**SOUTH AFRICAN LAW REFORM COMMISSION**

**PROJECT 140**

**WORKSHEET ON ISSUE PAPER 32**

**THE RIGHT TO KNOW ONE'S OWN BIOLOGICAL ORIGINS**

**RESPONDENT**

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**Please complete this worksheet in full. Please motivate your answers.**
**Please return completed worksheets by 15/12/17 to the law researcher, Miss Veruksha Bhana at VBhana@justice.gov.za or 086 216 7313. For telephone enquiries, call 012 622 6332.**



## CHAPTER 1: THE QUESTION OF THE RIGHT TO KNOW ONE'S OWN BIOLOGICAL ORIGINS

### What is infertility?

The clinical definition for infertility as "a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse.

### What is Assisted Reproduction Technology?

Assisted reproduction technology (ART) is used to treat infertility and entails the use of fertility medications and medical techniques to bring about the conception and birth of a child. Children are conceived using donor gametes (either eggs or sperm or both) in techniques such as in vitro fertilization and surrogacy.

**South African Legal Framework**

Assisted reproduction in South Africa is regulated by the National Health Act 61 of 2003 and the Regulations Relating to Artificial Fertilization of Persons, 2012 as well as the Children's Act 38 of 2005 and the regulations thereto. The legal position in South Africa is that gamete donors and surrogate mothers must be anonymous and it is an offence to reveal the identity of a gamete donor or surrogate mother. Further, gamete donation and surrogate motherhood should be altruistic and not for commercial purposes.

However, there are instances where the intended parent knows the identity of the gamete donor or surrogate mother because such gamete donor or surrogate mother may themselves be aware that the intended parent is infertile or is unable to have a child naturally (example a same sex couple) and offers to assist in this regard.

**Section 28 of the Constitution reads as follows:**

28. Children

(1) Every child has the right -

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services; …

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years.

**Article 7 of the Convention on the Rights of the Child states:**

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

South Africa is State Party to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, however; clauses in the Conventions are open to interpretation in deciding whether or not a child has a legal right to know his or her biological origins.

**Definition of "Parent" in the Children's Act 38 of 2005**

**'parent'**, in relation to a child, includes the adoptive parent of a child, but excludes-

*(a)* the biological father of a child conceived through the rape of or incest with the child's mother;

*(b)* any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; and

*(c)* a parent whose parental responsibilities and rights in respect of a child have been terminated.

Section 7 of the Children's Act reads as follows:

**7 Best interests of child standard**

(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-

*(a)* the nature of the personal relationship between-

(i) the child and the parents, or any specific parent; and

(ii) the child and any other care-giver or person relevant in those circumstances;

*(b)* the attitude of the parents, or any specific parent, towards-

(i) the child; and

(ii) the exercise of parental responsibilities and rights in respect of the child;

*(c)* the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;

*(d)* the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-

(i) both or either of the parents; or

(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

*(e)* the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

*(f)* the need for the child-

(i) to remain in the care of his or her parent, family and extended family; and

(ii) to maintain a connection with his or her family, extended family, culture or tradition;

*(g)* the child's-

(i) age, maturity and stage of development;

(ii) gender;

(iii) background; and

(iv) any other relevant characteristics of the child;

*(h)* the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

*(i)* any disability that a child may have;

*(j)* any chronic illness from which a child may suffer;

*(k)* the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

*(l)* the need to protect the child from any physical or psychological harm that may be caused by-

(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or

(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;

*(m)* any family violence involving the child or a family member of the child; and

*(n)* which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

(2) In this section **'parent'** includes any person who has parental responsibilities and rights in respect of a child.

What is a parent?

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1.2.1 With reference to S28 of the Constitution, does a right to parental care encompass a right to know one's own biological/genetic parent or parents and the does the right to family care encompass the right to know and have a relationship with one's own biological/genetic parent or parents and biological/genetic family or siblings or half-siblings (who may also have been conceived using assisted reproductive technology)?

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## CHAPTER 2: ASSISTED REPRODUCTIVE TECHNOLOGY

### 2.6 Should a Child have a Right to Know his or her Biological Origins

Research on the needs, preferences, and well-being of donor-conceived individuals is scant and we lack robust empirical evidence regarding all aspects of donor conception. However, the right to know one's genetic origins does not rest on empirical evidence. Some donor-conceived individuals who are unable to know their genetic origins may suffer great harms. Others may suffer no harm at all. For some, being donor-conceived may be an important element in the formation of their identities, narratives, and relationships. Others may find it irrelevant or insignificant. Are donor-conceived children treated wrongly when they are not told about the manner of their conception or are deprived of the ability to access information about their genetic origins?

**Section 10 of the Constitution reads as follows:**

**10. Human dignity**
Everyone has inherent dignity and the right to have their dignity respected and protected.

Biological origin could entail the manner of conception and or the identity of the gamete donor/biological parent. This investigation asks whether a child should know the identity of the gamete donor/biological parent.

1.1 Do donor-conceived children have a moral right to know their own biological origins?
Should donor-conceived children have a legal right to know their own biological origins?

1.2 Should donors have the right to remain anonymous? Please motivate.

2. Is it beneficial for donor-conceived children to know their own biological origins? If so, why?

3.1 What factors should be taken into account in deciding whether or not it is in the best interests of the child to know his or her biological origins? Does it make any difference if the donor is related to the intended parent (intrafamilial medically assisted reproduction) or unrelated to the intended parent or known to the intended parent?

3.2 What role, if any, should psychological or social issues that the intended parent is dealing with play in the decision of whether or not to reveal to the donor-conceived child the true manner of his or her conception (example the intended parent may not want anyone who to know that he is infertile or that she is lesbian)?

3.3 What role, if any, should the views of other family members (example grandparents) or the community at large play in the decision of whether or not to reveal to the donor-conceived child the true manner of his or her conception?

3.4 Should intended parents receive counselling regarding advising the donor-conceived child on the manner of conception and the identity of the donor before or as part of the assisted reproduction treatment? Who should provide guidelines in this regard?

4.1 Should legislation provide for donor-conceived children to have a legal right to know their own biological origins?

4.2 A donor-conceived child will likely also have his or her own genetically-related child.
Does a child born to a donor-conceived person have a right to know his or her genetic heritage?
What are the rights of future generations?

5.1 When and how should a child be told about his or her biological origins, if at all?
Should information be conveyed to the child in an age appropriate manner or at by a specific age?

5.2 Should a child be told about his or her biological origins when he or she is sufficiently mature?

5.3 Who will decide when a child is sufficiently mature? What mechanisms can be established to ensure that a donor-conceived child is sufficiently mature (mature minor) to deal with information about his or her donor conception?

5.4 Who assesses whether a child has the maturity to make their own decisions and to understand the implications of those decisions?

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6.1 Should a donor be given a choice as to whether or not he or she wishes to have his or identity disclosed to the child or parents? Is this a more flexible approach given the complexity of this matter and that donors and intended parents are unique individuals and that each family is different?

In this instance, the law will not provide for an express right to all donor-conceived children to know their genetic origins but intended parents who use ART can elect to use a donor who has no objection to his or her identity being disclosed.

In the instance where a donor who has no objection to his or her identity being revealed is used, should it be prescribed in law that the intended parent must reveal the biological origins to the donor-conceived child? Should such information appear on the birth certificate or identity document as well?

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Section 9 of the Constitution reads as follows:

**9. Equality**

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or

advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

6.2.1 Will the donor having a choice as to whether to be anonymous or to reveal his or her identity, lead to an argument that such a position violates section 9 (equality clause) of the Constitution in that donor-conceived children will be treated differently depending on whether the donor elects to remain anonymous or to disclose his or her identity and, depending on which donor the intended parents selects?

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6.2.2 Could a donor-conceived child, who cannot access the identity of the donor, take action against the State in terms of Section 9 of the Constitution? Could such donor-conceived children bring a class-action against the State?

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6.2.3 Further, could a donor-conceived child, who cannot access information about the identity of the donor, take action against his/her social/legal parent/s for their decision to use an anonymous donor (or not to use a donor who has no objection to his or her identity being revealed) which decision ultimately affects the donor-conceived child? Bear in mind that the donor-conceived child is not a party to ART but a result thereof.

7. If a donor-conceived child (or donor-conceived adult) is made aware of the identity of the donor, to what extent can or should the donor-conceived child (or donor-conceived adult) interact with the donor or the donor's family, for instance the biological children of the donor who are also genetically related to the donor-conceived child (if for instance the donor is deceased)?

8. In the event that a donor elects to have his or her identity disclosed to the child (or donor-conceived adult), should the donor stipulate to what extent the donor-conceived child (or donor-conceived adult) can interact with him or her? In other words, can the donor-conceived child contact the donor or meet the donor and develop a relationship with the donor and or the donor's family?
Do half siblings (donor's child and the donor-conceived child) have the right to know each other?

9. Will it be of any benefit to the donor-conceived child (or donor-conceived adult) to know the identity of the donor but to be barred from or unable to communicate with or interact with the donor and or the donor's family? Does it make any difference considering that the donor-conceived child does have social/legal parents?

