children's Act*.

¹⁰⁷ *Ex Parte WH* para 73.

¹⁰⁸ In terms of the *Child Care Act 74* of 1983.

¹⁰⁹ SALC *Review of the Child Care Act Report* and Draft Children's Bill; Mills 2010 *Stell LR* 429.

restrictions on commissioning parent/s which are obviously not imposed on parents who do not need to resort to MAR to have a child. Care should be taken that the rights of the commissioning parents are not violated by setting the bar too high for them where their only option to have a biologically related child is by way of surrogacy.¹¹⁰ With this in mind, our second argument relates to the violation of the rights to equality of the commissioning parents through the imposition of maximalist requirements, such as psychological assessments of their existing children.¹¹¹

The courts should not place an unjustifiable burden on commissioning parents by imposing unreasonable requirements on them, which do not exist outside the context of surrogacy. Such restrictions would constitute an infringement of the commissioning parents' right to equality.¹¹² The commissioning mother involved in a surrogate motherhood contract is unable to conceive or to carry a pregnancy to term: this infertility is permanent and irreversible.¹¹³ It should be borne in mind that the effects of an inability to have a child may be devastating,¹¹⁴ especially for those women (or gay men) who are physically or medically unable to conceive or gestate a foetus to term, or to deliver a healthy baby.

For infertile women who desire a child, the psychological harm of infertility may result in severe depression equivalent to that suffered by those diagnosed with terminal cancer.¹¹⁵ The psychological trauma experienced by all infertile people is further exacerbated by a sense of social stigma.¹¹⁶ Moreover, for women, infertility issues are increasingly recognised internationally as constituting a disability.¹¹⁷ The state should avoid obstructing decisions that such commissioning parent/s take to mitigate the socio-psychological harm of infertility, including reproductive decisions on how to have a child with the use of modern reproductive technologies and/or a surrogate mother.¹¹⁸ Scant and inadequate regard has been paid to how

¹¹⁰ Bill of Rights (ch 2 of the *Constitution of the Republic of South Africa*, 1996) and the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

¹¹¹ *Ex Parte JCR* paras 18-19.

¹¹² Section 9 of the *Constitution*.

¹¹³ Section 295(a) of the *Children's Act* provides that a court "may not confirm a surrogate motherhood agreement unless ... the commissioning parent or parents are not able to give birth to a child and that the condition is permanent and irreversible".

¹¹⁴ *AB* para 1.

¹¹⁵ *Lakatos et al* 2017 *BMC Women's Health* 1; *Domar et al* 1992 *Fertility and Sterility* 1158.

¹¹⁶ *AB* paras 84-85. Khampepe J states how in the Zulu culture there is even a disparaging term for women who cannot bear children.

¹¹⁷ *Fourie and Botes* 2018 *IJHR* 910.

¹¹⁸ *AB* para 86.

the freedom to form a family is inextricably linked to the attainment of equality for infertile persons who may be able to form families by artificial means,¹¹⁹ and which is particularly relevant in the context of women's lives.¹²⁰ An important milestone for infertile people was the recent decision in *Surrogacy Advisory Group v Minister of Health*, where the court held that infertility is a disability,¹²¹ and that discrimination based on infertility is therefore presumed to be unfair.

The Constitutional Court has held that constitutional rights are interrelated and interdependent, forming a single constitutional value system.¹²² The rights to equality of the commissioning parents are linked to their dignity¹²³ since the equality clause cannot be interpreted in isolation from the constitutional values of equality and dignity.¹²⁴ Furthermore, the right to family life is not a coincidental consequence of human dignity, but a core ingredient of it,¹²⁵ since the right to dignity recognises the inherent value of the choices made by all members of society.¹²⁶ Thus the Constitutional Court has linked the ability to make autonomous decisions with the right to dignity, which includes the right-bearer's entitlement to make choices and to take decisions that affect his or her life.¹²⁷

In *Ex Parte JCR*, there is a clear differentiation in the requirements demanded of the commissioning parents and those of parents where a new sibling is to be born by natural reproduction. Because the commissioning parents are often infertile¹²⁸ and hence suffer from a disability, they qualify under one of the listed grounds in section 9(3) of the Constitution. Thus, whoever wishes to support the new requirements introduced in *Ex Parte JCR* bears the onus to rebut the presumption of "unfairness" by establishing

¹¹⁹ Hernandez 1991 *Brook J Int'l L* 310 cited in Shozi 2020 *SAJHR* 18 fn 117.

¹²⁰ Birenbaum 1996 *SAJHR* 485.

¹²¹ *Surrogacy Advisory Group v Minister of Health* (50683/2020) 2022 ZAGPPHC 558 (19 July 2022) (hereafter *Surrogacy Advisory Group*) para 80.

