

**BUILDING FAMILIES THROUGH ASSISTED REPRODUCTIVE
TECHNOLOGIES IN SOUTH AFRICA: A CRITICAL LEGAL
ANALYSIS**

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NTUMBA MANDE

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PROMOTER: PROF JM KRUGER

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DECLARATION

Student number: 35933364

I declare that **BUILDING FAMILIES THROUGH ASSISTED REPRODUCTIVE TECHNOLOGIES IN SOUTH AFRICA: A CRITICAL LEGAL ANALYSIS** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

SIGNATURE

DATE

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ABSTRACT

The advent of ARTs has enabled many individuals to have children and build families. Although ARTs have from the start been designated to serve as alternative way for heterosexual infertile individuals and couples to have genetically related children, ARTs are nowadays widely used by gays and lesbians to have even genetically unrelated children and build their families. This study addresses the well-being of children born as a result of ARTs and growing up in homosexual families in South Africa. South Africa has legalised homosexual unions, granting gays and lesbians several rights, including the right to marry, use ARTs to reproduce, and build families in which they raise their children. South Africa has also provided constitutional and statutory protection of children's rights and has further required that the child's best interests be considered as paramount in every matter concerning the child. Although ARTs may have allowed people to have children, they have proven to put the child's interests at risk. ARTs are associated with several physical and psychological problems for resulting children. The legal protection provided for those children seems to be inadequate in respect of their best interests. Unlike Australian statutes that have provided strong protection for the child's best interests, South African legislations regulating ARTs are far from protecting ART-born children's interests. The application of the child's best interests criterion to ART procedures has revealed that in the USA and Australia efforts of the state, ART providers and parents have been centred on the transfer of the custody of the ART-born child to the commissioning parent(s). Although in South Africa the application of the child's best interests in the context of surrogacy procedures has revealed the protection of the child's interests, it should be noted that that protection seems to focus on the child's post-birth period. This situation leaves ART-born children without any protection, especially before their birth. In order to give effect to section 28 of the Constitution of the Republic of South Africa, 1996 and protect ART-born children's interests, I make certain proposals for law reform in the final chapter of this thesis.

KEY TERMS

Assisted reproductive technologies (ARTs), the best interests of the child, child's best interests criterion, child's well-being, homosexual families, building families, infertile individuals, legalisation of homosexual unions.

LIST OF ABBREVIATIONS

| | |
|----------|---|
| AA: | Acta Academia |
| AB: | Addictive Behaviours |
| AC: | Acta Criminologica |
| AGP: | Archives of General Psychiatry |
| AI: | Artificial Insemination |
| AJCL: | American Journal of Comparative Law |
| AJE: | American Journal of Epidemiology |
| AJETS: | Australian Journal of Emerging Technologies and Society |
| AJFL: | Australian Journal of Family Law |
| AJHG: | American Journal of Human Genetics |
| AJHPE: | African Journal of Health Professions Education |
| AJIS: | Academic Journal of Interdisciplinary Studies |
| AJLM: | American Journal of Law & Medicine |
| AJO: | American Journal of Orthopsychiatry |
| AJP: | American Journal of Psychiatry |
| AJPH: | American Journal of Public Health |
| AJSI: | Australian Journal of Social Issues |
| AMI: | Acta Media International |
| ANZJOG: | Australian New Zealand Journal of Obstetric Gynecology |
| AP: | American Psychology |
| APS: | Australian Psychological Society |
| ARTs: | Assisted Reproductive Technologies |
| ASR: | American Sociological Review |
| BYU JPL: | Brigham Young University Journal of Public Law |

BYULR: Brigham Young University Law Review
CA: Children Australia
CD: Child Development
CFGS: Center for Genetics and Society
CLPR: Constitutional Law and Policy Review
CLR: Cornell Law Review
CLR: Cardozo Law Review
COOG: Current Opinions in Obstetrics and Gynecology
CRJ: Christian Research Journal
CULR: Capital University Law Review
CSWJ: Clinical Social Work Journal
CWEP: Commonwealth Education Partnership
CWILJ: California Western International Law Journal
CWLR: Case Western Law Review
Dem: Demography
DJGLP: Duke Journal of Gender Law and Policy
DJ: De Jure
DP: Developmental Psychology
DS: Droit et Société
ELJ: Emory Law Journal
EUH: European Humanists
EY: Ernest Young
FP: Feminism and Psychology
FCLR: Florida Coastal Law Review
FLQ: Family Law Quarterly
FLR: Federal Law Review

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|------------|--|
| FLS: | Feminist Law Studies |
| FM: | Family Matters |
| FR: | Family Relations |
| FS: | Fertility & Sterility |
| FVVOG: | Facts, Views, Vision in Obstetric Gynecology |
| GJICL: | Georgia Journal of International and Comparative Law |
| GLIPR: | Gay and Lesbian Issues and Psychology Review |
| GLJ: | Georgia Law Journal |
| GS: | Gender & Society |
| HarJLPPol: | Harvard Journal of Law and Public Policy |
| HCR: | Hastings Center Report |
| HLJ: | Hastings Law Journal |
| Hof LR: | Hofstra Law Review |
| HR: | Human Reproduction |
| HRB: | Human Rights Brief |
| HRU: | Human Reproduction Update |
| HSCC: | Health and Social Care in the Community |
| HWLJ: | Harvard Women's Law Journal |
| IA: | Infancia Aprendizaje |
| ICSI: | Intra Cytoplasmic Sperm Injection |
| IJCE: | International Journal of Childbirth Education |
| IJCFW: | International Journal of Child and Family Welfare |
| IJCR: | International Journal of Children's Rights |
| IJHR: | International Journal of Human Rights |
| IJLF: | International Journal of Law and the Family |
| IJLPF: | International Journal of Law, Policy and Family |

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| ILJ: | Indiana Law Journal |
| IRJABS: | International Research Journal of Applied and Basic Science |
| IVF: | In Vitro Fertilisation |
| JAD: | Journal of Adult Development |
| JCCP: | Journal of Consulting and Clinical Psychology |
| JCHC: | Journal of Child Health Care |
| JCL: | Journal of Constitutional Law |
| JCP: | Journal of Consumer Policy |
| JDBP: | Journal of Developmental Behaviour Pediatrics |
| JFR: | Journal of Family Research |
| JFV: | Journal of Family Violence |
| JGIM: | Journal of General Internal Medicine |
| JGLBTFS: | Journal of Gay Lesbian Bisexual and Transgender Family Studies |
| JGLSS: | Journal of Gay and Lesbian Social Service |
| JH: | Journal of Homosexuality |
| JIV: | Journal of Interpersonal Violence |
| JJL: | Journal of Juvenile Law |
| JJS: | Journal for Juridical Science |
| JLFS: | Journal of Law & Family |
| JLM: | Journal of Law and Medicine |
| JLME: | Journal of Law, Medicine and Ethics |
| JLS: | Journal of Law and Society |
| JM & M: | Journal of Markets & Morality |
| JMEHM: | Journal Medical Ethics and History of Medicine |
| JMF: | Journal of Marriage and the Family |
| JMP: | Journal of Medicine and Philosophy |

JPSP: Journal of Personality and Social Psychology.
JRA: Journal of Research on Adolescence
JRIP: Journal of Reproduction and Infant Psychology
JSAS: Journal of South African Studies
JSPR: Journal of Social Personal Relationships
KIEJ: Kennedy Institute of Ethics Journal
KLJ: Kentucky Law Journal
LM: Law and Medicine
LD & D: Law, Democracy & Development
LIAC: Legal Information Access Centre
LLR: Louisiana Law Review
LT: Legal Theory
LWW: Lippincott Williams and Wilkins Journals
MH: Men's health
Minn JLST: Minnesota Journal of Law, Science and Technology
MLR: Michigan Law Review
MQ: Mediation Quarterly
MULR: Melbourne University Law Review
NDJLEPP: Notre Dame Journal of Law, Ethics and Public Policy
NEJM: New English Journal of Medicine
NQHR: Netherlands Quarterly of Human Rights
NSW PLRS: New South Wales Parliamentary Library Research Service
NSWPLRS: New South Wales Parliament Library Research Service
NYSBAJ: NYSBA Journal
NYUJILP: New York University Journal of International Law and Politics
NYULR: New York University Law Review

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| O&GF: | Obstetrics & Gynecology Forum |
| OSLJ: | Ohio State Law Journal |
| PD: | Prenatal Diagnosis |
| PEC: | Patient Education and Counseling |
| PELJ: | Potchefstroom Electronic Law Journal |
| PLR: | Public Law Review |
| PLS: | Politics and the Life Sciences |
| PRJSJ: | Peace Review: A Journal of Social Justice |
| PS: | Prevention Science |
| PSP: | Parenting: Science and Practice |
| SACQ: | South African Crime Quarterly |
| SAJHR: | South African Journal on Human Rights |
| SAJP: | South African Journal of Psychology |
| SALJ: | South African Law Journal |
| SAMJ: | South African Medical Journal |
| SAPR: | South African Psychiatry Review |
| SATJ: | South African Theatre Journal |
| SCLR : | Santa Clara Law Review |
| SJ: | Speculum Juris |
| SJLR: | Saint John Law Review |
| SLR: | Sydney Law Review |
| SLUPLR: | Saint Louis University Public Law Review |
| SP: | Sociological Perspectives |
| SPP: | School of Public Policy |
| SR: | Sex Roles |
| SSM: | Social Science & Medicine |

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| SSSP: | Society for the Study of Social Problems |
| STI: | Sexual Transmissible Infections |
| STLR: | South Texas Law Review |
| SULR: | Suffolk University Law Review |
| THRHR: | Tydskrif vir Hedendaagse Romeins-Hollandse Reg |
| TuLLR: | Tulsa Law Review |
| U III LR: | University Illinois Law Review |
| UCLR: | University of California Law Review |
| UCWLJ: | University of California Women's Law Journal |
| ULR: | Utrecht Law Review |
| UMLR: | University of Miami Law Review |
| UMLR: | University of Memphis Law Review |
| VLR: | Virginia Law Review |
| VLRC: | Victoria Law Reform Commission |
| WJEM: | Western Journal of Emergency Medicine |
| WLR: | Wisconsin Law Review |
| WLR: | Whittier Law Review |
| WMJWL: | William and Mary Journal of Women and Law |
| YHRDJ: | Yale Human Rights Development Journal |
| YJLF: | Yale Journal of Law and Feminism |

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 INTRODUCTORY REMARKS

In 1978, Steptoe and Edwards made a revolutionary discovery in the field of human procreation, a discovery that made it possible to initiate a pregnancy in the absence of sexual intercourse by fertilising a woman's egg in a test tube and transferring the embryo into the woman's body, resulting in the live birth of a child. This achievement was years later subjected to developments and improvement and is now referred to as assisted reproductive technologies ("ARTs").¹ The discovery of Steptoe and Edwards was the starting point of many changes that have occurred in the family, procreation and states' legislation throughout the world.