10. The ability of donor-conceived children to access information about their genetic origins initially depends on their awareness of the nature of their conception. In other words the donor-conceived child must know that he or she was conceived via ART. Without this knowledge, such donor-conceived children will assume that their "social" parent is their biological parent. Hence, the onus of revealing the manner of conception rests on the social parents, unless such information is disclosed by the State or, it is obvious that the donor-conceived child cannot be the biological child of the social parents. Although legislative changes removing donor anonymity may play a part in facilitating parental disclosure, a parental decision not to reveal the truth to a donor-conceived child is a complex family matter and therefore very difficult to regulate by law.

10.1 Who is responsible to tell a child about his or her biological origins, the social parent or the State?

10.2 How should a child be told about his or her biological origins?
Should the State provide guidelines or compulsory counselling aimed at assisting parents to reveal information to the donor-conceived child?

10.3 Should the information appear on the birth certificate? Would this be feasible because a minor donor-conceived child would hardly ever see his or her birth certificate because an important document would be kept safely stored or be in the possession of the parent? Further a minor donor-conceived child may not understand the significance or information contained in the document.

10.4 Should the State reveal information about the donor-conceived child's biological origins to the child when he or she applies for an identity document? Does such an approach take into account the emotional and psychological well-being of the donor-conceived child?

10.5 Will State disclosure on a birth certificate or identity document encourage disclosure or cause upheaval in the family? In other words, should a more individual approach be adopted depending on the circumstances of the family and the disposition of the donor-conceived child?

10.6 How do you think a child should be told about his or her biological origins?

Regulation 5 of the **Regulations Relating to Artificial Fertilisation of Persons, 2012** reads as follows:

**5 Establishment of a Central Data Bank**

> The Director-General shall establish an electronic central data bank into which all information regarding gamete and embryo donations is stored.

Note: Currently, the State has failed to set up and maintain such a database.

11.1 Should the State maintain a donor database or should an independent organization or other juristic entity maintain such a register?

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11.2 Who should have access to a donor database and when?

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11.3 For how long should donor records be kept?

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11.4 Should there be any costs involved in accessing donor information?

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11.5 If South African law is amended to remove donor anonymity or to allow for a choice, should a **voluntary** donor register be established where donors who were anonymous previously can disclose their identity so that donor-conceived children can access information about donors or try to trace the biological origins? If so, who should establish such a database?

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**Section 32 of the Constitution reads as follows:**

**32. Access to information**

(1) Everyone has the right of access to:-

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

11.6 In light of section 32 of the Constitution, can a donor-conceived child claim access to donor information held by either the State or medical professionals or donor agencies or an attorney?

Section 14 of the Constitution reads as follows:

**14. Privacy**

Everyone has the right to privacy, which includes the right not to have:-
(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed.

11.7 Donors may claim a right to privacy and may therefore say that they do not wish to have their identity revealed. In donating a gamete/s, a donor knows that a child could be born, which child will have his or her own rights or interests. A gamete donor's right to privacy has to be balanced against a donor-conceived child's right/desire to know the identity of his or biological parent. Bearing in mind

that the donor-conceived child is not a party to the assisted reproduction process but a result thereof, how should these competing rights or interests be balanced?

11.8 Intended parents who use assisted reproduction may say that their health (infertility) is a private matter or that their family planning or family life decisions are a private matter and that they therefore should not have to tell their donor-conceived child about the manner of conception or the identity of the gamete donor. When an intended parent uses assisted reproduction, he or she knows that a child could be born, which child will have his or own rights and interests. Intended parents' right to privacy has to be balanced against a donor-conceived child's right/desire to know the manner of conception and or the identity of his or her biological parent. Bearing in mind that a donor-conceived child is not a party to the assisted reproduction process but a result thereof, how should these competing rights or interests be balanced?

11.9 Should a donor provide paraphernalia or his or her voice recording, letter, etc to the donor-conceived child? If so, should either the donor or the donor agency charge for providing such paraphernalia, voice recording, letter, etc? Would your answer change depending on whether the donor was anonymous or disclosed his or her identity?

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In Chapter 3 (Parental Responsibilities and Rights) of the Children's Act 38 of 2005, Section 23 reads as follows:

**23 Assignment of contact and care to interested person by order of court**

(1) Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary-

*(a)* contact with the child; or

*(b)* care of the child.

(2) When considering an application contemplated in subsection (1), the court must take into account-

*(a)* the best interests of the child;

*(b)* the relationship between the applicant and the child, and any other relevant person and the child;

*(c)* the degree of commitment that the applicant has shown towards the child;

*(d)* the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and

*(e)* any other fact that should, in the opinion of the court, be taken into account.

(3) If in the course of the court proceedings it is brought to the attention of the court that an application for the adoption of the child has been made by another applicant, the court-

*(a)* must request a family advocate, social worker or psychologist to furnish it with a report and recommendations as to what is in the best interests of the child; and

*(b)* may suspend the first-mentioned application on any conditions it may determine.

(4) The granting of care or contact to a person in terms of this section does not affect the parental responsibilities and rights that any other person may have in respect of the same child.

11.9 What role, if any, does Section 23 play with regards to gamete donors?

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### 2.7.2 Limits on the Number of Donor Offspring – Questions

Regulation 6 of the **Regulations Relating to Artificial Fertilisation of Persons, 2012** reads as follows:

**6 Restriction on donation of gametes**
A competent person-
*(a)* shall not remove or withdraw a gamete, or cause a gamete to be removed or withdrawn, from the body of a gamete donor if the competent person has information or suspects that a maximum of six children have been conceived through the artificial fertilisation using the gametes of that gamete donor;
*(b)* shall, where the gamete donor has conceived six children as contemplated in paragraph *(a)*, inform that gamete donor that she may not make any farther donation of gametes; and
*(c)* must immediately relay all the information relating to such gamete donor, the removal or withdrawal of a gamete and the artificial fertilisation, to the central data bank contemplated in regulation 5.

1. Should there be a limit on the number of children conceived or born from a donor's gametes? Would a limit be in the best interests of donor-conceived children as it would reduce the chances of consanguineous relationships between donor-conceived children?

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**The proposed regulation 7 of the draft regulations, 2016 reads as follows:**

Restriction on donation of gametes

7. (1) A competent person -
(a) may not remove or withdraw a gamete, or cause a gamete to be removed or withdrawn, from the body of a gamete donor for a new recipient if the competent person has information or suspects that a maximum of 12 live births have been reached through the artificial fertilisation using the gametes of that gamete donor;
(b) must, where the gamete donor has been used and resulted in 12 live births as contemplated in

paragraph (a), inform that gamete donor that he or she may not make any further donation of gametes to a new recipient unless the provisions of sub-regulation (2) apply; and
(c) must, immediately relay all the information relating to such gamete donor, the removal or withdrawal of a gamete and the artificial fertilisation, to the central data bank contemplated in regulation 6;
(2) Where the maximum number of 12 live births have been reached using the gametes of a specific donor, the Minister may allow a family to use the gametes from that donor to have an additional sibling.
(3) The competent person and the central data bank must ensure that gametes from a single donor are not used for more than 12 live births.

2. Do you agree with the limit of 12 live births as proposed in the draft regulations?

3. Donor sperm is more readily available than donor donors. Should there be different limits for sperm and egg donors?

4. What factors should be considered when establishing what the maximum number of conceptions or live births should be – race, ethnicity of the donor and recipient, population dynamics, locality?

## CHAPTER 3: SURROGACY

Surrogacy is an agreement whereby a woman agrees to carry a pregnancy for another person or persons, who will become the newborn child's parent or parents after birth.

There are two main types of surrogacy namely, traditional surrogacy and gestational surrogacy.
Traditional surrogacy (also known as partial, genetic, or straight surrogacy), occurs when the surrogate mother's own ovum/egg is fertilized using the sperm of the intended father or of a donor. Fertilization is usually done by artificial insemination or intrauterine insemination. The resulting child is genetically related to the surrogate.

Gestational surrogacy (also known as host or full surrogacy) takes place when an embryo created by *in vitro* fertilization is implanted in a surrogate, sometimes called a gestational carrier.
Gestational surrogacy may take a number of forms, but in each form the resulting child is not genetically related to the surrogate:

- the embryo is created using the intended father's sperm and the intended mother's eggs. The resulting child is genetically related to both intended parents.
- the embryo is created using the intended father's sperm and a donor egg where the donor is not the surrogate. The resulting child is genetically related to the intended father.
- the embryo is created using the intended mother's egg and donor sperm. The resulting child is genetically related to the intended mother.
- a donor embryo is implanted in a surrogate. Such an embryo may be available when others undergoing IVF have embryos left over, which they donate to others. The resulting child is genetically unrelated to the intended parent or parents.

Surrogacy has become a viable option for the increasing number of infertile couples and individuals who wish to have children of their own and may be used for the following reasons:

- A woman does not have a uterus. This can be because the woman was born without a uterus or she needed her uterus removed to treat a medical condition such as cancer, tumours, uterine injury and uncontrollable bleeding. Since there is no uterus, a child cannot be carried. Therefore a surrogate is one option for having a baby if a woman has had a hysterectomy.