¹²² *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC) para 62.

¹²³ *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) para 41.

¹²⁴ *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 30.

¹²⁵ *Nandutu v Minister of Home Affairs* 2019 5 SA 325 (CC) para 1; *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35.

¹²⁶ *AB* para 110.

¹²⁷ *AB* para 109.

¹²⁸ Section 295(a) of the *Children's Act* requires infertility on the part of the commissioning parents, while s 294 requires a genetic link with at least one commissioning parent. These two requirements must both be present in order for a surrogacy agreement to be approved by the courts.

that the discrimination is "fair".¹²⁹ In considering whether this discrimination is fair or unfair,¹³⁰ the court should consider the position of the parties to the surrogate motherhood contract, whether the discrimination occurs on a listed or unlisted ground, and whether they have suffered in the past from unfair discrimination. In this case, the discriminatory new requirements imposed by the court in *Ex Parte JCR* have a powerful stigmatising effect on the affected group, by implying that commissioning parents and surrogate mothers and their spouses or partners are incapable of preparing their existing children for the intended surrogate motherhood. It contributes to the "othering" of infertile people, rather than bringing them into the social fold. The court should also consider the nature of the discriminatory provision and its purpose. This requires the court to consider whether the discriminatory provision seeks to achieve a legitimate purpose. As discussed in section 4 above, we suggest that this differentiation is ill-advised, and it not only does not serve the best interests of the child, but also places further unreasonable barriers in the path of infertile persons who are struggling legitimately to form a family. Accordingly, the new requirements imposed by the court in *Ex Parte JCR* unfairly discriminate against commissioning parents and cannot be justified.

6 Access to reproductive healthcare services, reproductive autonomy, and privacy

South Africa follows a rights-based approach, which strongly supports access to reproductive healthcare services.¹³¹ In *Certification of the Constitution of the Republic of South Africa, 1996*,¹³² it was held that the right of access to healthcare services has both a positive component (in subsection 27(2) of the *Constitution*) and a negative component (in subsection 27(1)(a) of the *Constitution*).¹³³ The positive component places a duty on the state to take measures to promote access to healthcare, while the negative component places a duty on the state to refrain from limiting access to healthcare.¹³⁴ While the state's positive duty to "achieve the progressive realisation" of access to healthcare is qualified by "within available resources", the state's negative duty is not similarly qualified. What

¹²⁹ *Harksen v Lane* 1997 1 SA 300 (CC) (hereafter *Harksen*) para 47.

¹³⁰ *Harksen* paras 50-51.

¹³¹ Lince-Deroche *et al* 2016 *South African Health Review* 95.

¹³² *Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) (hereafter *Certification of the Constitution*).

¹³³ *Certification of the Constitution* para 78.

¹³⁴ *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 46.

is relevant for our present purposes, is subsection 27(1)(a) of the *Constitution*, which places a *negative duty* on the state to refrain from limiting access to healthcare services.

This negative right against the state – that the state should not hinder one's access to reproductive healthcare services – links closely with the right to make decisions concerning reproduction, which is protected in section 12(2)(a) of the *Constitution*. While the latter right embraces in its ambit the right to procreate by way of entering into a surrogate motherhood agreement, the former right demands that access to healthcare services should not be hindered. Moreover, these rights also link closely with the right to privacy, protected in section 14 of the *Constitution*. In the recent judgment in *Surrogacy Advisory Group*, the court held:¹³⁵

The decision of people in a relationship to conceive a child through artificial fertilisation is within the truly person realm. It is close to the core of privacy, the most protected end of the continuum.

Accordingly, when these three sections (12, 14 and 27) are read together, we suggest that the *Constitution* provides a solid basis for a right to form a family using reproductive healthcare services, and not to be prevented in that pursuit.

The new requirements imposed by *Ex Parte JCR* limit this right in two ways: First, and most importantly, it gives parents' existing children the power to obstruct their parents in the exercise of their right to build their families. Although the court in *Ex Parte JCR* did not describe what the exact weight of the child's psychological evaluation should be in its decision to confirm the surrogate motherhood agreement or not, presumably the evaluation is not just a financially costly tick-box exercise, and has the potential to – if anything less than positive – derail the confirmation application of the entire surrogate motherhood agreement. As we have discussed above, this effectively gives parents' existing children power over their parents' reproductive plans – the power to limit their parents' right to build their families further. Accordingly, the new requirements laid down in *Ex Parte JCR* are a clear violation of sections 12, 14 and 27 of the *Constitution*. Secondly, one should also consider that there is a cost component to psychological evaluations. As such, the new requirements laid down in *Ex Parte JCR* add to the cost of accessing surrogacy *qua* a reproductive healthcare service, which makes it less accessible. This infringes on, at the

¹³⁵ *Surrogacy Advisory Group* para 86.

very least, the right to access to healthcare, as guaranteed by section 27(1)(a) of the *Constitution*.