Changes in the family have resulted in the decline of the nuclear family and the emergence of non-traditional families, which include single parent families and homosexual families.² Sexual intercourse is no longer the only way for human beings to reproduce; infertile couples, single parent as well as gays and lesbians may now alternatively use ARTs to procreate and build their families. This situation forced states to take appropriate legislative measures to accommodate all these changes within their jurisdictions.

Before the occurrence of all these changes, the nuclear family, which is the result of the union between a man and a woman, was the only form of the family that was accepted worldwide, and sexual intercourse was the only means for human beings to procreate and build families. The presence of a woman and a man was a requirement for the existence of the fundamental unit of the society which is the family. This requirement denotes the belief that both genders are equal and

¹ Carara and Filippi "Sex and reproduction: An evolving relationship" 2010 *HRU* 98.

² Although families headed by two fathers or two mothers and families headed by a father and a mother are referred to respectively as both "same-sex families" or "same-gendered families" and "opposite-sex families"; and homosexual and heterosexual families I will refer to them in this study as homosexual and heterosexual families.

necessary for the existence of a family and stresses the crucial and equal contribution of a man and a woman to the institution of family.³ The harmony of heterosexual marriage partially depends on the fact that there is a difference of sex between a woman and a man.⁴

Changes that occurred throughout the world did not spare South Africa. South Africa adopted its final Constitution,⁵ which contains a Bill of Rights that affords a wide range of rights to individuals. In 2006, South Africa passed the Civil Union Act 17 of 2006, which extended marriage rights to homosexual couples and became the first country in Africa to legalise homosexual relationships.⁶ In terms of section 1 of the Civil Union Act, two persons who are both 18 years of age or older may engage themselves in a civil union, which is solemnised and registered by way of either a marriage or a civil partnership. The gender neutral formula used in this section would suggest the intention of the legislature to include homosexual individuals in the ambit of the Act. Section 13 of the Act makes it clear that those who enter into a civil union will be accorded the same rights as those who enter into a traditional marriage in terms of the Marriage Act 25 of 1961.

It should be noted that homosexual relationships also benefit from constitutional protection. The South African Constitutional Court has in several cases interpreted section 9 of the Constitution to mean that homosexual relationships merit equal protection and respect. Section 9 can be interpreted to mean that homosexual couples can form long-lasting relationships and an environment where they can love, raise and care for children.

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,⁷ and *Minister of Home Affairs v Fourie*,⁸ the Constitutional Court reached the conclusion that like

³ Wardle "Same-sex marriage and the limits of legal pluralism" in Eekelaar and Nhlapo (eds) *The Changing Family: International Perspective on the Family and Family Law* 392.

⁴ *Joshua v Joshua* 1961 (1) SA 455 (GW) (hereafter "the *Joshua* case").

⁵ Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution").

⁶ De Vos "A judicial revolution? The court led achievement of same-sex marriage in South Africa" 2008 *ULR* 162.

⁷ 1998 (12) BCLR 1517 (CC), 1999 (1) SA 6 (CC) paras [32]-[33].

heterosexual couples, homosexual couples can establish a *consortium omnis vitae* and build families through which they can enjoy family life. It is important to note that, within the year following the passing of the Civil Union Act in parliament, 1070 homosexual couples officialised their relationships in terms of the Act.⁹ The legalisation of homosexual relationships and its consequences in South Africa is the context in which this study takes place.

Decades ago, homosexual individuals enjoyed their intimate relationships without having children. However, nowadays these individuals demonstrate the desire to parent children either through adoption or ARTs and hence build their own families.¹⁰ Patterson and Tornello observed that some homosexual couples who identify themselves as such have demonstrated an increased desire to use ARTs and become parents.¹¹ This would mean that ARTs are now an attractive option for gay and lesbian couples to reproduce and build new forms of families. This view is also shared by Robertson who, after observing homosexual families for a long time, concluded as follows:

“Gay males expressed their desire to have their own children either as single parents or with a same-sex partner. To do so, they will have to find a woman who will bear the child for them. In case of lesbians, one woman will donate the egg which is fertilised with the sperm of one of the gay males and another woman will gestate”.¹²

Assisted reproductive technologies, which were meant to be used in infertility treatment and were intended to enable infertile heterosexual couples to have children, are now intensively used by homosexual couples, irrespective of their fertility status, to have children and build non-traditional families. It is thus clear that with developments in the field of ARTs and the extension of the right of adoption to

⁸ *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 255 (CC) para [54].

⁹ De Vos 2008 *ULR* 173 (quoting Judge *et al* “Introduction” in Judge *et al* (ed) *To Have and Hold: The Making of Same-Sex Marriage in South Africa* (2007) 14).

¹⁰ Lubbe “Mothers, fathers or parents: Same-gendered families in South Africa” 2007 *SAJP* 260.

¹¹ Patterson and Tornello “Gay fathers’ pathways to parenthood: International perspectives” 2010 *JFR* 104.

¹² Robertson “Gay and lesbian access to assisted reproductive technology” 2005 *CWRLR* 350.

homosexual individuals, homosexual couples are now in a position to have children and raise them. The number of children born by means of ARTs is reported to increase on a daily basis worldwide. According to Galpern, in the last three decades ARTs have allowed the birth of more than three million babies in the world. Infertile women and men, single women and men, and lesbian, gay and transgender couples have hence been able to have genetically related children and build families of their own.¹³

As a result, the number of children born by means of ARTs to homosexual couples is increasing and this raises the concern for the well-being of children born and growing up in families built through ARTs. Children born and growing up in these families experience particular hardships that have attracted the focus of researchers. Golombok for instance points out that, children born through ARTs may be brought up in new forms of families where they are not always genetically linked to their parents. Progress in medical technology has made it possible for children to grow up in families where they are genetically related to only one parent, or in some cases they have no genetic link with either parent. Parenthood in these families is not necessarily founded on the genetic link between parents and the children they raise; some children such as those genetically unrelated to either parent are in essence socially linked to the people who are raising them.¹⁴

1.2 PROBLEM STATEMENT

The growing number of same-sex marriages, coupled with the development of reproductive technologies, has resulted in the diversification of family types and a new conception of family.¹⁵ Family no longer consists of only a man and woman, but also of same-sex partners who through ARTs and adoption are able to have children

¹³ Galpern "Assisted reproductive technologies: Overview and perspective using a reproductive justice framework" 2007 *CFGS* 1.

¹⁴ Golombok *et al* "Families created through surrogacy arrangements: Parent-child relationships in the first year of life" 2004 *DP* 400.

¹⁵ Vanfraussen, Kristofferssen and Brewaeys "An attempt to reconstruct children's donor concept: A comparison between children and lesbian parents' attitude towards donor anonymity" 2001 *HR* 20 40.

and raise them. Consequently a wider range of non-traditional families is now increasingly recognised.¹⁶

In South Africa, a number of legal provisions allow gays and lesbians to become parents and raise children. For instance, in terms of the Civil Union Act, same-sex partners have the right to marry each other. Section 40 of the Children's Act 38 of 2005 recognises ARTs as a method of reproduction, and section 295 of the same Act requires the court to confirm surrogate motherhood agreements irrespective of the sexual orientation of the commissioning parents, provided that they comply with the terms of this section.

Finally, the Constitution guarantees the rights of gays and lesbians to establish life partnerships, adopt children, keep the care for their own children after divorce proceedings and more recently, establish co-parenting.¹⁷ This would suggest that the right of gays and lesbians to parent is no longer questionable. Gays' and lesbians' right to parent was confirmed in a number of cases brought before the court. South African courts have in several cases ruled in favour of gays and lesbians in divorce cases. In April 1998, for instance, a lesbian mother was allowed to keep caring for her child that was removed by the Department of Social Services and placed in the care of the child's grandparents.¹⁸ In November of the same year, a gay couple was also awarded care of a child that they had fostered since birth.¹⁹ More recently, in *Ex parte WH*, the court confirmed a surrogate motherhood agreement involving two male commissioning parents.²⁰

As a result many children are being raised in families where parents are homosexuals. However, the South African Constitution, among other legal texts in

¹⁶ De Vaus *Statistical Profiles* 4.

¹⁷ Knoesen "Queering the vote" (3 March 2004) *Mail and Guardian* 15.

¹⁸ Powers "Lesbian mother wins custody of her child" (3 April 1998) *The Star* 3.

¹⁹ Oliver "Tears as pair is given custody" (5 December 1998) *Saturday Argus* 3.