- The woman has a structural abnormality to her uterus, or has fibroids or scar tissue inside the uterus. These conditions can make it harder for women to become pregnant or carry a pregnancy to term.
- The woman has a medical condition that would make pregnancy dangerous. Such conditions may include serve heart disease, severe kidney disease, severe diabetes, severe preeclampsia or a history of breast cancer.
- Older women may be more likely than younger women to need a gestational carrier because some of the risk related to some conditions, such as uterine fibroids, that affect the ability to carry a pregnancy, increase with age. Older women may also be more likely to have chronic conditions that would make pregnancy risky, such as heart, lung or thyroid conditions.
- Some women, who have reached an older gestational age, choose surrogacy because pregnancy and the health of the child become a higher risk at this stage. They may also find it difficult to conceive or carry a baby to term.
- The woman has experienced repeated in vitro fertilisation implantation failures or miscarriages.
- The woman has no eggs or unhealthy eggs.
- To avoid passing on heredity diseases to the child.
- Couples who have experienced multiple miscarriages or difficulty conceiving.
- Single men who want to have a child use the services of either a traditional or gestational surrogate.
- Gay men use surrogacy to fulfil the desire to become parents. By doing so, at least one of the intended parents can have a biological connection to the child by providing their sperm.

The laws governing surrogacy in South Africa are set out in Chapter 19 of the Children's Act 38 of 2005.

Section 1(1) of the Children's Act defines a:

> 'surrogate motherhood agreement' as an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such child to the commissioning parent upon its

birth, or within reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.

"surrogate mother" as an adult woman who enters into a surrogate motherhood agreement with the commissioning parent

"commissioning parent' as a person who enters into a surrogate motherhood agreement with a surrogate mother.

Stemming from the definition of 'surrogate motherhood agreement' (SMA), it is clear that only an adult woman can agree to be surrogate mother, fertilization must take place by artificial means (conception of the child by means other than natural sexual intercourse) and the surrogate mother must intend to handover the child to the commissioning parent after birth with the intention that the child becomes the legitimate child of the commissioning parent.

Section 294 of the Children's Act reads as follows:

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.

Section 294 clearly requires that a child contemplated in terms of a valid SMA must be genetically related to both the commissioning parents or, if this is impossible as a result of medical or biological or other valid reasons, related to at least one of the commissioning parents. Where the commissioning parent is a single person, the child must be genetically related to the commissioning single parent.

In the case of AB and Surrogacy Advocacy Group v the Minister of Social Development (CCT155/15) [2016] ZACC 43; 2017 (3) BCLR 267 (CC), AB who is both conception and pregnancy infertile, challenged the constitutionality of S294 of the Children's Act 38 of 2005. Section 294 requires that a child contemplated in terms of a valid surrogate motherhood agreement must be genetically related to both the commissioning parents or, if this is impossible as a result of medical or biological or other

valid reasons, related to at least one of the commissioning parents. Where the commissioning parent is a single person, the child must be genetically related to the commissioning single parent.

On 29 November 2016, the Constitutional Court held that a genetic link is required between the intended parent and the child. The Constitutional Court adopted a more impartial approach in deciding the matter. Rather than focussing only on the rights of the intended parent, the Court considered the best interests of the intended child.

**3.5 Questions**

1. Does a child contemplated in terms of a valid surrogate motherhood agreement have a right to know his or her genetic origin?

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2. Should a child born as a result of a surrogacy motherhood agreement where a donor gamete is used have the right to know the identity of the gamete donor?

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3. Should a child born as a result of a surrogacy motherhood agreement have a right to know the identity of the surrogate mother?

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4. The constitutional court in AB and Another v Minister of Social Development held that clarity regarding the origin of a child is important to the self-identity and self-respect of the child. Given this decision should South Africa reconsider anonymous gamete donation in surrogacy and in other types of assisted reproduction?

## CHAPTER 7: MITOCHONDRIAL REPLACEMENT THERAPY

Mitochondrial replacement therapy is sometimes called three-parent IVF. It is a form of in vitro fertilization in which the future baby's mitochondrial DNA (mtDNA) comes from a donor. This technique is used in cases when mothers carry genes for mitochondrial diseases. Therefore, mtDNA from a healthy donor egg is used to attempt to prevent the transmission of mitochondrial disease from one generation to the next.

Although it takes three people to make a fertilized egg, some researchers take issue with the moniker “three-parent baby” and call the term erroneous because mtDNA does not contribute to a person’s traits.

**MRT in the United Kingdom**

In February 2015 the UK became the first country in the world to pass legislation to regulate MRT and regulations in this regard came into force on 29 October 2015. The UK parliament voted to allow mitochondrial replacement and this gave the country’s Human Fertilisation and Embryo Authority (HFEA) the power to approve the therapy.

Based on the extent of the genetic contribution and the function of the genes involved, UK Department of Health did not accept that the child born through mitochondrial donation would have three parents. Genetically, the child will indeed have DNA from three individuals but all available scientific evidence indicates that the genes contributing to personal characteristics and traits come solely from the nuclear DNA, which will only come from the proposed child's mother and father. The donated mtDNA will not affect those characteristics.

Additionally, the legislation specifies who are eligible to use the techniques (women at risk of transmitting mitochondrial disease to their offspring). This would mean that those wishing to use the techniques to enhance fertility and lesbian couples who wish to use the techniques so that the child has a genetic contribution from both (one would be mitochondria donor) would not be permitted

**Concerns regarding MRT**

Mitochondrial replacement therapy involves the introduction of foreign mitochondrial DNA into the germ line that will be inherited by all children in downstream generations. Ethical concerns relate to the alteration of germ line genetics and the dilemma of children inheriting DNA material from three instead of two parents.

Mitochondrial transfer has also been closely associated with reproductive cloning which is regulated differently worldwide. Children born from these techniques might experience an identity crisis. The use of donors also raises the question of what information should be available about them to the children born from their eggs and vice versa.

Chapter 8 of the National Health Act 61 of 2003 (NHA) deals with the control of use of blood, blood products, tissue and gametes in humans.

Section 56 of the NHA states:

> Use of tissue, blood, blood products or gametes removed or withdrawn from living persons
> (1) A person may use tissue or gametes removed or blood or a blood product withdrawn from a living person only for such medical or dental purposes as may be prescribed.

Section 57 of the NHA states:

> Prohibition of reproductive cloning of human beings
> (1) A person may not-
> *(a)* manipulate any genetic material, including genetic material of human gametes, zygotes or embryos; or
> *(b)* engage in any activity, including nuclear transfer or embryo splitting,
> for the purpose of the reproductive cloning of a human being.

Section 57(6) states that for the purpose of this section-

> *(a)* 'reproductive cloning of a human being' means the manipulation of genetic material in order to achieve the reproduction of a human being and includes nuclear transfer or embryo splitting for such purpose;

The NHA does not mention alteration of germ line genetics or reproductive embryo cloning. Transfer of mtDNA even in the form of blastomere nuclei (the technique which has been scrutini**z**ed the most by ethicists) is not '*reproductive cloning of a human being*'.

The NHA also does not specify that genetic material may not be manipulated for any other reasons. Germ line genetics and cloning (other than for purposes of reproducing human beings) is not mentioned and it is not clear whether the lack laws and regulations on these techniques imply that they are not prohibited. It is likely that ministerial authorization will be required.

### 7.6 Questions

1. Does the legislative framework in South Africa allow for MRT or MRT research to be carried out in South Africa?

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2. MRT is a very new technology. Should MRT or MRT research be carried out in South Africa?

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3. Should laws be enacted regulate this area of science?

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4. Does a child born via MRT have three parents?

5. Should lesbian couples be allowed to use MRT to create a biological link between both woman and the child? Should MRT only be used to prevent the transfer hereditary diseases?

6. Should a child conceived using MRT have the right to know his or her biological origins including the details of the donor?

## CHAPTER 8: ETHICS AND REGULATION OF INTER-COUNTRY MEDICALLY ASSISTED REPRODUCTION

The proliferation of medically assisted reproduction (MAR) for the treatment of infertility has brought benefit to many individuals around the world, since the first birth of a child following in vitro fertilization (IVF) in 1978. By 2012 it was estimated that the number of babies born as a result of MAR reached a total of 5 million.

Over the past decade, there has been a steady growth in a new global market of cross-border medical travel for repro-genetic purposes (medical tourism). Many practices of inter-country medically assisted reproduction (IMAR) involve 'third-party' individuals acting as surrogate mothers and gamete providers in reproductive collaborations for the benefit of other individuals and couples who wish to have children.

IMAR involves various permutations of the cross-border movement of intended parents, third-party reproductive collaborators and new-born children, with transfers of human embryos, sperm and egg cells. Like transnational organ transplants, IMAR consists of shifting international networks. The chain of medical production starts from sperm and egg cell procurement and continues through fertilization, embryo implantation and gestation, to culminate in birthing. Theoretically each of these six links could be performed in a different country and the child then transported to the country of the intended parents. Some of the surrogacy practices currently marketed involve, in combination, at least three different provider countries. The intended parents from country A might transact with an egg provider from country B, who travels to a clinic in country C, where the egg is fertilised and implanted in a surrogate mother from provider country D.

