

## CHAPTER 19

## SURROGATE MOTHERHOOD

**Surrogate motherhood agreement must be in writing and confirmed by High Court**

292. (1) No surrogate motherhood agreement is valid unless—
- (a) the agreement is in writing and is signed by all the parties thereto; 5
  - (b) the agreement is entered into in the Republic;
  - (c) at least one of the commissioning parents, or where the commissioning parent is a single person, that person, is at the time of entering into the agreement domiciled in the Republic;
  - (d) the surrogate mother and her husband or partner, if any, are at the time of entering into the agreement domiciled in the Republic; and 10
  - (e) the agreement is confirmed by the High Court within whose area of jurisdiction the commissioning parent or parents are domiciled or habitually resident.
- (2) A court may, on good cause shown, dispose with the requirement set out in subsection (1)(d). 15

**Consent of husband, wife or partner**

293. (1) Where a commissioning parent is married or involved in a permanent relationship, the court may not confirm the agreement unless the husband, wife or partner of the commissioning parent has given his or her written consent to the agreement and has become a party to the agreement. 20
- (2) Where the surrogate mother is married or involved in a permanent relationship, the court may not confirm the agreement unless her husband or partner has given his or her written consent to the agreement and has become a party to the agreement.
- (3) Where a husband or partner of a surrogate mother who is not the genetic parent of the child unreasonably withholds his or her consent, the court may confirm the agreement. 25

**Genetic origin of child**

294. No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both 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. 30

**Confirmation by court**

295. A court may not confirm a surrogate motherhood agreement unless— 35
- (a) the commissioning parent or parents are not able to give birth to a child and that the condition is permanent and irreversible;
  - (b) the commissioning parent or parents —
    - (i) are in terms of this Act competent to enter into the agreement;
    - (ii) are in all respects suitable persons to accept the parenthood of the child that is to be conceived; and 40
    - (iii) understand and accept the legal consequences of the agreement and this Act and their rights and obligations in terms thereof;
  - (c) the surrogate mother—
    - (i) is in terms of this Act competent to enter into the agreement; 45
    - (ii) is in all respects a suitable person to act as surrogate mother;
    - (iii) understands and accepts the legal consequences of the agreement and this Act and her rights and obligations in terms thereof;
    - (iv) is not using surrogacy as a source of income;
    - (v) has entered into the agreement for altruistic reasons and not for commercial purposes; 50
    - (vi) has a documented history of at least one pregnancy and viable delivery; and
    - (vii) has a living child of her own;

- (d) the agreement includes adequate provisions for the contact, care, upbringing and general welfare of the child that is to be born in a stable home environment, including the child's position in the event of the death of the commissioning parents or one of them, or their divorce or separation before the birth of the child; 5
- (e) 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.

#### **Artificial fertilisation of surrogate mother**

- 296.** (1) No artificial fertilisation of the surrogate mother may take place— 10
- (a) before the surrogate motherhood agreement is confirmed by the court;
  - (b) after the lapse of 18 months from the date of the confirmation of the agreement in question by the court.
- (2) Any artificial fertilisation of a surrogate mother in the execution of an agreement contemplated in this Act must be done in accordance with the provisions of the National Health Act, 2003 (Act No. 61 of 2003). 15

#### **Effect of surrogate motherhood agreement on status of child**

- 297.**
- (1) The effect of a valid surrogate motherhood agreement is that—
- (a) any child born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of the birth of the child concerned; 20
  - (b) the surrogate mother is obliged to hand the child over to the commissioning parent or parents as soon as is reasonably possible after the birth;
  - (c) the surrogate mother or her husband, partner or relatives has no rights of parenthood or care of the child; 25
  - (d) the surrogate mother or her husband, partner or relatives have no right of contact with the child unless provided for in the agreement between the parties;
  - (e) subject to sections 292 and 293, the surrogate motherhood agreement may not be terminated after the artificial fertilisation of the surrogate mother has taken place; and 30
  - (f) the child will have no claim for maintenance or of succession against the surrogate mother, her husband or partner or any of their relatives.
- (2) Any surrogate motherhood agreement that does not comply with the provisions of this Act is invalid and any child born as a result of any action taken in execution of such an arrangement is for all purposes deemed to be the child of the woman that gave birth to that child. 35