²⁰ *Ex Parte WH* 2011 (6) SA 514 (GNP).

the country, also protects the rights of the child and requires that the child's best interests be considered as paramount in every matter concerning him or her.²¹

In short, on the one hand the Constitution allows gays and lesbians to marry, raise children and build families. On the other hand, the Constitution protects the rights of the child and states that in every matter concerning the child, his or her best interests must be considered as paramount. This situation raises a number of questions within the context of South African law.

1.3 THE RESEARCH QUESTIONS

In view of the fact that the children's rights enshrined in the Constitution seem to be in opposition to the rights of parents, this study seeks to provide acceptable answers to the following questions:

- (a) Do ARTs serve the best interests of the South African child?
- (b) Does being born through ARTs and growing up in a homosexual family serve the best interests of the child in the South African legal context?
- (c) If the first two questions are answered in the negative, then there is a conflict of rights between homosexual parents and their children. The question then arises how this conflict of rights can be resolved.

1.4 THE AIM AND SIGNIFICANCE OF THE STUDY

1.4.1 The aim of the study

The debate over the suitability or not of the homosexual family as an environment for child development is inescapable when analysing post-modern families or families

²¹ Section 28(2) of the Constitution states that: "[a] child's best interests are of paramount importance in every matter concerning the child". See also Clark "Custody: The best interests of the child" 1992 *SALJ* 394.

built through ARTs. This study aims at emphasising the debate by advocating a more objective approach to homosexual families. The study seeks to critically analyse the welfare of children born to homosexual people as a result of ARTs and growing up in homosexual families.

The study aims to investigate whether the welfare of those children requires improvement, whether their best interests are put at risk and whether they face challenges as a result of being born through ARTs and growing up in homosexual families. If so the study aims to investigate ways of improving their welfare, ensuring that their best interests are not put at risk and analysing challenges faced by homosexual families with regard to children's optimal development. In this the study seeks to ensure the effective protection of these children's best interests and improve the chances of children growing up in homosexual families to develop appropriately.

The study also seeks to stimulate more reflections on post-modern families with a particular focus on its suitability for the protection of children's best interests. The study intends to fill the gaps left by previous studies and contribute to a better understanding of children's experience in homosexual families. Finally the study highlights the role of a father and a mother in the optimal development of the child.

1.4.2 The significance of the study

It is important to discuss children's well-being in homosexual families and to examine ways of further improving the conditions of children born to and growing up in those families. This study evaluates the strengths and the weaknesses of homosexual families in terms of the protection of the best interests of children growing up in homosexual families. To this end the study submits that the law can play an important role. The best interests of children born as a result of ARTs can be adequately protected, for example by applying the best interests of the child criterion to children before birth.

The study of the well-being of children in homosexual families is a significant exercise in that it provides an opportunity to critically analyse the opinion that has prevailed until now in the reviewed studies regarding the child's well-being in homosexual families and to strive towards improving the way children are being raised in homosexual families.

Further, the study is significant in that it analyses the role played by a father and a mother in the child's development, and evaluates the contribution of each parent (mother and father) to the child's well-being. Finally, the study is significant in that it seeks to find a solution to the conflict of rights that might exist between homosexual parents and their children.

1.5 RESEARCH METHODOLOGY

Legal research always has a pattern of performance commonly referred to as the research method. The research method can be understood "as the manner of proceeding adopted by researchers in their bid to gain systematic, reliable and valid knowledge about legal phenomena".²²

This study is intended to be analytic. The study intends to analyse the experience of children born to homosexuals within the bonds of their homosexual relationships and apply the best interests of the child criterion to the situation of these children.

To this end a literature study will be used as the research method. The techniques used include a legal analysis and a comparative approach. The comparative approach will consider the experience of children in two countries, namely the United States of America (USA) and Australia, because of the scarcity of the application of ARTs in South Africa. The USA and Australia have a long history of homosexuality, and ARTs have been used in these countries for many years. The number of children growing up in these countries is big and available data from the USA and

²² Cranston "The rational study of laws: Social research and access to justice" in Zuckermann and Cranston (eds) *Reform of Civil Procedure: Essays on "Access to Justice"* 31-32.

Australia on homosexual families and the use of ARTs will therefore be used to understand the South African experience and find a way forward. A historical research component is also necessary for this study, in order to understand the evolution or changes relating to the family that occurred in different societies under examination. However, this will basically consist of a historical overview and not in depth legal-historical perspective. It is thus clear that the study uses various research methods in order to answer the abovementioned questions and solve the problems prevailing in South Africa.

In this respect, textbooks, legislation, judicial decisions, journal articles, reports, theses and electronic data constitute relevant sources of information.

1.6 OVERVIEW OF STUDY

The achievement of the aim of this study requires a particular structure for the study. The study is divided into eight chapters. The first chapter introduces the study and sets the content and the structure of the research. The chapter starts with introductory remarks, highlights the problem tackled in the research. The chapter also sets out the aim and the significance of the study. The chapter further describes the methodology adopted in the research and in the last section, the overview of study.

The second chapter is a survey of the homosexual family. The chapter will firstly define the concept “homosexual family” in the context of this study. Secondly, the chapter will analyse the functioning of this family, and thirdly the chapter will examine the experience of the child as a member of a homosexual family. The aim of this analysis is to provide a general understanding of homosexual family and some particulars thereof. This understanding is important in that it helps orientate the analysis of legislative measures related to homosexual families. There is no way to understand legislation that authorises homosexual people to build families if one does not know or understand what homosexual families are and what members of these families may experience as part of society.

In chapter three, the overview of ARTs is provided in the first section. The second section analyses how ARTs are used in South Africa. In a third section, physical, emotional and psychological effects that ARTs may have on children are analysed. The conclusions reached in this chapter have an important implication in the analysis of the approach that should be appropriate for the best interests of children in South Africa.

The fourth chapter is an analysis of the international and South African constitutional perspectives on the family. The chapter aims at comparing how the family and family members are protected at international and domestic level. The conclusion on the analysis of the protection of the rights of parents on one side and the rights of the children on the other highlights the conflict that exists between the rights of parents and their children. The understanding of this conflict will help this study envisage an appropriate approach for the adequate protection of the child when attempting to solve this conflict.

The fifth chapter is about the homosexual family and the child's best interests in South Africa. This chapter discusses the emergence of homosexual families in South Africa, followed by an analysis of the legal recognition of homosexual families and the status of the children born and growing up in those families. Parental rights and responsibilities as well as the best interests of the child in homosexual families will also be discussed. It is important to note that in this chapter from time to time a comparison will be made between the position sustained under the apartheid regime and the position under the new constitutional regime. The chapter will analyse the ways in which the well-being of the child can be improved.

The sixth chapter deals with homosexual families in the context of the USA. The chapter begins with an analysis of the legal position of homosexual families in the USA. The chapter will then analyse the effects of this legal position on the well-being of the child growing up in a homosexual family. The chapter will also analyse the right of homosexual couples to procreate and the implications of that right on children born from the use of ARTs. The aim of this chapter is to understand how

issues concerning children in general are handled and how the best interests of the child born as a result of ARTs are protected in particular.

The seventh chapter analyses the homosexual family in the Australian context. To this end, the chapter will focus on the laws recognising homosexual families in Australia, those regulating access to ARTs, and those regulating parentage. This legal investigation is important in that it provides insights on how legislations have treated children born as a result of ARTs, and that in turn will inform how the situation of those children may be improved.

The eighth chapter will end with the conclusion. In this chapter, answers to the following question will be provided: What is the South African approach to ARTs and to the families built as a result of the use of those procedures? It is followed by the comparative conclusions which highlight those areas where the best interests of the child suffer from poor protection. Lastly, concluding remarks are provided followed by proposals for law reform.

CHAPTER TWO

HOMOSEXUAL FAMILIES

2.1 INTRODUCTION

In many societies worldwide, homosexual families are a relatively new reality. In western societies, for instance, it is only recently that the meaning of family was expanded to include a vast array of familial groups in which children are born and being raised. In addition to nuclear families, many other forms of families are nowadays encountered, including a “patchwork” or “blended” family where after divorce one of the parents found a partner who had children out of a former relationship and together they built a new family, and families consisting of two mothers or two fathers.²³ The last two categories of families are referred to in this study as homosexual families or gay and lesbian families.

In Africa in general, some countries have opposed this view of the family. However, in South Africa, the wave of changes that came from western societies influenced the conception of the family and caused homosexual families to be viewed as part of the society.

This chapter will provide an overview of homosexual families. The chapter is divided into five sections followed by an interim conclusion. The first section defines homosexual families. The second section discusses the decline of the nuclear family and the emergence of other forms of families, including lesbian and gay families (homosexual families). This section will also focus particularly on the emergence of homosexual families. While the third section is about the description of homosexual families, the fourth examines the functioning of homosexual families, and the fifth section is devoted to children as members of homosexual families.

²³ Bos, Van Balen and Van den Boom “Lesbian families and family functioning: an overview” 2005 *PEC* 263.

2.2 DEFINITION OF HOMOSEXUAL FAMILIES

Heterosexual family has undergone many changes in its structure and function which has contributed to its decline.²⁴ A good understanding of the former requires one to know what the latter are. Therefore, it is important to define the heterosexual or natural or traditional or nuclear family before attempting to give any meaning to homosexual families.

It is also important to bear in mind that homosexual families are the result of changes that the society has undergone and the advent of ARTs. In the first paragraph of this section the nuclear family will be defined and the second paragraph will define homosexual families.

2.2.1 Definition of the family

Writers have defined the family or heterosexual family in diverse ways. According to Fineman “the family is an institution of horizontal intimacy, based on the romantic sexual affiliation between a woman and a man”.²⁵ This definition stresses two important dimensions of the family: firstly, the horizontal intimacy between two persons, and secondly, the horizontal intimacy must be based on the sexual affiliation of two persons of opposite sex. This would suggest that, for a family to come into existence, two persons (a man and a woman) must engage themselves in a romantic relationship, be it marriage or not. There must be interdependency between the two people who enter this romantic relationship.