The growth of the IMAR market in recent years is due to complex economic, legal and cultural conditions. A major driver of this multi-billion dollar business is the desire of individuals to parent children and their inability to do so in their home countries due to legal restrictions or economic constraints on surrogacy or egg cell procurement. Moreover, there are signs of an emerging market of cross-border reproductive care for non-medical sex selection of embryos by means of pre-implantation genetic diagnosis, and similar practices for the selection of preferred embryonic traits are likely to grow further.

Since the IMAR market is not regulated, there is no official data and a dearth of information. At the same time, for-profit trade in IMAR services involves the commodification of human beings (women

and children) and body parts (gametes and wombs). Indeed, there is evidence of violations of the human rights of children and women, and some cases of harmful and degrading practices have been documented.

Arrangements between intended parents and third-party reproductive collaborators create a special kind of agreement that needs regulation so as to protect the interests of all the involved persons: the intended parents, the third-party collaborators and the children. In inter-country settings, under conditions of geographical distance, cultural differences and economic disparity, the for-profit motivation of medical entrepreneurs and intermediary agents exacerbates the potential commodification and abuse of women and children.

The unregulated market of IMAR involves the commercialization of human reproduction and transforms the personal and intimate nature of reproductive relations into contractual and labour relations. Considering also foreseeable technological developments that would allow the genetic selection and modification of human embryos, there are profound concerns about the moral limits of markets and the impact of market-driven repro-genetic technology on the future of humanity and the very nature of the human species.

**Lack of Oversight**

The subject matter is extremely controversial. Questions of children's legal parentage and nationality in transnational surrogacy have been on the agenda of the Hague Conference on Private International Law for several years. A comprehensive document prepared by its Permanent Bureau in 2014 notes the diversity in states' domestic law regarding the establishment of legal parenthood and emphasises the importance of focusing on building bridges between legal systems based on internationally established common principles rather than the harmonisation of substantive laws concerning legal parentage. Yet discussions there have yet to resolve the divergent views on the legal status of children born in cross-border situations that circumvent legal prohibitions in the parents' country of origin.

What is more, public international law aspects of IMAR practices that are similar to the field of organ transplant tourism such as trafficking in human beings and body parts are not within the mandate of the Hague Conference and have not been addressed so far by any other relevant international forum.

At the moment, there are no internationally accepted ethical principles or clinical standards for the quality and safety of MAR interventions. The distribution of scarce human bio-resources is done according to ability to pay rather than considerations of justice or solidarity.

There are no mechanisms in international law for transparency and accountability or for regulatory oversight in case of human rights violations. And lastly, there is no understanding of what differentiates legitimate cross-border medical travel from reproductive trafficking and no criminal justice redress for instances of exploitation, deception and coercion.

**Egg Donors and Surrogates in IMAR**

A major concern regarding third-party collaborators such as egg donors and surrogate mothers is the exacerbated risk of harm from medical interventions because of a double standard of care, that is, care that is centred towards the paying customer rather than the surrogate's or egg donors' medical needs, as well as emotional and financial harm due to unequal relations of power between third-party collaborators and commissioning parents, and the potential bias of mediators and professionals within the IMAR industry.

The vulnerability of third-party reproductive collaborators to harm is exacerbated in inter-country settings due to structural inequalities, geographical distance and cultural gaps. There is limited quantitative data because IMAR takes place in a private market. But social science studies, human rights reports and documentary films – mostly about India – indicate patterns of exploitation, deception and coercion that might amount to human trafficking. Cases in which women have been recruited to travel and tricked or forced into working as surrogates have been documented in Guatemala, Poland, Myanmar and Thailand.

In more routine cases, intended parents may set in course a process marketed and facilitated by intermediaries, that culminates in the birth of a child without having met or seen their third party collaborators. The relative invisibility of resource providers to those who purchase gametes or surrogacy services in these markets, due to language and cultural barriers as well as geographical and social distancing, is a factor that objectifies them and diminishes concern for their well-being.

Egg providers are typically recruited to be a racial match with intended parents, but do not receive any information about their identity. International surrogacy agencies working from Israel recruit

women from countries such as the Ukraine and South Africa, offering them a “reproductive tourism” package that includes egg “donation” and a holiday in India, Thailand or Nepal. Women in India will provide eggs for intended parents who are Indian, whether residing in or outside the country. These women might also work as surrogates and as human subjects in clinical trials. One woman who provided eggs recounted that the hospital told her to get lost after the retrieval procedure and refused to give her any medical record of the intervention.

Surrogacy practices in India incur impaired autonomy in decision making about the pregnancy: choices about the numbers of embryos implanted, termination of pregnancy, lifestyle during pregnancy, and interventions during labour and delivery such as c-section will be made by the intended parents and medical professionals. The literature describes deprivations of liberty (confinement in hostels for the duration of the pregnancy, with controlled nutrition and limited family visits), violations of patient autonomy and bodily integrity (non-consensual abortions, routine c-sections) and exploitation of maternal labour (multiple embryo implantations, and breast milk nursing pending the late arrival of intended parents). Social harms include stigmatization.

In many cases, surrogate women are required to leave their homes and live in dormitories or housing providing by the surrogacy clinics and agencies. These practices have been documented in India, Nepal and Russia. In such dormitories or housing arrangements, surrogates are fed and monitored around the clock by the clinic personnel and, in extreme cases, are not allowed to exit the site or engage in physical activity.

**Rights of Children in IMAR**

While the number of children conceived as a result of inter-country surrogacy and other IMAR arrangements has increased dramatically in recent years, there have been certain extreme cases of child trafficking in which the babies have become commodified as a marketable product of exchange. For example, the surrogacy industry in India has also produced ‘extra’ babies, either because excess pregnancies are carried to full term or because intended parents do not claim the children they ordered. At this point the abuse of surrogate mothers turns into baby selling. In a documentary, a journalist went undercover to meet a surrogacy agent who claimed there were ‘extra’ babies being sold on the black market and there and then offered to sell her one on the spot.

In February 2012, Theresa Erickson, a USA attorney specializing in reproductive law was sent to prison for her role in an international baby selling scheme. In her guilty plea, Erickson admitted that she and her conspirators used surrogate mothers to create an inventory of unborn babies that they would sell for over $100,000 each. They accomplished this by paying women from the USA to travel to the Ukraine, to become implanted with 'donated' sperm and eggs.

If the women sustained their pregnancies into the second trimester, the conspirators offered the babies to prospective parents by falsely representing that the unborn babies were the result of legitimate surrogacy arrangements, but that the original intended parents had backed out.

A recent decision of Israel's Supreme Court ruled that a genetic connection between the child and at least one of the intending parents is needed in order to rule out child trafficking. The case concerned a single woman who arranged for the fertilization of embryos with the sperm of an acquaintance and the egg cell of an anonymous provider from South Africa. The woman's niece carried the pregnancy for her after undergoing embryo implantation in India and gave birth to the child in Israel. The woman then petitioned the court for a parenting order which she was denied. The court reasoned that the law does not recognize parentage that is purely contractual and making babies cannot be left to simple agreement for the creation of a product.

In other cases children born of IMAR have been rendered parentless and stateless, in violation of the rights of the child to nationality and parentage under article 7 of the Convention on the Rights of the Child. The baby is born in one country on the basis of an agreement with the intended parents who live in another and they need travel documents to bring the baby home. But conflicts of domestic law can arise between the two jurisdictions as regards the determination of legal parenthood. In one case, intended parents from the UK had a child from surrogacy in the Ukraine. Under the law in the UK the surrogate and her husband would be considered the legal parents while under the law in the Ukraine the child's legal parents were the intended parents, so they could not adopt the child to be recognized as her parents under UK law.

In another case, the European Court of Human Rights found that France had violated the right of children born of international surrogacy to respect for private family life under Article 8 of the European Convention on Human Rights by denying the parent–child relationship that had been legally established in the USA where the children were born. The decision concerned two couples from France who had children biologically related to the male partner by means of a surrogacy

agreement in the USA, where the legal parent–child relationship had been recognized. The French authorities refused to enter the birth certificates in the French register of births, because that might be seen as giving effect to a surrogacy agreement that was null and void under French law on grounds of public policy.

Other cases have involved abandonment of the children. For example, an infant was born in India in 2010 to a married couple from Japan, who had divorced during the course of the pregnancy. Neither the Indian birth mother nor the Japanese intended mother wanted the child. At the time Japanese law did not recognize surrogacy and the intended father could not adopt the child under Indian law because he was now single. The baby's paternal grandmother took responsibility for the baby but they were stranded in India for six months while trying to overcome the legal hurdles to obtaining travel documents.

A more recent and much publicized case was that of Baby Gammy born as a twin in Thailand in 2014 to an Australian intended couple (the intended was a convicted paedophile). Gammy had Down's syndrome and a congenital heart condition, and the intended parents took his healthy twin sister home while abandoning him. The Thai surrogate mother took responsibility for Gammy and succeeded eventually in obtaining Australian citizenship for the child and rights of access to health care in Australia.