#### **Termination of surrogate motherhood agreement**

- 298.** (1) A surrogate mother who is also a genetic parent of the child concerned may, at any time prior to the lapse of a period of sixty days after the birth of the child, terminate the surrogate motherhood agreement by filing written notice with the court. 40
- (2) The court must terminate the confirmation of the agreement in terms of section 295 upon finding, after notice to the parties to the agreement and a hearing, that the surrogate mother has voluntarily terminated the agreement and that she understands the effects of the termination, and the court may issue any other appropriate order if it is in the best interest of the child. 45
- (3) The surrogate mother incurs no liability to the commissioning parents for exercising her rights of termination in terms of this section, except for compensation for any payments made by the commissioning parents in terms of section 301. 50

### Effect of termination of surrogate motherhood agreement

**299.** The effect of the termination of a surrogate motherhood agreement in terms of section 298 is that—

- (a) where the agreement is terminated after the child is born, any parental rights established in terms of section 297 are terminated and vest in the surrogate mother, her husband or partner, if any, or if none, the commissioning father; 5
- (b) where the agreement is terminated before the child is born, the child is the child of the surrogate mother, her husband or partner, if any, or if none, the commissioning father, from the moment of the child's birth;
- (c) the surrogate mother and her husband or partner, if any, or if none, the commissioning father, is obliged to accept the obligation of parenthood; 10
- (d) subject to paragraphs (a) and (b), the commissioning parents have no rights of parenthood and can only obtain such rights through adoption;
- (e) subject to paragraphs (a) and (b), the child has no claim for maintenance or of succession against the commissioning parents or any of their relatives. 15

### Termination of pregnancy

**300.** (1) A surrogate motherhood agreement is terminated by a termination of pregnancy that may be carried out in terms of the Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996).

(2) For the purposes of the Choice on Termination of Pregnancy Act, 1996, the decision to terminate lies with the surrogate mother, but she must inform the commissioning parents of her decision prior to the termination and consult with the commissioning parents before the termination is carried out. 20

(3) The surrogate mother incurs no liability to the commissioning parents for exercising her right to terminate a pregnancy pursuant to this section except for compensation for any payments made by the commissioning parents in terms of section 301 where the decision to terminate is taken for any reason other than on medical grounds. 25

### Payments in respect of surrogacy prohibited

**301.** (1) Subject to subsections (2) and (3), no person may in connection with a surrogate motherhood agreement give or promise to give to any person, or receive from any person, a reward or compensation in cash or in kind. 30

(2) No promise or agreement for the payment of any compensation to a surrogate mother or any other person in connection with a surrogate motherhood agreement or the execution of such an agreement is enforceable, except a claim for — 35

- (a) compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and the confirmation of the surrogate motherhood agreement; 35
- (b) loss of earnings suffered by the surrogate mother as a result of the surrogate motherhood agreement; or 40
- (c) insurance to cover the surrogate mother for anything that may lead to death or disability brought about by the pregnancy. 40

(3) Any person who renders a bona fide professional legal or medical service with a view to the confirmation of a surrogate motherhood agreement in terms of section 295 or in the execution of such an agreement, is entitled to reasonable compensation therefor. 45

### Identity of parties

**302.** (1) The identity of the parties to court proceedings with regard to a surrogate motherhood agreement may not be published without the written consent of the parties concerned. 50

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



**Prohibition of certain acts**

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

(2) No person may in any way for or with a view to compensation make known that any person is or might possibly be willing to enter into a surrogate motherhood agreement. 5