Although this definition emphasises the presence of a man and a woman for the family to come into existence, it lacks another dimension of family which is very important for this study. Fineman’s definition fails to include children as members of the family. It is worth keeping in mind that children are the main focus of the study. For the purpose of this study, this definition is narrow and exclusive: Narrow because

²⁴ For more details on the heterosexual family decline, see para 2.3 below.

²⁵ Fineman “The neutered mother” 1992 *UMLR* 663.

it does not take into consideration all dimensions of the family and exclusive because it excludes children as members of the family.

Moosavi proposes another definition of the family that goes beyond the definition of Fineman. He adds two new important dimensions, namely the social acceptance of the relationship and the presence of children. There is even a third dimension which is the durability of the relationship. In Moosavi's words:

“A family is a unit that comprises a relationship more or less durable, confirmed by the society between two people of different gender who form a common life, who have children and who raise them. This type of family has become a global phenomenon that is found in all types of societies”.²⁶

According to Sheikh, “the family is a social and a key institution”. As a key institution, the family allocates responsibilities to individuals in order to protect societal structure and stabilise social life. Family as a social institution is the place where three categories of relations interact: “parent-child, blood and marriage”.²⁷ Therefore the term family covers a wide range of organisations, forms and responsibilities which may change from one country to another and may even change inside the same society, and which may be based on social classes, cultural influences and income levels.²⁸

Popenoe has proposed another definition of the family. According to him, family “is a relatively small group of kin (or people in a kin like relationship) consisting of at least one adult and one dependent person”.²⁹ What Popenoe is proposing here is similar to a single mother or single father family where there is at least one dependent child. Single mother and single father families emerged because of the changes that have stricken society particularly in industrialised countries. It is clear that this definition

²⁶ Moosavi “The comparison of family functioning, marital adjustment and intimacy in middle aged and young spouses” 2012 *IRJABS* 2015.

²⁷ Sheikh *Family Sociology* 9.

²⁸ Moosavi 2012 *IRJABS* 2015.

²⁹ Popenoe “American family decline 1961-1990: A review and appraisal” 1993 *JMF* 529.

includes children as part of the family. However, it is characterised by the absence of either a father or a mother who are very important for the nuclear family to be complete.

Macklin defines the non-traditional family as opposite to the traditional family. According to him, non-traditional family is defined as “all living patterns other than legal, lifelong, sexually exclusive marriage between a man and a woman, with children, where the male is the primary provider and ultimate authority”.³⁰

A closer look at this definition reveals a number of realities. Firstly, in Macklin’s opinion, nuclear family is composed of a man, a woman and children. Secondly, the man is united to the woman through the legal and long-lasting relationship of marriage; thirdly the marriage must be the only institution in which sexual activities are tolerated; and fourthly, the man is the provider and the ultimate authority of the family.³¹ Although the authority of the man in the nuclear family can be questioned today, this definition seems to be consistent with the requirements of the nuclear family in traditional societies.

Based on what is discussed above, and for the purpose of this study, family or nuclear family or traditional family should be understood as a unit composed of a father, a mother and their children. This unit is a result of a relationship between a woman and a man. It is important to note that the above realities are characteristics of the nuclear family which is the basic and fundamental unit of society. As will be seen in the discussion that follows, this form of family was valued and viewed as of great benefit to a stable and productive society. This would suggest that the stability and productivity of society are associated with the benefit that the nuclear family brings it.

³⁰ Macklin “Nontraditional family forms: A decade of research” 1980 *JMF* 905.

³¹ Macklin 1980 *JMF* 905.

In this regard, Fineman is of the view that the protection of family and its values shapes the policy and politics of society.³² Rogers also stresses the importance of the family in the society. He admits that the family is a “social building block”. He goes on to argue that the collapse of this building block causes society to collapse with it and that puts the well-being of children under threat.³³ However, with the changes that happened in society and the development of new methods of reproduction, other forms of families have emerged, including homosexual families.

With the emergence of homosexual families, the definition of the family discussed in this section was challenged. It was criticised and viewed as exclusive as it excluded homosexual couples and their children. There was therefore a need for an inclusive definition of the family that could take into account lesbians and gays who are raising children.

In order to include gay and lesbian families in the definition of family, Macklin conceived the family as similar to the “open marriage”. According to him, “open marriage” is a lifestyle that is characterised by the mutual decision of a couple to allow one or both partners to have openly acknowledged, independent sexual relationships with many partners who keep their own residences.³⁴ Macklin observed that in the “open family” some features are emphasised. These include flexible roles played by men and women of all ages, clear communication characterised by negotiations and consensual decisions, open expression of emotion, and mutual respect.³⁵

For the purpose of including homosexual families in the definition of family, Fineman proposed a definition of family entrenched in the vertical relationship between caretaker and dependent, as opposed to a family definition rooted in the horizontal relationship between a man and a woman.³⁶ In this definition of family, the caretaker

³² Fineman 1993 *ULR* 390-391.

³³ Rogers “Suffer the children”: What’s wrong with gay adoption” 2005 *CRI* 6.

³⁴ Macklin 1980 *JMF* 910.

³⁵ Macklin 1980 *JMF* 910.

³⁶ Baker “Taking Care of Our Daughters, a book review of Martha Fineman, The Neutered Mother, The Sexual Family and other twentieth century tragedies” 1995 *CLR* 1496.

and the dependent may be of the same-sex and the dependent might be a sexual partner of the caretaker.

Demo and Allen note that homosexual families are part of the wide family landscape. Within this landscape, homosexual individuals are interacting as siblings, parents, stepparents, partners and extended and chosen kin.³⁷ This explanation accounts for why many lesbians and gays have been described to be living simultaneously in two worlds, their heterosexual family where they come from and the lesbian and gay family they have created as mature partners through ARTs. They hence build an extended family environment that may be called a mixed or gay-straight or “dual” orientation family. Within these families, lesbians and gay men have relationships with other members of their family of origin, including brothers, sisters, parents, grandparents, and grandchildren.³⁸

Remarkably, defining homosexual families is problematic and controversial. While Demo and Allen maintain that families, in which lesbian and gay individuals are members, and where other family members are heterosexual, should not be defined as homosexual families,³⁹ Patterson is of the view that homosexual families are families that include at least one lesbian or gay partner.⁴⁰ This definition appears to be incomplete as it does not mention the presence of children as members of the family.

According to Rogers, homosexual families are new family units consisting of mother-and-mother with children or father-and-father with children.⁴¹ In Demo and Allen’s words:

³⁷ Allen and Demo “Family of lesbians and gay men: A new frontier in family research” 1995 *JMF* 111.

³⁸ Demo and Allen “Family structure, family process, and adolescent well-being” 1996 *JRA* 416.

³⁹ Allen and Demo 1995 *JMF* 112.

⁴⁰ Paterson “Family relationships of lesbians and gay men” 2000 *JMF* 1052.

⁴¹ Rogers 2005 *CRI* 6.

“Lesbian and gay families are defined by the presence of two or more people who share the same-sex orientation (couple) or by the presence of a least one lesbian or one gay rearing a child”.⁴²

In other words, lesbian and gay families are defined by the intimate interaction of two or more people who share same-sex orientation or by the enduring involvement of at least one lesbian or gay adult in the rearing of children. The problem with this definition is that a child may have more than two parents of the same sex who are involved in his or her rearing. The absence of at least one opposite sex parent might affect the psychological development of the child. This will become clear further down.

A homosexual family is also defined as “a family circle with a gay couple, who live together with adopted or biological children from prior heterosexual relationships, and/or where children either live in or visit the household”.⁴³ The fact the parent-child relationship was established before the couple relationship makes these families to be similar to heterosexual stepfamilies.

Not undermining the value of these definitions, it is worth noting that for the purpose of this study, homosexual families should be understood as families in which two men or two women are raising children that are born in the context of their homosexual relationship. In other words, in homosexual families, two men or women are rearing children who are born not from their previous heterosexual marriage, but are born while they are in homosexual relationship. This means in the context of this study, children reared in homosexual families are born as a result of homosexual relationships. This definition limits the number of the parents of the same sex at two and insists on the fact that the child reared in this family must not be adopted or born from the previous heterosexual marriage; rather the child must be born through assisted reproductive technologies. In view of the fact that the study analyses the welfare of children born through ARTs and growing up in homosexual families,

⁴² Demo and Allen 1995 *JMF* 112.

⁴³ Burnett and Lawrence “A descriptive empirical study of gay male step families” 1993 *FR* 256.

having two parents of the same sex and being born as a result of ARTs are the two important aspects of homosexual families in the context of this study.

It is important to bear in mind, as already stated, that homosexual families resulted from changes that occurred within the society in general and to the nuclear family in particular. The discussion of these changes is the subject of the next section.

2.3 SOCIAL CHANGES AND THE DECLINE OF THE NUCLEAR FAMILY

Society throughout the world has undergone profound changes. Sodomy was for instance decriminalised in the USA; a gay bishop was consecrated in an Episcopal church; in many states in the USA equal rights for same-sex couples are judicially protected; and Canada and many other countries, including South Africa, legally recognise homosexual marriages. These changes are seen as contributing to the decline of the nuclear family and the emergence of “the post-modern family”.⁴⁴

The decline of the nuclear family was commented on by a number of researchers including Popenoe. Popenoe mentioned changes that have happened in the structure and functions of the family in the USA. He highlighted the seriousness of these changes as they affect the nuclear family. In his words:

“There has been a striking decline in family structure and functions in American society, particularly since 1960. Recent family decline is ‘more serious’ than any decline in the past, because what is breaking up is the nuclear family, the fundamental unit stripped of relations that is left with two essential functions that cannot be performed elsewhere: Child-rearing and the provision of its members affection and companionship”.⁴⁵

⁴⁴ Greenan and Tunnel “Sex, drugs, rock ‘n’ roll ... and children: Redefining male couples in the 21st century” 2005 *JGLBTFS* 54.