**Rights of the Child to Identity**

Yet another crucial issue concerns the right of the child to identity or the right to know the circumstances of one's birth and origin. This has both psychological and health-related aspects. Medical documentation about genetic progenitors is obviously relevant to informed health care decision-making, but the right to know has more far-reaching meaning as is evident from the growing support for the moral right of donor-conceived children to know their genetic origins.

It is a key facet of the child's sense of self-identity and his or her connectedness with heritage and kin, be they the genetic father and mother, the woman who gave birth or part-siblings. But in IMAR no one has the legal obligation or responsibility to keep records of gamete providers and surrogate mothers. This erases the identity of the third-party collaborators while compromising the child's ability to learn of his or her circumstances of birth later in life.

The activity of reproduction is intrinsically dependent on collaboration with others and the relational context of this activity should be acknowledged so as to avoid the objectification of third-party collaborators. The relationships, however short- or long-lived, should be based on respect, reciprocity, trust and integrity between intended parents and third-party collaborators.

A common argument in defence of the MAR market derives from the principle of personal liberty and freedom of contract. However, much as personal liberty is inalienable and cannot extend to the right of an individual to sell one self into slavery and as much as freedom of contract is constrained by considerations of morality and public policy, the freedoms and rights of infertile persons to establish a family through IMAR may be subject to limitations for the purpose of meeting just requirements of morality and public order in the global marketplace. Such restrictions are necessary and justified out of respect for the rights and freedoms of both the children and the third-party women who provide their bodily services and resources to assist in bringing them into the world.

### 8.10 Questions

1. Does a child conceived by way of IMAR have a right to know his or her biological origins?

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2. Should South Africa prohibit IMAR (how would this be regulated) or stipulate which countries may be suitable destinations for IMAR?

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3. Should South Africa enter into bilateral agreements regarding IMAR with countries that are known to be regular IMAR destinations so as to regulate IMAR health care services and issues related to the nationality, adoption or the right of the donor-conceived child to know his or her biological origins?

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4. Which country will be responsible to store information regarding the donor?

5. Which country will be responsible to ensure that a child is told about being conceived via donor gametes?

6. How can uniformity or international law regarding IMAR be established?

7. What can South Africa do to prevent illicit IMAR and the abuses that IMAR can result in?

**8.** What rules should health care professionals establish regarding IMAR?

## CHAPTER 5: REGISTRATION OF BIRTH AND DISPUTED PATERNITY

Section 28 of the Constitution provides that "every child has the right to a name and a nationality from birth". The Department of Home Affairs (DHA) administers the Birth and Death Registration Act, 1992 (BDRA) and the Regulations on the Registration of Births and Deaths (BD Regulations) thereto which provides for the birth registration of children born in South Africa.

Birth registration is necessary to concretize a child's rights to a name and nationality. A birth certificate is a vital record that documents the birth of a child and is the means by which the State recognizes the existence and status of a child. A birth certificate provides a child with an identity of their own and allows a child to access key social services such as education, health care and social grants.

The register of births allows the State to obtain statistics regarding births and mortality and to develop social structures to cater for all children.

The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child protect the right of all children to be registered immediately after birth, to be given a name, and to acquire a nationality.

Section 10 of the BDRA states:

> 10. Notice of birth of child born out of wedlock
>
> (1) Notice of birth of a child born out of wedlock shall be given
>
> (a) under the surname of the mother; or
>
> (b) at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged.
>
> (2) Notwithstanding the provisions of subsection (1), the notice of birth may be given under the surname of the mother if the person mentioned in subsection (1)(b), with the consent of the mother, acknowledges himself in writing to be the father of the child and enters particulars regarding himself upon the notice of birth.

Where the parents are not married, the mother must register the child under her surname or, the child may be registered under the surname of the biological father provided that the father acknowledges paternity and both the father and the mother consent to the registration of the child under the father's surname in the presence of a Home Affairs official.

Notwithstanding the provisions of s10(1)(a) and (b), the child may still be registered under the surname of the unmarried mother even though a man with her consent acknowledges himself to be the father and completes his particulars on the notice of birth.

When mothers and fathers want the unmarried father's particulars to be added to the birth notice form, the father will need to fill out an affidavit acknowledging paternity of the child. If the unmarried father is not a South African citizen, permanent resident or refugee (with a s24 refugee permit or a refugee identity document) he will also need to submit a paternity test, obtained at his own cost, confirming paternity.

Where the parents are not married, the mother must register the child. She can do so under her own surname without including the father's particulars or, with the father's particulars if the father consents and acknowledges he is the father in writing on the birth notice form.

Section 10(1)(a) does not compel an unmarried mother to disclose the identity of the biological father. An unmarried mother can give birth to a child and simply register the child under her name no questions asked. It is conceivable that the unmarried mother may therefore also never disclose the identity of the biological father to the child thus depriving the child of knowledge of his or her paternal relations and of getting to know and forming a bond with his or her biological father and paternal family.

It is also possible that the mother may deceive the child by telling the child that another man is his or her biological father either knowing that this is untrue or in circumstances where she is not certain as to whom the biological father is.

**5.19** There are various reasons why an unmarried mother may not know the identity of the biological father or why she may not want to disclose the identity of the biological father such as:

a. the pregnancy is a result of rape and the identity of the perpetrator is unknown;

b. the pregnancy is a result of rape and the identity of the perpetrator is known but she wants no association or contact with the him;

c. the pregnancy is a result of incest or sexual abuse;

d. she is a teenager and the pregnancy is the result of a relationship with an older or married man (a blesser or sugar daddy);

e. family pressure not to disclose the identity of the biological father possibly in circumstances where the family does not approve of the relationship;

f. she does not know who the father is due to the fact that she had sexual relations with more than one man at the time of conception (the mother is promiscuous or she is a prostitute and the sex was contractual);

g. the relationship between the mother and father has ended and she has not revealed to him that she is pregnant with his child;

h. the biological father denies paternity; and

i. the biological father acknowledges paternity but refuses to be identified on the birth certificate.

Unmarried fathers, who want to add their particulars to the birth register of their child but who are unable to get consent from the mother due to, the mother refusing or being unable to consent or deceased, currently have to approach the High Court for relief.

**5.2(a) Question**

1. Should the Act be amended to allow unmarried fathers to approach the children's court or the High Court when seeking to amend birth registration particulars?

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**5.2(b) Questions**

1. Does a child born to an unwed mother have a right to know his or her paternal biological origins?

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2. Should an unwed mother be compelled by law to disclose the identity of the biological father when registering the birth of a child?

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Section 31(1)(b) of the BDRA states:

> 31. Offences, penalties and evidence
>
> (1) Any person who -
>
> (b) makes or causes to be made any false statement relating to any of the particulars required by this Act to be made known and registered;
>
> shall be guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment.

3. Will an unwed mother be guilty of an offence in terms of s31(1)(b) in instances where she fails to disclose the identity of the biological father even though she knows who he is in circumstances described in paragraph 5.19, in particular 5.19 d-g?

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4. Does a child have the right to know the identity of his or her father in circumstances described in paragraph 5.19 d-g?

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5. Should a mother be compelled by law to disclose the identity of the biological father in circumstances described in paragraph 5.19d-g? Is it desirable to legislate in these circumstances or will the law be stretching too far in to social issues and be dictating how people should conduct their relationships?

6. In instances, where the mother is unsure of who the father is, should she be compelled to disclose the identity of the men who she had sexual relations with around the time of conception so that paternity tests can be done in order to establish the identity of the biological father so that his name can appear on the birth records?

7. If so, should such men be compelled in law to submit to such paternity tests?

8. If so, who should bear the costs of such paternity tests (especially in the case of multiple sexual partners: the State (taxpayer), the mother, the man established to be the biological father, the mother and the biological father equally or the costs should be shared equally between the mother and all the men tested?

9. Whose responsibility is it to use contraception? Can a man say that he should not be liable for the cost of such paternity tests because the mother was responsible for using contraception or that she led him to believe that she was using contraception or that he believed that they were in a monogamous relationship?

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*"Hans Kelsen has observed that the function of every social order is to "bring about certain mutual behavior of individuals; to induce them to certain positive or negative behavior, to certain action or abstention from action." Going by the catchphrase maxim ubi societas ibi ius, the purpose of law is to make social life possible. Naturally, there is a very close bond between the individual and his societal environment. Whoever believes in the existence of a social order believes in the existence of a legal order. Living together involves setting up rules and institutions that regulate this living together. There is no other conceivable way by which large communities can be constituted other than through some coercive legal orders. As observed…, law is the cultural force which has that important social function of imposing, conducting and/or controlling patterns of human behavior."* - The Correlation Between Law and Behaviour as Pillars of Human Society, Amin George Forji IJPS (2010) Vol 6 No 3 pages 84-96 at 85

Law regulates all aspects of life from commercial to social to science such as:

- the age at which one can obtain a drivers licence or consume alcohol or enter a club
- the speed at which one can drive on a particular road
- the age that one can get married
- building regulations
- businesses must comply with by-laws
- Employers must comply with labour laws
- Compulsory primary and secondary schooling
- Doctors must have specific prescribed qualifications
- No smoking in certain areas
- No consuming alcohol in certain public spaces
- etc, etc, etc

Laws influences people's behaviour and are designed to protect society.