7 Justification

In theory, the limitation of all the rights analysed above can be justified by the best interests of the child. However, as we pointed out in our analysis of the best interests of the child above, in the present context of psychological evaluation of existing children, such evaluation *may* promote the best interests of these children, but there is *no evidence* that it is *required* to protect the best interests of these children. Moreover, there are good reasons to argue that the mandatory psychological evaluation of children may in fact undermine the children's interests, and hence be counter-productive. Accordingly, the argument that the limitation of the rights analysed above serves the best interests of the child falls flat. The limitation of rights is not justified.

A "child participation" argument can also be used as a potential argument for justification. The *Children's Act* recognises the right of a child to participate in a decision which concerns him or her and states that "every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration".¹³⁶ However, is the plan of a parent with a child to have more children a "matter concerning that [existing] child" in the *legal* sense? We suggest not. It would be absurd for a child to approach the court with the aid of a curator *ad litem* to request an interdict preventing his or her parents from having unprotected intercourse, because he or she does not want another sibling! Why is this so? Because, in our *law*, the reproductive plans of two consenting adults simply do not concern their existing children. To hold otherwise would open the door to the most outrageous litigation on behalf of children against their parents, which would fundamentally undermine the family as a valuable social unit. Unfortunately, the court in *Ex Parte JCR* failed to consider such unfortunate implications of its judgment.

8 Conclusion

The court in *Ex Parte JCR* declared that the lack of an explicit requirement for psychological assessment of the children of the existing children of the

¹³⁶ Section 10 of the *Children's Act*.

two families is a gap in both the domestic legislation and international law.¹³⁷ We suggest that the *Ex Parte JCR* judgment is, regrettably, an example of prejudice parading under the banner of the best interest of the child principle or taking the best interest principle too far and not weighing and balancing the other rights involved. Instead of suspiciously dealing with the parties to a surrogacy agreement and assuming that there may be something wrong with them and their parenting skills, the court should actively endeavour to *normalise* surrogacy in the minds of society – as it is the reproductive avenue of last resort for many infertile people.

While the judgment ostensibly rests on the best interests standard in relation to the *existing* children of the families concerned, we indicated how the justification for the best interests determination in the judgment lacked vigour and may actually be detrimental to the existing children. The new requirements have the effect of replacing the parent's role with the assessment and opinion of a psychologist. From a policy perspective, this is not necessary or desirable.

Furthermore, the decision in *Ex Parte JCR* and its summary of the submissions by the Centre as amicus curiae all read as if in a legal vacuum, uninformed by important precedent, namely *Ex Parte KAF 2*. In light of this shocking oversight, the Centre's argument that there was oversight on the part of parliament is dubious. The *Ex Parte KAF 2* criterion of ensuring that the surrogate mother is emotionally available for her children, which includes her readiness to discuss the surrogate pregnancy with her child or children, depending on their ages and levels of comprehension, is clearly relevant. This criterion, we suggest, strikes a reasonable balance between protecting the wellbeing of the surrogate mother's children, and respecting the rights of the parties to a surrogate motherhood agreement. This criterion further underscores and supports sections 6(5) and 10 of the *Children's Act* which promotes child participation in matters affecting them, according to their "age, maturity and stage of development." This criterion does not require existing children to participate in the *decision* of their parents to enter into a surrogacy agreement but respects their emotional needs.

If the new requirements imposed by *Ex Parte JCR* remain unchallenged, it would amount to an absurd situation where the existing children are effectively placed in a position where they have the power to grant parenting licences to their parents – or withhold such parenting licences. Such a situation is untenable. People having children via surrogacy have a right not

¹³⁷ *Ex Parte JCR* para 33.

to be discriminated against because of their infertility, and not to have their reproductive rights confounded by the state. The new requirements imposed by *Ex Parte JCR* fail to respect the rights of prospective commissioning parents on both accounts. For all these reasons, these new requirements must be struck out. Nothing else will bring balance to the scales of justice.

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List of Abbreviations

Brook J Int'l L	Brooklyn Journal of International Law
IJHR	International Journal of Human Rights
MAR	medically assisted reproduction
PMG	Parliamentary Monitoring Group
SAJBL	South African Journal on Bioethics and Law
SAJHR	South African Journal on Human Rights
SALC	South African Law Commission
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
UN	United Nations