⁴⁵ Popenoe 1993 *JMF* 527.

Bengtson also admits that the family has undergone many changes. He observes that these changes have extended family bonds beyond the limits of the nuclear family. He states:

“Over the century, there have been significant changes in the family’s structure and functions. Prominent among them has been the extension of family bonds, affection and or the creation of kin like relationship”.⁴⁶

In other words, the creation of relationships between man and man or woman and woman, the legal recognition and the social acceptance of these relationships in some countries, and the rights afforded to two attracted men or women have pushed the conception of the family beyond the limits of what was conceived until then as family in many societies.

According to Bengtson, all these social changes are the result of, among other factors, industrialisation and modernisation, which have direct or indirect effects on the family. In his view, urbanisation, increased individualism, and secularism have transformed the family from a social institution based on law and customs to one based on companionship and love. He argues that forms and meanings of families are changing and expanding beyond the nuclear family structure to include a variety of kin and non kin relationships.⁴⁷

Burgess also comments on the changes undergone by society. He starts his comment by defining the family, considering it in the context of evolution, and then concludes that changes caused the family to transit from an institution to a companionship.

The changes of both the structure and function of the family as discussed above have resulted in the emergence of new forms of families, including homosexual

⁴⁶ Bengtson “Beyond the nuclear family: The increasing importance of multigenerational bonds” 2001 *JMF* 14.

⁴⁷ Bengtson 2001 *JMF* 4.

families. Burgess shares this view and asserts that diverse forms of families have emerged from social changes.⁴⁸

Popenoe explains how these changes have resulted in the emergence of homosexual families. According to him, all the social changes undergone by society all over the world have resulted in states being forced to pass social rules that justify the search of individual rather than collective interests. This, coupled with the availability of alternate social groups for the satisfaction of basic needs, has resulted in the weakening of the institution of the family as an agent of socialisation and a source of nurturance for family members.⁴⁹

Based on the comments of the abovementioned researchers, one can argue that today's society is becoming more and more individualised; legislation in many countries tends to legitimate individual rather than collective interests. Industrialisation, capitalism and ARTs are the major causes of these changes. All these changes have altered the structure and the function of the nuclear family as discussed above and from those changes emerged other forms of families, including homosexual families.

For Stacey, it is the modern industrial society that caused the decline of the nuclear family. In Stacey's words:

“If what we mean by ‘family’ is the nuclear family form of dad, mom and their biological or adopted children, this form of family rose and fell with modern industrial society. In the last few decades, with the shift to a post-industrial domestic economy within a capitalist system and the advent of new reproductive technologies, ‘the modern family system’ has been replaced by the post-modern family condition, a pluralistic, fluid, and contested domain in which diverse family patterns, values, and practices contend for legitimacy and resources”⁵⁰.

⁴⁸ *Ibid.*

⁴⁹ Popenoe 1993 *JMF* 527.

⁵⁰ Stacey *In the Name of the Family: Rethinking Family Values in the Post- modern Age* 35.

It follows from all these comments that social changes have resulted in the alteration and decline of the nuclear family, which is the product of the institution of marriage between a man and a woman. The nuclear family is now challenged by other forms of families that are termed differently as post-modern families, companionship or simply homosexual families.

However, according to Sorokin, once a society ceases to honour the institution of marriage as described above, it will also cease to survive. For him marriage and parenting are the fulfilment of life meaning for both individuals and society. He argues that enjoying marital union in its infinite richness; parents freely fulfil many other paramount tasks. They maintain the procreation of the human race. Through their progeny they determine the hereditary and acquired characteristics of future generations. Through their marriage, they preserve themselves, their ancestors and particular groups in the society through the transmission of their names and values, traditions and ways of life to their children and generations to come.⁵¹

The nuclear family has declined and homosexual families have emerged. Homosexual families have certain characteristics that need to be discussed for a better understanding of these families. The next section is devoted to the discussion of those characteristics.

2.4 CHARACTERISTICS OF HOMOSEXUAL FAMILIES

Many characteristics seem to be common to homosexual families: these include, amongst other things, the absence of a father or a mother, domestic violence, parents' mental and health problems and a particular mode of reproduction.

⁵¹ Sorokin *The American Sex Revolution* 6.

2.4.1 The absence of a father or mother

Baetens and Brewaeyts define lesbian families as families in which there is no father, and in which, if there are children, these children are raised by two mothers. According to them in lesbian families a father has been excluded from the beginning, and children are raised by two mothers.⁵² In these families, one mother is the biological or birth mother of the children they are rearing and the other is the social or non-birth mother. The social mother is the intimate partner of the biological mother. In most cases, the biological mother provides for the family whereas the social mother is a helper; she looks after children while the biological mother is busy in paid work. Most of the time, the social mother is involved in the children's discipline but sometimes she also spends time in paid work.⁵³ Although this is the scenario sketched by Golombok, one should keep in mind that in some cases the child might have no biological link with either of the mothers, and the "division of labour" in the household may be quite different.

Similarly, in gay families there is no mother. Children live with two fathers who are their parents; one of the two fathers has biological ties with the children and his partner is in charge of the discipline of children and other domestic tasks.⁵⁴ Once again, although this is the scenario sketched by Golombok, one should keep in mind that in some cases, it can happen that neither of the fathers has biological ties with the children and both parents are equally involved in the care of their children.

In short, there is no father or mother respectively in lesbian and gay men families. This is one of the major characteristics of homosexual families.

⁵² Baetens and Brewaeyts "Lesbian couples requesting donor insemination: An update of the knowledge with regard to lesbian mother families" 2001 *HRU* 512.

⁵³ Golombok *et al* "Family with children conceived by donor insemination: A follow up at age twelve" 2002 *CD* 952.

⁵⁴ Golombok 2002 *CD* 953.

2.4.2 Domestic violence

Different terms have been used to describe the violence that happens between homosexual partners. These include same-sex interpersonal violence (SSIPV), interpersonal violence (IPV), et cetera. All these terms describe acts of physical, emotional and sexual abuse as well as the verbal aggression that occur between two homosexual intimate partners.⁵⁵

Many cases of domestic violence have been reported in lesbian and gay families. According to Lockhart *et al*, 90% of lesbians surveyed in their study have been victims of one or more acts of verbal aggression from their intimate partners during the year prior to their study, with 31% reporting one or more incidents of physical abuse.⁵⁶

In another survey of 1099 lesbians conducted in 1991, Lie and Gentlewarrier found that more than half of lesbians reported that they have been physically, emotionally, and psychologically abused by their female lover or partner.⁵⁷ Island and Lettelier concluded that domestic violence within gay households was very high. They admitted that the occurrence of domestic violence among gay men is nearly double what it is in the heterosexual population.⁵⁸

In relatively recent studies, cases of violence among gays and lesbians were also reported. In 2008, Lisa Eaton *et al* reported that in a sample of 226 lesbians, 40% frequently experienced interpersonal violence perpetrated by their partners. The acts of violence ranged from verbal harassment (50%) to physical violence (39%) and threats of physical violence (33%).⁵⁹ In another study undertaken in 2010,

⁵⁵ Murray and Mobley "Empirical research about same-sex partners' violence: A methodological review" 2009 *JH* 631.

⁵⁶ Lockhart "Letting out the secret: Violence in lesbian relationships" 1991 *JIV* 14.

⁵⁷ Lie and Gentlewarrier "Intimate violence in lesbian relationships: Discussion of survey findings and practice implications" 1991 *JSSR* 49.

⁵⁸ Island and Lettelier *Men Who Beat the Men Who Love Them: Battered Gay Men and Domestic Violence* 14.

⁵⁹ Eaton *et al* "Examining factors co-existing with interpersonal violence in lesbian relationships" 2008 *JFV* 699.

Stephenson, Khosropour and Sullivan analysed the rate of gay partners experiencing and perpetrating violence; they reported that in a sample of young gay men 11.8% of respondents reported physical violence from another male partner while around 4% experienced coerced sex. They also reported that 7% of respondents perpetrated physical violence while less than 1% of respondents perpetrated sexual violence. They concluded that their results demonstrated high levels of interpersonal violence among gay men and bisexuals.⁶⁰ In 2011 similar findings were reported. The National Violence Against Women (NVAW) survey found that 21.5% of gay men and 35.4% of lesbians had experienced physical abuse from their partners in their life time. Another survey of 3000 gay men found that gay men experienced physical and sexual abuse of 22% and 5.1% respectively.⁶¹

Few studies were conducted in South Africa on violence that happens in heterosexual families. In 2001, for example, Technikon South Africa conducted a study amongst its employees regarding attitudes and responses to intimate assault and domestic abuses. The study revealed that only 17% to 19% of female respondents admitted to have been pushed while 15% had been threatened with injury. Eleven percent of male respondents indicated that they had pushed their wives less than 6 times and 9% had threatened to hurt them.⁶² In a more recent study, Shai and Sikweyiya indicated that 24% of adult women have experienced sexual or physical intimate violence in their life time and 31% in their most recent marriage and cohabitating relationships.⁶³

All these studies clearly indicate that violence often occur more among lesbians and gay men than in heterosexual families and this sometimes tends to shorten the life span of their relationships.

⁶⁰ Stephenson, Khosropour and Sullivan "Reporting of intimate partner violence among men who have sex with men in an online survey" 2010 *WJEM* 245.

⁶¹ Ard and Makadon "Addressing intimate partner violence in lesbian, gay, bisexual and transgender partners" 2011 *JGIM* 630.

⁶² Singh "Intimate abuse - A study of repeat and multiple Victimisations" 2003 *AC* 36.

⁶³ Shai and Sikweyiya "Addressing sexual and intimate partner violence in South Afrtica" 2015 *SACQ* 32.