Example: a driver will ensure that he drives within the speed limit in order to avoid a fine or prosecution for a speeding traffic offence. By keeping within the speed limit, one can prevent or reduce collisions or deaths on the road. In specifying a speed limit, the State seeks to protect road users.

With reference to the above extract and notes, please answer question 10.

10. Would compelling a mother to disclose the identity of the biological father or men who she thinks may be the biological father have the effect of:

a. Preventing or reducing unwanted pregnancies (on the assumption that men behave recklessly and fail to use contraception because they can simply walk away from a pregnancy leaving the woman to deal with the consequences. Knowing that they will be discovered and that they will have to support the child may cause men to be more responsibly sexually and either use contraception themselves or ensure that the woman uses contraception)?

b. Preventing or reducing rape and sexual abuse?

c. Would such a law be a deterrent to reckless sexual behaviour?

d. Changing the gender bias which favours men and give woman a stronger footing to assert themselves socially and legally? If a woman is not encumbered by a pregnancy and caring for a child, she could pursue her studies or a career. She would have legal basis to claim maintenance from the father for the child.

e. Changing the sexual dynamic which favours men and give woman a stronger footing to assert themselves sexually? In many instances men refuse to use condoms. Woman could use such a law or persuade men to use condoms. In turn, the more frequent use of condoms to prevent pregnancy may also have the effect of reducing HIV infection.

f. Making it possible for children to know their fathers and extended family resulting in children having a healthier upbringing because fathers are compelled to acknowledge their children and take responsibility for their children? Would this in turn create a more stable society?

g. Would this in turn have a positive effect on the fiscus because less money would have to be spent on social welfare grants because fathers would have to support their children?

11. What should an unwed mother tell her child regarding his or her biological origins in the instances of rape or incest?

12. What are the child's rights to know his or her genetic origins in the case of incest?

13. Would it be in the best interests of the child to know his or her genetic origins in the case of incest?

14. Should the law have any say in this regard or should it be he biological mother's decision entirely?

15. Would the mother disclose an incestuous relationship bearing in mind that incest is illegal? Could there be criminal proceedings against the biological father stemming from such disclosure? In answering this questions it should be borne in mind that s26(2)(a) specifically prohibits a biological father from applying to be identified as the father of a child in circumstances where the child was conceived through the rape of or incest with the child's mother.

**5.2(c) Questions**

1. Does a child born to unwed parents have a right to know his or her biological origins and have the biological father registered on the birth register and on his or her birth certificate?

2. Should s10 amended or repealed? If so, why?

3. Should the BDRA be amended to allow the DHA to register the unmarried father when there is proof of paternity even where he does not consent to be registered as the father?

4. Why do certain fathers refuse to be registered on the birth register? Is it because they are unsure about whether they are actually the biological father of the child or do they want to avoid maintenance claims?

5. Should paternity tests be mandatory in order to ensure correct birth registration reflecting both the mother and father of the child?

6. Should paternity tests take place before or after the birth of the child?

7. Would it be in the best interest of the child to have the birth registered with both the mother's and father's information detailed?

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8. Would having both parents legally identified protect the child's dignity and provide a child with an established complete identity and the potential to form stable family relations with both mother and father?

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9. Would having both parents legally identified provide a child with legal certainty from the time of registration of birth regarding claims for maintenance and succession?

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**Temporary residents, Asylum-seekers and Parents with Work Permits**

The B&D Regulations require parents to submit a copy of their passport **and** visa, work permit or asylum-seeker permit. In the case of a child born to a non-South African mother and South Africa father, if the parents want to register the child as a South African citizen, the DHA requires that the father must apply to register the birth of the child under his surname with the mother present.

The B&D Regulations require that foreign national parents produce both proof of lawful residence in South Africa and a copy of their passports. This requirement has been criticised as it is likely to prevent many children born to foreigners in South Africa from being registered, thereby putting such children at a high risk of growing up stateless.

### 5.4.1 Question

1. Should Regulation 8(3)(c) of the B&D Regulations be amended to require either proof of lawful residence in South Africa or a passport and to allow for the use of alternative forms of recognizing a foreign national's identity where none of the documents are available?

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**Gamete Donors and Registration of Birth**

Section 26(1) of the Children's Act states that a biological father claiming paternity may apply for an amendment to be effected to the registration of birth of the child in terms of s11(4) of the Births and Deaths Registration Act, 1992, identifying him as the father of the child, if the mother consents to such amendment. Section 26(2)(b) prevents any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation from making such an application.

Section 41(2) of the Children's Act prohibits the identity of a gamete donor from being disclosed to a child or the child's guardian.

Regulation 19 of the Regulations Relating to Artificial Fertilisation of Persons, 2012 states that no person may disclose the identity of any person who donated a gamete or received a gamete, or any matter related to the artificial fertilisation of such gametes, or reproduction resulting from such artificial fertilisation except where a law provides otherwise or a court so orders.

Further Regulation 21 of the Regulations Relating to Artificial Fertilisation of Persons, 2012 provides that any person who contravenes or fails to comply with any provision of these regulations commits an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 10 years, or to both such fine and imprisonment.

It is clear that the identity of the gamete donor may not be disclosed.

### 5.5.1 Questions

1. Donor gametes would have to have been used where a single person or a gay couple or a lesbian couple conceive and have a child. How would or should the birth of such a child be registered?

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2. Where a heterosexual couple conceive and have a child using door gametes, how would or should the birth of such a child be registered?

3. Who is responsible to tell a child about his or her biological origins, the social parent or the State?

4. How and when should a child be told about his or her biological origins?

5. Should the information appear on the birth certificate? Would this be feasible because a minor child would hardly ever see his or her birth certificate because an important document would be kept safely stored or be in the possession of the parent? Further a minor child may not understand the significance of the document.

**6.** Should the State reveal information about the child's biological origins to the child when he or she applies for an identity document? Does such an approach take into account the emotional and psychological well-being of the donor-conceived person?

**Disputed paternity**

In order to determine who a child's father is, the common law (law that is derived from custom and judicial precedent rather than statute) distinguishes between married and unmarried mothers and different presumptions operate in these different cases.

If a married woman gives birth to a child, her spouse is deemed to be the father of the child and the maxim *pater est quem nuptiae demonstrant* applies. The meaning of the maxim is that the father is he who is married to the mother. The law presumes that the woman's husband is the father of the child. The presumption may be rebutted by evidence which proves, on a balance of probabilities, that the woman's husband is not in fact the child's father.

If an unmarried mother alleges that a certain man has fathered her child she must adduce conclusive evidence to prove her allegations. As soon as sexual intercourse between the female plaintiff and the alleged father is proved or if he admits to coitus having taken place at any time when the child could have been conceived, it shall be presumed that he is the father of that child unless evidence to the contrary is led. This presumption may be rebutted by any admissible evidence; for example, sterility or non-access, which proves on a balance of probabilities that he is not the child's father.

Section 36 of the Children's Act States:

> 36 Presumption of paternity in respect of child born out of wedlock
>
> If in any legal proceedings in which it is necessary to prove that any particular person is the father of a child born out of wedlock it is proved that that person had sexual intercourse with the mother of the child at any time when that child could have been conceived, that person is, in the absence of evidence to the contrary which raises a reasonable doubt, presumed to be the biological father of the child.

Section 36 creates a rebuttable presumption that the unmarried man is the child's biological father and operates 'in the absence of evidence to the contrary which raises a reasonable doubt'. The Children's Act does not define the word 'evidence'. The word therefore bears its usual, wide meaning. Thus any acceptable evidence suffices, regardless of whether it is direct or circumstantial, provided that it is sufficient to raise a reasonable doubt.

Further. section 37 of the Children's Act provides that any party who refuses to submit himself or herself, or the child, to the taking of a blood sample in order to carry out scientific tests relating to the paternity of the child, must be warned by the court of the effect which such refusal might have on the credibility of that party.

In South Africa there is no legislation regarding the use of scientific paternity tests and whether a court can compel an adult or child to submit to blood tests. Case law in this regard has been inconsistent and the courts have had to balance rights to privacy, dignity and the best interests of the child

In LB v YD 2009 (5) SA 463 (T), the court considered ascertaining the truth regarding paternity as taking precedence over the rights to privacy and dignity and as being necessary in determining where parental rights and duties actually lie. In establishing paternity, the possible stigma of a disputed paternity will also be removed. Importantly the Court said: Where we come from and who we are, for most people, are questions within the realm of the sacred.

On appeal to the Supreme Court of Appeal in YM v LB 2010 (6) SA 338 (SCA), court said that whether the discovery of truth should prevail over the rights to privacy and bodily integrity is a matter that should not be generalised and said that it is not necessarily always in an individual's interest to know the truth. In each case the court, faced with a request for an order for a blood test or a DNA test, must consider the particular position of the child and make the determination for that child only. The role of a court, and its duty, is to determine disputes in civil matters on a balance of probabilities. It is not a court's function to ascertain scientific proof of the truth.