Homosexual partners cannot naturally reproduce. Their children come into the world by the means of different techniques.

2.4.3 Particular mode of reproduction

It is a biological reality that same-sex couples cannot conceive together. For this reason their children arrive by a multiplicity of routes. In many cases, children living with lesbian and gay couples are biological offspring of one member of the couple, whether by an earlier marriage or relationship, by arrangement with a surrogate birth mother or by arrangement with a known or unknown donor (in the case of lesbians).⁶⁴ While gay men are often interested to know the surrogate mother, lesbian mothers can choose to receive gametes from known or unknown donors for them to be inseminated and become pregnant.⁶⁵

This would suggest that although children can arrive in homosexual families from former heterosexual relationships and adoption, homosexuals predominantly use donor insemination and surrogacy arrangements as routes to become parents. Patterson has added two other routes to the list. According to her, apart from donor insemination, adoption and surrogacy arrangements as discussed above, foster care and co-parenting are also routes for homosexual couples to become parents.⁶⁶ As it will become clear later in this thesis, laws on adoption by gays and lesbians vary from one country to another. While some countries or states in the same country allow gays and lesbians to adopt unrelated or related children, other countries deny gays and lesbians the right to adopt at all, or allow them to adopt only unrelated children.⁶⁷

⁶⁴ Meazan and Rouch "Gay marriage, same-sex parenting, and America's children" 2005 *The Future of Children* 99. It should be noted that this is not always the case; sometimes children in these families have no genetic ties with their parents.

⁶⁵ Meazan and Rouch 2005 *The Future of Children* 99.

⁶⁶ Patterson "Families of the lesbian baby boom: Parents' division of labor and children's adjustment" 1995 *DP* 116-7.

⁶⁷ See chapter 5 below.

Lesbian and gay couples prefer donor insemination with known and/or unknown sperm donors or arrangements with a birth mother for several reasons. The predominant reasons for this preference are: first, for the majority of homosexual couples, sexual intercourse with the opposite sex partner is an unacceptable solution. They consider this method harmful to their relationship because they assume that it lacks respect for the couple's identity.⁶⁸

Secondly, lesbians prefer donor insemination because they can choose between a known or unknown sperm donor. Some lesbians choose a known sperm donor because they admit that their children need a father, a male role model, someone who will father their children. They also choose a known sperm donor because they recognise that each child has the right to know his or her genetic origins.⁶⁹ Other lesbians prefer an unknown sperm donor. They argue that using sperm from an unknown donor will ensure that their relationship and the family are not subjected to any interference from a third party.⁷⁰ They also argue that their children do not need a father or a male role model. In these circumstances, the unknown donor is informed from the beginning by the clinic or the sperm bank that he will have no relationship with the child born with his genetic material.⁷¹

Homosexual families are also characterised by parents' health and psychological problems.

2.4.4 Health and psychological problems

A number of health and psychological problems have been reported amongst gays and lesbians. Several studies conducted in different countries at various periods have revealed that the lifestyle of gays and lesbians is dominated by some problems related to their mental health and behaviours.

⁶⁸ Baetens and Brewaeys 2001 *HR* 513.

⁶⁹ Baetens and Brewaeys 2001 *HR* 514.

⁷⁰ *Ibid.*

⁷¹ Baetens and Brewaeys 2001 *HR* 512. See also Brewaeys *et al* "Donor insemination: Child development and family functioning in lesbian mother families" 1997 *HR* 1351.

In the USA, Thomas *et al* conducted a study on a probability sample of 288 gay men in 2004, and concluded that the rates of depression are high in gay men.⁷² Three years earlier, another study was conducted in the USA. The study focused on lesbian health and behaviours and found that there was a general elevation of the risk of anxiety, substance abuse and suicidal thoughts and plans among lesbians.⁷³ In 1999, Herell *et al* reported that “having same-sex sexual partners was associated with thoughts about death and suicidal attempts.”⁷⁴

In 1989, a survey of 3400 gay men in Chicago revealed a higher prevalence of alcohol problems as well as marijuana and cocaine abuse amongst gays and lesbians than in the general population.⁷⁵ More than 68% of lesbians in a study conducted in 1994 by Bradford *et al* reported having mental health problems including long-term depression and sadness, constant anxiety, fear and other mental health concerns.⁷⁶ The largest study conducted in the Netherlands was an epidemiological study that commenced in 2001. The study found that gay men and lesbians had more mental and physical health problems than the general population.⁷⁷

Fethers *et al* conducted a large study in Australia in the 1990's and reported that lesbians and bisexual women had a history of drug use.⁷⁸ Wardle reported that homosexual behaviour amongst male youths is associated with suicidal attempts, prostitution, running away from home, substance abuse, HIV infection, highly promiscuous behaviour with multiple sex partners, and premature sexual activity.⁷⁹ In

⁷² Thomas *et al* “Distress and depression in men who have sex with men: The Urban Men’s Health Study” 2004 *AJP* 278.

⁷³ Gilman *et al* “Risks of psychiatric disorders among individuals reporting same-sex sexual partners in National Comorbidity Survey” 2001 *AJP* 933.

⁷⁴ Herell *et al* “Sexual orientation and suicidality: A co-twin control study in adult men” 1999 *AGP* 869.

⁷⁵ McKirnan and Peterson “Alcohol and drug use among men and women: Epidemiology and population characteristics” 1989 *AB* 545.

⁷⁶ Bradford, Ryan and Rothblum “National Health Care Survey: Implications for mental health care” 1994 *JCCP* 228-229.

⁷⁷ Sandfort *et al* “Sexual orientation and mental health status: Findings from Dutch population survey” 2006 *AJPH* 1119, 1122-1124.

⁷⁸ Fethers *et al* “Sexually transmitted infections and risk behavior in women who have sex with women” 2000 *STI* 345,348.

⁷⁹ Wardle in Eekelaar and Nhlapo (eds) 854.

South Africa, a more recent study indicated that the sexual violence that lesbian women experience is associated with the higher risk they have for contracting sexually transmitted diseases, including HIV.⁸⁰ Müller reported in his study that 13% of South African men who have sex with men and 10% of women who have sex with women are diagnosed as HIV positive.⁸¹

Dora Wynchank, borrowing from American studies, indicated the increasing toll of stress-related psychiatric disorders, including anxiety, mood and substance use disorders in lesbian, gay and bisexual populations.⁸² Drawing on Isaacs and McKendrick, McCormick describes South African homosexuality as characterised by crisis. McCormick goes on to argue that the fact that homosexuality was declared as a crime resulted in gay men (as well as lesbian women) remaining in the closet and displaying self-hatred and self-destructive behaviours, which manifested with promiscuity and ultimately leads to feelings of defilement and incompleteness.⁸³ According to McCormick, being in the closet is associated with behaviours such as crisis, cruising, camping, objection, neurosis, filth, denial internalised homophobia.⁸⁴ Some of these behaviours can lead to depression and thoughts of suicide. These psychological problems are in most cases the result of a lack of acceptance of homosexual individuals in a society dominated by the heteronormativity. The lack of acceptance is often manifested in a homophobic climate that prevailed in most of societies. In South Africa for instance, more recent studies indicate that there are homophobic hate crimes perpetrated against gays and lesbians in different areas of the country. Kerry reported in his study that in a tavern in Germiston, a young black gay man was assaulted on 7 October 2007 by a group of patrons. He was punched, kicked and hit over the head.⁸⁵ In another study, Naidoo and Kerels reported that

⁸⁰ Müller "Strategies to include sexual orientation and gender identity in health profession education" 2015 *AJHPE* 6

⁸¹ *Ibid.*

⁸² Wynchank "Psychiatry and same-sex marriage: Are we involved" 2006 *SAPR* 69.

⁸³ McCormick "Queering discourses of coming out in South Africa (2013) available at <http://spiplus.journals.ac.za> (date of use 10 August 2016) 141-142.

⁸⁴ McCormick <http://spiplus.journals.ac.za> (date of use 10 August 2016) 142-143.

⁸⁵ Kerry "'Dip me in chocolate and throw me to the lesbians': Homophobic hate crimes, the State and civil society" 2012 *SACQ* 39.

92% of lesbian women in their sample had been victims of verbal abuse, 5.5% had been robbed, 91% sexually assaulted and 32% raped at some point.⁸⁶

It is interesting to note that with the legalisation of homosexual relationships in South Africa, people are becoming more tolerant than before and a slight change in their behaviours against homosexual individuals had been observed. Van Zyl for instance observed that the attitude of people towards gays and lesbians in city centres like Cape Town was more positive and affirming compared to the attitude in the rural areas.⁸⁷ Bett Pacey also confirms the acceptance of the “moffee” (A derogatory Afrikaans term for a gay man) in Cape Town.⁸⁸

These studies indicate the acceptance of the gay and lesbian community, which resulted in the increase of self-esteem among gays and lesbians and a slight decrease of psychological problems, including depression and suicidal thoughts.

After discussing how homosexual families have emerged, defining and characterising them, it is now important to have a look at how they function.

2.5 THE FUNCTIONING OF HOMOSEXUAL FAMILIES

Before discussing how homosexual families function, one would find it interesting to understand what family functioning is, which factors can influence family functioning and what the relationship is between family functioning and the well-being of family members.

⁸⁶ Naidoo and Kerels “Hate crimes against black lesbian South Africans: Where race, sexual orientation and gender collide (Part I)” 2012 *Obiter* 239.

⁸⁷ Van Zyl “Cape Town activists remember sexuality struggle” in Martin HN and Reid G (eds) *Sex and Politics in South Africa* 105.

⁸⁸ Pacey “The emergence and recognition of moffees as popular entertainer in the Cape Minstrel Carnival” 2014 *SATJ* 122.

2.5.1 The definition of family functioning

Silburn *et al* have drawn the definition of family functioning from the value that is given to the family. According to them family is considered the centre of its members' well-being. They point out that family functioning is about how family members interact, relate, and maintain relationships. It is also about how family members make decisions and solve their problems.⁸⁹ In other words, the well-being of all family members is dependent on the way they are interrelated within the family. What is happening within the family and how the family functions can be positive or negative factors in building children's resilience and reducing their present and future risks associated with adversities and disadvantages. Therefore, family environments where children are cared for can enable children to learn and succeed. On the contrary, dysfunctional family environments can harm many aspects of children's development and their positive transition into adulthood.⁹⁰

2.5.2 The importance of family functioning

Family is responsible for the support, protection and guidance of its members. How family goes about supporting, protecting, guiding, nurturing and socialising its members in general and children in particular, is a very important aspect of the family environment. Family functioning influences the physical, social and emotional well-being of children.⁹¹

According to L'Abate, individual behaviour is strongly influenced by family functioning. He points out that dysfunctional individuals generally grow up in dysfunctional families.⁹² Zubrick *et al*, share this view and emphasise that good outcomes for children are generally dependent on good family functioning. Children living in families that function well tend to benefit from having positive role models for building relationships and an environment that promotes the development of high

⁸⁹ Silburn *et al* *The Western Australian Aboriginal Child Health Survey: Strengthening The Capacity of Aboriginal Children, Families and Communities* 263.

⁹⁰ *Ibid.*

⁹¹ Van As and Janssen "Relationships between child behaviour problems and family functioning: A literature review" 2002 *IJFCW* 44.

⁹² L'Abate *Family Psychology: The Relational Roots of Dysfunctional Behaviours* 15.

self-esteem and other qualities for children.⁹³ It is therefore important to understand how a family functions in order to study children's behaviour and experience within a family.

The level of optimal family functioning can be affected by changes in the family circumstances, the interaction between parental employments or economic circumstances and family life, as well as external stressors that may affect the home environment. Specific relationships between family members in general and the relationship between parents and children can also affect the functioning of the family.⁹⁴

It is important to be reminded that a child's development and psychological well-being depend on how the family functions and in particular on the parent-child relationship.⁹⁵ How then do homosexual families function? The answer to this question is provided in the discussion that follows.

2.5.3 Lesbian and gay family functioning

In general, lesbian and gay families comprise respectively two mothers and children; or two fathers and children. The discussion of how these families function will revolve around parenting in these families, the parent-child relationship and the family structure.

2.5.3.1 Parenting behaviours in lesbian and gay families

It appears important to be reminded that the manner in which family members interrelate is very important for their well-being. Parental behaviour in families is a

⁹³ Zubrick *et al* "Prevention of child behavior problems through universal implementation of a group behavioural family intervention" 2005 *PS* 15.

⁹⁴ Zubrick *et al* 2005 *PS* 15.

⁹⁵ Shankoff and Phillips *From Neurons to Neighbourhood: The Science of Early Childhood Development* 23.

predictor of the well-being of children growing up in these families. In this section, the division of labour within lesbian and gay families and child-rearing is discussed.

2.5.3.1.1 The division of labour in lesbian and gay families

The division of labour within lesbian and gay families is about how lesbian mothers and gay fathers share their responsibilities regarding paid employment and unpaid family labour. Unpaid family labour refers to household work and child care.⁹⁶ According to several researchers, lesbian mothers and gay fathers tend to share equally their responsibilities within their respective families.⁹⁷

Patterson *et al* reports that among lesbian couples with children, the two mothers are likely to equally share responsibilities for both paid employment and unpaid family labour.⁹⁸ At this point Patterson is in contradiction with Golombok and Brewaeys *et al*, who are of the view that the biological mother spends more time in paid work while the social mother looks after children.⁹⁹ This study is analysing the division of labour within lesbian and gay families with regard to child care and household tasks.¹⁰⁰

2.5.3.1.2 The division of labour with regard to child care

Within lesbian and gay families, two mothers or two fathers have to look after their children, and do domestic or household tasks. There is a controversy over the division of child care in lesbian and gay families.

⁹⁶ See paras 2.5.3.1.2 and 2.5.3.1.3 below.

⁹⁷ It is important to note that different authors have different views on this issue. Their views are given here without considering the contradictions that might exist among authors. The purpose here is to expose what has been said on the division of labour in gay and lesbian families.

⁹⁸ Paterson, Suftin and Fulcher "Division of labour among lesbian and heterosexual parenting couples: correlates of specialised versus shared patterns" 2004 *JAD* 179.

⁹⁹ See para 2.4.1 above.

¹⁰⁰ Paterson, Suftin and Fulcher 2004 *JAD* 179.

Some researchers, including Bell and Weinberg, are of the view that most lesbians and gays equally share their child care tasks.¹⁰¹ Kurdek supports this view and reports egalitarian division of labour among lesbian and gay couples.¹⁰² Gartel *et al* have also reported similar findings.¹⁰³ This would suggest that each mother and each father respectively in lesbian and gay families contributes equally towards child care. According to Stacey and Biblarz, lesbian co-parents may enjoy parental compatibility and achieve particularly high quality parenting skills. Studies suggest that two women co-parenting may create a synergic configuration that brings more egalitarian, more well-matched shared responsibilities and time spent with children, greater understanding of children and closeness, as well as communication between parents and children.¹⁰⁴ Similarly, these authors are in contradiction with Golombok and Brewneys *et al*.¹⁰⁵

An equal division of labour was also observed among gay male couples. Biblarz and Stacey observe that gay male couples share parenting more equally and with fewer polarisations in levels and types of interactions than heterosexual couples, but to a lesser extent than female parents.¹⁰⁶

However, other researchers are of the view that there is an inequality or asymmetry when it comes to child care in lesbian and gay families. Johnson and O'Connor for instance reported that birth mothers have more child care tasks than non-birth mothers in lesbian families. According to them, birth mothers spend more time in child care activities than non-birth mothers.¹⁰⁷

¹⁰¹ Bell and Weinberg *Homosexuality: A Study of Diversity among Men and Women* 310.

¹⁰² Kurdek "Lesbian gay couples" In D'Augelli and Patterson (eds) *Lesbian, Gay, and Bisexual Identities over the Lifespan: Psychological Perspectives* 248.

¹⁰³ Gartel *et al* "The National Lesbian Family Study 1: Interviews with prospective mothers" 1999 *AJO* 276.

¹⁰⁴ Stacey and Biblarz "How does the sexual orientation of parents matter?" 2001 *ASR* 175.

¹⁰⁵ See para 2.4.1 above.

¹⁰⁶ Biblarz and Stacy "How does the gender of parents matter?" (Paper delivered at the Evolving Families Conference, 7-8 April 2006, Institute for Social Sciences, Cornell University). See also Johnson and O'Connor *The Gay Baby Boom: The Psychology of Gay Parenthood* 36.

¹⁰⁷ Johnson and O'Connor *The Gay Baby Boom: The Psychology of Gay Parenthood* 36.

Patterson supports this view and points out that, non-birth mothers spend more time in paid employment. Consequently, they have less time to spend on child care.¹⁰⁸ The inequality in the division of child care tasks was also reported in the study conducted by Brewaeys *et al.* According to them birth mothers spend more time in paid employment outside the home while non-birth mothers are more involved in practical child care activities. Non-birth mothers help their partners in disciplining their children.¹⁰⁹ In another study conducted by Boyce and Sireci, the authors report that in lesbian families, child care tasks are divided among birth and non-birth mothers with the birth mothers performing more child care than the non-birth mothers.¹¹⁰ They further report that birth mothers want to do more child care.¹¹¹ Birth mothers also report to be less satisfied with non-birth mothers' involvement in their child's life.¹¹²

It is clear from the views expressed above that there is an asymmetry in the division of labour regarding child care. Birth mothers are generally more involved in child care than non-birth mothers. What then are the causes of this asymmetry? Researchers have identified factors that may influence the division of labour in lesbian and gay families and hence cause the asymmetry.

The fact that birth mothers are more involved in child care than non-birth mothers seems to be dependent on a number of factors, including biology or genetic ties and the time spent with the child. Parental roles in caring for children in lesbian families are influenced by the fact that birth mothers are strongly connected to their children due to pregnancy and breastfeeding. The fact that the birth mother was pregnant with her child for 9 months and the fact that she is the one breastfeeding the child establishes strong biological bonds between the mother and the child and make her to feel more responsible for child care than her partner. What role can pregnancy and breastfeeding play in the division of labour in lesbian families?

¹⁰⁸ Patterson 1995 *DP* 116.

¹⁰⁹ Brewaeys *et al* 1997 *HR* 1356.

¹¹⁰ Boyce and Sireci "Who is mummy tonight? Lesbian parenting issues" 2002 *JH* 7.

¹¹¹ Boyce and Sireci 2002 *JH* 7.

¹¹² Boyce and Sireci 2002 *JH* 9.