The High Court touched on the question of the right of a child to know his or her biological origins by stating "Where we come from and who we are, for most people, are questions within the realm of the sacred whereas the SCA did not consider a child's right to know his or her genetic origin, other than providing that it is not always in the best interests of a person to know the truth.

There are medical why it is in the best interests of a child to know his or her biological origins. A child can learn of his or her biological parent's medical history and can be aware his or her predisposition to genetic diseases and can take preventative or cautionary measures in this regard.
Further, in instances where a child requires an organ transplant or bone marrow for example, biological relatives may be the best donors and knowledge of the child's biological origins would this

be crucial. Further, not knowing one's biological relatives can lead to incestuous relationships. Or, one could simply live in doubt as to one's true identity and long for the truth which may lead to behavioural or emotional problems.

Latiefa Albertus (legal academic) concludes that:

> One has to consider the SCA's statement that knowing the truth is not always beneficial to individuals and/or children. It is not always in one's interest to find out the truth, but how is not knowing any better? DNA/blood tests should not be regarded as the 'ends' which the administration of justice seeks. Instead, it should serve as the 'means' to attain the 'end', the end not only being truth and justice but a decision which will be in the best interests of the particular child. The truth will reveal that the alleged father is or is not the biological father of the child and provide the child with certainty regarding his or her genetic origin. Justice would be served by ensuring that a particular relationship is not built between a child and a man that may not be his or her biological parent and fulfilling duties that are not his. Furthermore, the best interests of a child cannot be served by perpetuating a possible fraud. Instead, the best interests of a child in establishing paternity should only lie in finding such child's biological parent.

#### 5.3.2.1 Question

1. In an age of highly advanced medical technology, is there a need to apply legal presumptions or should scientific means by used to ascertain paternity?

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#### 5.3.6 Questions

1. Does a child have a right to know his or her biological origins in instances of disputed paternity?

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2. If so, should a child's right to know his or her genetic origin be considered in determining paternity?

3. Duties and rights may be conferred on an alleged father in respect of a child that could possibly not be his. Would a man who is uncertain about whether a child is his biological child really do right by that child? Would he, for example, ensure that maintenance is paid timely or at all or that he builds and maintain a good father-child emotional relationship with the child? Will a man who is presumed to be a father and who grudgingly maintains the child, really be serving the best interests of that child?

4. Duties may be conferred on an alleged father in respect of a child that could possibly not be his. Is this fair to such a man simply because a child may benefit by receiving maintenance?

5. Does it serve the best interests of the child to impose a relationship between that child and a man that may or may not be his or her father especially in light of the fact that the child may at stage discover the truth about his or her biological origins?

6. What is in the best interests of a child: knowing the truth about his or her parentage or believing that a particular man is such a child's father when there is a possibility that this may not be so?

7. Should civil courts still decide paternity disputes on a balance of probabilities in an era of advanced scientific technology?

8. Should paternity be determined by the courts by the use of presumptions or scientifically?

9. When and on what grounds can one approach the court for an order compelling blood tests for purposes of determining paternity or maternity?

10. Should the legislation be enacted to provide for the resolution of paternity and maternity disputes? If so, should the Children's Act be amended in this regard or should stand alone legislation be enacted?

11. Should paternity be determined at the earliest and scientifically? Children grow into adults. What would an adult who learns that he or she was the centre of a paternity dispute which was settled by means of presumptions do? Would such an adult be inclined to want to ascertain his or her paternity scientifically? Would such actions have the effect of destabilizing the family *status quo*? Will establishing paternity at the earliest, avoid the possibility of a dispute later which may lead to serious upheaval in the child's life especially if the child has grown up in circumstances that the child believes are reality?

12. Regard being had to s129 and s130 of the Children's Act, should a child be able to consent to paternity tests?

13. Should the Children's Act be amended to provide for compulsory paternity and maternity testing especially in light of assisted reproductive techniques?

14. Will it be in the best interests of the child if paternity is determined scientifically and accurately and resolved at the earliest?

15. How should a child at the centre of a paternity dispute be registered?

## CHAPTER 4: ADOPTION

Adoption is the statutory process of terminating a parent's legal rights and duties towards its biological children and substituting similar rights and responsibilities with its adoptive parents. An adoption thus severs parental responsibilities and rights of the biological parent or parents and transfers those responsibilities and rights to the adoptive parent or parents. A legal parent-child relationship is created between individuals who are not biologically parent and child. Biological parents are also referred by terms such as original parents, natural parents or birth parents.

In recent decades, both in South Africa and internationally, there has been an ongoing movement towards greater openness with regard to adoption. From being an area which was long surrounded by great secrecy, arising in large measure from the stigma often associated with extramarital pregnancy and infertility, South African adoption practice has followed the international trend towards promoting a climate in which there would be an optimum level of sharing of information with adoptees about their origins.

In terms of s242 of the Children's Act, an adoption order terminates all the parental ties that any person, including a parent, step-parent or partner in a domestic relationship had in respect of the child prior to the adoption and confers full parental responsibilities and rights in respect of the child, unless the adoption order or a post-adoption agreement confirmed by the court provides otherwise.

Section 248 of the Children's Act reads as follows:

> Access to adoption register
> (1) The information contained in the adoption register may not be disclosed to any person, except–
> *(a)* to an adopted child after the child has reached the age of 18 years;
> *(b)* to the adoptive parent of an adopted child after the child has reached the age of 18 years;
> *(c)* to the biological parent or a previous adoptive parent of an adopted child after the child has reached the age of 18 years, but only if the adoptive parent and the adopted child give their consent in writing;
> *(d)* for any official purposes subject to conditions determined by the Director-General;

*(e)* by an order of court, if the court finds that such disclosure is in the best interests of the adopted child; or

*(f)* for purposes of research: Provided that no information that would reveal the identity of an adopted child or his or her adoptive or biological parent is revealed.

(2) The Director-General may require a person to receive counselling before disclosing any information contained in the adoption register to that person in terms of subsection (1)*(a)*, *(b)*, *(c)* or *(e)*.

(3) Notwithstanding subsection (1), an adopted child or an adoptive parent is entitled to have access to any medical information concerning –

*(a)* the adopted child; or

*(b)* the biological parents of the adopted child, if such information relates directly to the health of the adopted child.

(4) Notwithstanding subsection (1), parties to a post-adoption agreement as contemplated in section 234 are entitled to have access to such information about the child as has been stipulated in the agreement.

The Act allows for court-ordered disclosure of information held in the adoption register, for access by the child or the adoptive parent to essential medical information, and for access to any information which may be specified in a post-adoption agreement in terms of s234.

Regarding inter-country adoptions, s272 of the Children's Act provides for access to information and states that, subject to the provisions of s248 with regard to access to the adoption register, read with such changes as the context may require, the Central Authority may disclose to a person older than 18 years who, as a child, was adopted in accordance with the Hague Convention on Inter-country Adoption, any information in the records of the Central Authority concerning that person's origin.

### 4.4 Questions

According to s248 and s272 of the Children's Act, an adopted child has the right to access information contained in the Adoption Register (other than medical information) at 18 years of age.

1. Should adopted an adopted child have access to information related to his or her biological parent or parents when younger than 18 years of age?

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2. Would an adopted child having access to information related to his or biological parent or parents when younger than 18 years of age have the effect of destabilising the adoption family arrangement?

3. Would an adopted child having access to information related to his or her biological parent or parents when younger than 18 years of age have the effect of causing the adopted child psychological or emotional harm or would such information be beneficial to the child depending on the circumstances and the maturity of the adopted child?

4. In instances where it is clear that the adopted child is not the biological child of the adoptive parents (such as a black child adopted by a white couple) or where there could certainly be questions about the biological origins of an adopted child (such as a white child adopted by a white gay couple), should the adopted child have access to information about his or her biological parents sooner rather than at 18 years of age in the interests of the adopted child learning about his or her culture or to answer obvious questions about the adopted child's paternity or maternity?

5. Is it to the donor-conceived person's benefit to have knowledge of who his or her parents are, if he or she cannot have a relationship with his or her genetic parents?

## CHAPTER 6
## ABANDONED CHILDREN

Every child has the right to parental care and family care or to appropriate alternative care when removed from the family environment.

However, the realities of the South African landscape paint a dark picture as far as the child's the right to know and be cared for by his or her parents. Based on research conducted from March 2013 to February 2014 by Dee Blackie, a consultant to NACSA (Blackie, 2014), the statistics appear as follows:

Statistics on Child Abandonment in South Africa

- Child Welfare South Africa estimated that more than 3500 babies were abandoned in 2010
- There are no current statistics detailing the number of children who are abandoned in South Africa on an annual basis, but most child protection organizations believe that the numbers have increased significantly over the past decade

Statistics on Children in South Africa

- There are 18.5 million children in South Africa, of these children 4.5 million live with neither of their parents.
- Orphans have increased by 30% over the decade to approximately 5.2 million children
- Over this same period, foster care grants have increased by over 70% whilst adoption has decreased by more than 50%
- An estimated 150 000 children live in child headed households
- Over 13 000 children live in residential care facilities
- An estimated 10 000 children live on the streets of South Africa
- In 2013 over 11 million children were registered for child support grants and over half a million children for foster care grants

Chapter 9 of the Children's Act deals with children in need of care and protection. Section 150(1)(a) reads as follows:

(1) A child is in need of care and protection if, the child-

*(a)* has been abandoned or orphaned and is without any visible means of support;

The section does not distinguish between abandoned and orphaned children. The key difference being that, in the case of abandoned children the parents are alive but fail to take care of the children whereas in the case of orphaned children the parents are deceased and therefore the child is in need of alternative care.

Section 1 of the Children's Act defines an abandoned child as a child who-

> *(a)* has obviously been deserted by the parent, guardian or care-giver; or
> *(b)* has, for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months;

There are many reasons why parents abandon their children and these include:

- The birth of a baby outside marriage and not accepted in a culture leaves the mother feeling that she cannot keep the baby for fear of being rejected by her family.
- Depression, in particular, post-natal depression. Mothers not bonding with the baby after birth. An inability to communicate with family members and a feeling of being overwhelmed by the pregnancy.
- Abortion is frowned upon as a child is seen as a gift from the ancestors.
- A review of African ancestral beliefs indicates that adoption where children are incorporated into families that they are not related to is viewed as problematic.
- Personal circumstances of the mother, poverty, alcohol and substance abuse
- Mass urbanization and diminished family support
- HIV and Aids, most young women who are affected by Aids are also in the grips of poverty and do not possess the emotional, mental or financial capacity to support a child.
- Mothers feel isolated and do not know where to turn especially since anonymous abandonment is not allowed in South Africa.
- Pregnancy as a result of rape is also seen as a possible reason for infanticide and abandonment. The foetus growing inside the woman is seen as a violation, an invader of her body. When the baby is born, all the woman feels is anger and revulsion, resulting in her actions against the baby.
- Gender inequality as men or boys father babies and then leave the responsibility of raising the child to the mother.

- The phenomenon of sugar daddies and blessers who impregnate young girls and then abdicate their responsibility for the baby.
- Baby abandonment might be an extreme form of the maternal instinct. Some young mothers feel that the baby would be better off without them and place their babies in a spot where they intend them to be discovered.
- Babies born with mental or physical health defects or diseases.
- Relinquishing one's parental rights so that a child can be adopted, can only be done without a legal guardian's consent from the age of 18 years, making this option inaccessible to teenage mothers

Section 12 of the Births and Deaths Registration Act 51 of 1992 provides for the registration of abandoned or orphaned children.

**Safe Haven Laws**

Many State legislatures in the United States have enacted legislation to address infant abandonment and infanticide in response to a reported increase in the abandonment of infants. Beginning in Texas in 1999, "Baby Moses laws" or infant safe haven laws have been enacted as an incentive for mothers in crisis to safely relinquish their babies to designated locations where the babies are protected and provided with medical care until a permanent home is found.

Safe haven laws generally allow the parent, or an agent of the parent, to remain anonymous and to be shielded from prosecution for abandonment or neglect in exchange for surrendering the baby to a safe haven. "Safe-haven" laws typically let parents remain nameless to the court, often using a numbered bracelet system as the only means of linking the baby to the parent.

Some states treat safe-haven surrenders as child abandonment or child dependency (meaning that the parent is unable or unwilling to care for the child), with a complaint being filed for such in juvenile court. The parent either defaults or answers the complaint. Other states treat safe-haven surrenders as adoption surrenders and a waiver of parental rights.

The laws have different names in different states and states have different age limits. Police stations, hospitals, rescue squads and fire stations are all typical locations to which the safe-haven law applies.

South Africa does not have safe haven laws. Child abandonment and orphanhood are dealt with together in s150 of the Children's Act.

Safe haven legislation is aimed at saving the lives of newborns who may otherwise be unlawfully abandoned potentially resulting in fatal consequences.

A baby hatch or baby box is a place where people (typically mothers) can bring babies, usually newborn and abandon them anonymously in a safe place to be found and cared for.

In November 2009, the German Ethics Council recommended that a statutory basis should be created for relinquishment of infants on a confidential basis and that the possibilities of anonymous birth and baby drops, which are unlawful but which till now have been tolerated, should be discontinued. Parallel to this, the availability of public information on the existing comprehensive legally sanctioned assistance facilities for pregnant women and mothers in situations of distress or conflict should be expanded. The reasons for this decision was that the council was not convinced that baby hatches do in fact prevent the death of newborns and because baby hatches do not address the root cause of the problem and the plight of the mother who has abandoned her child.

In 2013 German chancellor Angela Merkel put forward legislation to find an alternative to baby hatches (known as babyklappe in Germany). The draft laws provide that women will be allowed to give birth anonymously at hospitals in Germany. The personal information of the mother is recorded and kept in a sealed envelope by federal authorities. The information would be kept for 16 years which would allow children who have been abandoned to find out who their birth mother is when they are older. The child then has the right to find out the name of his or her mother unless the mother refuses. The mother can ask that her files not be given out in certain circumstances such as if she fears the reaction of her family or feels threatened. At that point, a family court decides. The law grants the mother temporary anonymity at least in her immediate social circle and makes a major contribution to the rights of the child who wants to know his or her origins on the other hand.

The Act Expanding Assistance for Pregnant Women and Regulating Births in Confidence of 28 August 2013 (Federal Law Gazette I, p. 3458), which came into force on 1 May 2014 creates the new option of a confidential birth as an alternative to the unregulated option of giving a child up anonymously. The law guarantees safe childbirth for pregnant women and the possibility for children unwanted by

their biological mothers to learn their origin when they turn 16 years of age. The Act does not criminalize baby hatches.

The Committee on the Rights of the Child objects to the establishment of baby hatches as they believe that these violate a child's right to know the identity of his or her biological parents as provided for in Article 7(1) of the CRC which states that a child shall, as far as possible, have the right to know and be cared for by his or her parents.

Abandoned children may suffer disadvantages due to not knowing their biological origins including that the lack of genetic information may infringe on the child's right to health; the inability to exclude the possibility of a consanguineous marriage when the child marries; the child will lack information on his or her biological parents and his or her own birth, which are crucial to the establishment of independence and identity.

Professor of Philosophy at the University of New Hampshire, Charlotte Witt, says that baby hatches do not violate the human rights of an abandoned baby as the service provides mothers with an alternative to infanticide and unsafe abandonment and, in fact, promotes the child's right to life as found in Article 6 of the CRC:

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

### 6.6 Questions

1. What are the solutions to child abandonment in South Africa?

2. Should South Africa enact safe haven laws similar to those in the United States?

3. Should South Africa enact confidential birth laws similar to that in Germany?

4. Should South Africa enact both safe haven and confidential birth laws?

5. Does an abandoned child have the right to know his or her biological origins?

6. Does ancestor worship play a role in child abandonment? If so, why?

7. Does ancestor worship influence the right a child to know his or her biological origins?

**REAL QUESTION**

Ann gives her daughter, Mary, up for adoption just after Mary is born. Mary's biological father, Jack, did not acknowledge the fact that Ann was pregnant with Mary and was not part of the adoption process. Mary was adopted into a loving family and she was told that she was adopted and knew from a young age.

Mary gets married and has 3 children of her own.

Mary learns who her biological mother is. While her biological mother is on her deathbed, Mary pleads with her and convinces her to reveal the identity of her biological father and her biological mother does do so and reveals that Jack is her biological father.

Mary thereafter makes contact with her biological father who initially engages with her.

Tom is Mary's biological first cousin because Jack is his paternal uncle (Jack and Tom's father are brothers). Tom has no other siblings except for Mary. Tom is married but does not have children. Tom is thrilled to meet Mary because he now has a family member and nieces and nephews and the family bloodline can continue via Mary's children.

Tom wants a paternity test to confirm that Mary is his biological cousin. Tom convinces Mary to approach Jack for a paternity test. Mary agrees because she would also like certainty for her sake and for the sake of her children.

Mary approaches Jack for a paternity test but he refuses.

Tom constantly approaches Jack for a paternity test and Jack therefore applies for and gets a court order preventing Tom from contacting him.

Mary says that she has lived her entire life wondering what her biological origins are. She says she feels "bewildered". She has wondered about her physical features and her interests and if these come from her biological parents.

She says that when her daughter, Kayla, was born, people said that Kayla has beautiful long fingers and asked where they come from and Mary had no answer.

Mary says that her son, John, has been fascinated with aircrafts since he was 5 and, John could name all the different types of aircraft by the time he was 7 and he's a very clever boy.

Guess what? Jack is a pilot.

Mary says that she is 90% certain that Jack is her biological father but the 10% is worrying her.
She does not want anything from Jack (not money and not a claim against his estate when he dies, not anything really). She just wants to know who her biological father is.

She is afraid to approach Jack again because he might get a court order against her.

Consider the contents of Issue paper 32. This real question relates to the rights to know one's own biological origins, adoption and paternity testing. Further, this real question concerns a cousin's need to have certainty about the biological origins of another person (his cousin).

What should Mary do?

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**GENERAL COMMENTS OR ANY OTHER RELATED MATTERS**

**Please furnish your comments on any related matter/s that you think is of relevance to this investigation.**

## THANK YOU!!!