Some researchers point out that the pregnancy bonds the birth mother to her child. In fact, pregnancy is one of the strongest bonds between mother and child. De Jong-Pleij *et al* for instance reported that bonding during pregnancy seems to be a good predictor of the mother-child relationship and for this reason is considered a critical factor in the process of caring for the child.¹¹³ This view was confirmed by Lucassen *et al*, who reported that sensitive parenting has its origin in pregnancy. They refer to sensitivity as the ability to perceive and interpret accurately the signals implicit in the child's behaviour and to respond promptly and adequately.¹¹⁴ The sensitivity developed by the birth mother vis-à-vis her child had been found to be caused by a hormone (oxytocin) secreted during the pregnancy. In this regard, Johnson reported in his study that the levels of oxytocin across the pregnancy facilitate the postnatal maternal behaviours and emotional bond between mother and infant by reducing anxiety and improving response to stressors.¹¹⁵ This would suggest that the birth mother feels more connected than any other person to the child she carried for nine months in her womb and to whom she gave birth. This special connection to the child causes her to feel more responsible for the child. It can then be argued that the responsibilities of the birth mother in respect of her child flow from the fact that by being pregnant with the child, she is before birth and after birth accountable for the nutrition, life and good health of the child. Her decisions, attitudes and behaviours indirectly and directly affect the child prenatally and postnatally. Research suggests that birth mothers tend to perform more child care regardless of working hours.¹¹⁶ This is a consequence of their feeling of being bonded to their child by the fact of the pregnancy. Among lesbians, the fact that birth mothers are performing more child care tasks was significantly associated with the feeling that biology makes the difference.¹¹⁷

Another aspect of biology that influences the division of the child care tasks is breastfeeding. For some lesbian mothers, breastfeeding clearly determines their

¹¹³ De Jong-Pleij *et al* "Three-dimensional ultrasound and maternal bonding, a third trimester study and a review" 2013 *PD* 81.

¹¹⁴ Lucassen *et al* "Expressed emotion during pregnancy predicts observed sensitivity of mothers and fathers in early childhood" 2015 *PSP* 158.

¹¹⁵ Johnson "Maternal-infant bonding: A review of literature" 2013 *IJCE* 19.

¹¹⁶ Goldberg and Jenkins 2007 *JSPR* 306.

¹¹⁷ Goldberg and Jenkins 2007 *JSPR* 308.

roles. Birth mothers experience breastfeeding as a special connection with the child. For them breastfeeding creates a unique and primary bond between mother and child. Breastfeeding allows birth mothers to spend long hours attached to the child.¹¹⁸ As a result the birth mother will feel connected to and responsible for the feeding of the child.

It is evident that performing more child care tasks is a result of the biological tie between the mother and the child, which may consequently be determinant of parental roles in lesbian families. Goldberg and Jenkins point out that, in contrast to this view, other researchers believe that biology or a genetic tie is not a determining factor in parenting roles; it is rather the time spent with the child that creates closeness with the child and therefore influences the parental roles in lesbian and gay families.¹¹⁹

Emphasising the importance of the time spent with the child, Goldberg and Jenkins argue that women who spend more time with their children construe their greater responsiveness to their children's cues as "biological" in nature. By this fact they then conclude that biology does in fact influence parental roles.¹²⁰

In 1999 Gartell *et al* conducted a study on lesbian families and found that 50% of lesbians in their sample believed that the time spent with the child is the most important factor that affects the mother-child attachment.¹²¹ In another study Goldberg and Jenkins admitted that being a birth mother or performing more child care does not in itself make any difference; it is the behaviour of the mother toward her child that creates a bond between mother and child. In their words:

"[A]lthough biological mothers tended to perform more child care ... and ... tended to view their role as more primary, neither performing more child care nor being the

¹¹⁸ Goldberg and Jenkins 2007 *JSPR* 310.

¹¹⁹ Goldberg and Jenkins 2007 *JSPR* 311.

¹²⁰ Goldberg and Jenkins 2007 *JSPR* 312.

¹²¹ Gartel *et al* "The National lesbian family study 1: Interviews with prospective mothers" 1996 *AJO* 279.

biological mother did by themselves create a motherhood hierarchy ... [I]t is behaviour that is important in determining motherhood (if you act like a mother, you are a mother)."¹²²

In other words, this view predicts that in order to be a mother, one does not need to give birth to a child. Rather, one needs only to behave like a mother. In short, behaviour creates motherhood.

Despite this controversy over the important factors in the determination of parenting roles, it is important to note that the fact of giving birth to a child and breastfeeding him or her creates an asymmetry in lesbian families. The biological asymmetry created by pregnancy and breastfeeding is a source of emotional problems among lesbian couples. In fact, being a birth mother and breastfeeding the child sometimes creates a feeling of jealousy and exclusion for non-birth mothers. In order to counterbalance this biological asymmetry and therefore mitigate the feeling of jealousy and exclusion, non-birth mothers have developed strategies to resist the social norm of primary and secondary caregiver that are created by the factors discussed above.

Some lesbian couples often arrive at an agreement even before the artificial insemination on who is going to be the birth mother and by doing so they create and clarify their parenting roles out of conscious preference. Other lesbian couples admit that the fact of birthing a child automatically designates the birth mother as the primary caregiver,¹²³ and they establish a set of roles that benefit the child. In their division of household tasks and child care for instance, they decide that it is the non-birth mother who will be in charge of preparing the child for bed and putting him or her to bed, who will be responsible for bathing the child or changing the diaper during the night, or who will be in charge picking up/dropping off of the child.¹²⁴

¹²² Goldberg and Jenkins 2007 *JSPR* 312.

¹²³ Boyce and Sireci 2002 *JH* 9-10.

¹²⁴ Goldberg and Jenkins 2007 *JSPR* 308.

In some lesbian families, birth mothers were partially breastfeeding the child, allowing non-birth mothers to fulfil the complementary role of bottle feeding the baby. According to Goldberg and Jenkins, this combination of feeding has helped to tone down the feeling of jealousy and exclusion created by breastfeeding.¹²⁵

All these activities were seen as a means for non-birth mothers to create their own connection to the child. They created motherhood through their behaviours. Through the strategies discussed above, non-birth mothers were affirming and asserting their maternal identity and promoting their parenting roles. They were also counterbalancing the exclusive breastfeeding relationship and the bond created by the fact of carrying the child during nine months in the womb.¹²⁶

It should be noted that non-birth mothers' efforts to maintain equality extended beyond child care. Non-birth mothers are more concerned and interested in counterbalancing birth mothers' contribution in the household. For instance, when birth mothers are breastfeeding, non-birth mothers attended to household tasks including cooking, laundry and cleaning. Sometimes non-birth mothers reduced the hours they spend in paid employment for them to spend more time caring for children, and hence counterbalanced their partner's contribution.¹²⁷ However, it is necessary to note that the quality of the time spent with the child makes a difference in the strength of the bond created between mother and child. The birth mother who is breastfeeding her own child, a child that she was pregnant with and gave birth to, will consider the time she is breastfeeding her child to be more important than the time she spends to do any other activity and this may give a special meaning to the bond created between her and the child, resulting in a special emotional connection between them.

It is important to note that there are very few scholarly texts on homosexual families in South Africa. As a result many aspects of homosexual families such as the division of labour, child-rearing and the experiences of children in these families are not

¹²⁵ Goldberg and Jenkins 2007 *JSPR* 309.

¹²⁶ Goldberg and Jenkins 2007 *JSPR* 308-9.

¹²⁷ Goldberg and Jenkins 2007 *JSPR* 309.

explored. One of the rare studies conducted on gay parenting behaviours in South Africa indicated that gay fathers are egalitarian in fulfilling their parenting tasks. Using their strength, mutual support and their availability they share equally their parenting tasks. In the words of Jacques Rothman:

“Associated with their gender role orientation, gay fathers displayed an affinity for a more androgynous and egalitarian approach to the parenting practices. As such, they eradicated the so-called gender hierarchies and binary categories which dictated what masculinity or femininity entailed, and what the exclusive tasks of fathers and mothers should be. They opted for the negotiation of the allocation of household tasks for the couples, based on their strengths and mutual support, rather than the gender of the individual...”¹²⁸

This would suggest that since there is no father and mother in a gay family, the division of labour is negotiated based on the strengths, mutual support, and availability of partners and not on their gender.

2.5.3.1.3 Division of labour with regard to house work

The division of labour in gay and lesbian families seems to be influenced by a number of factors, including the discrepancies in the parents’ resources and the desire to counterbalance the other partner’s contribution.

The difference in the resources of the two parents is an important factor that influences the division of labour in lesbian and gay families. According to Patterson and her colleagues, the partner who earns more money should do less unpaid family work.¹²⁹ This would suggest that the income determines which of the two mothers will do more house work.

¹²⁸ Rothman “South African gay fathers’ parenting practices: From pathology to normalisation” 2011 *AA* 69.

¹²⁹ Patterson, Suftin and Fulcher 2004 *JAD* 179.

Research suggests that it is expected from a partner who is often available at home to fulfil more household tasks.¹³⁰ The demands in household work and the availability of the partner due to the fact that she spends less time in paid employment, determines the level of her participation in household tasks.

Lesbian and gay families function in a way that is different from heterosexual families. How lesbian and gay families function can determine how well children are growing up in these families. Therefore it is important to analyse how lesbian and gay parents rear their children.

In South Africa, the division of labour with regard to the household work is also egalitarian as indicated by Rothman.¹³¹

2.5.3.2 *Child-rearing*

2.5.3.2.1 General focus on child-rearing

According to the literature on child-rearing, warmth, responsiveness and control are the three dimensions that need to be discussed. Warmth refers to the parents' emotional expression of love and empathy and their creation of a warm and accepting atmosphere.¹³² Warmth is an important factor in determining a child's outcomes. A warm family environment helps children develop to their full potential. Are lesbian and gay men families creating a warm atmosphere? The answer to this question will be provided further down.

Responsiveness can be defined as the sensitivity of the parents to the needs and feelings of their children and their adequate reaction in this respect.¹³³ In parent-child relationships, parents must be sensitive to the needs of their children. A mother, for instance, must be able to understand the child's language. This means that the

¹³⁰ Patterson, Suftin and Fulcher 2004 *JAD* 179.

¹³¹ Rothman 2011 *AA* 69.

¹³² Van As and Janssens 2002 *IJCFW* 41.

¹³³ Van As and Janssens 2002 *IJCFW* 41.

mother must be able to discern when the child is sick, in need of food or needs a diaper change. This ability is reported to be dependent on hormonal factors. In fact, women experience a high level of secretion of the hormone peptide oxytocin. This hormone has the ability to strongly attach the mothers to their children. As a result mothers' sensitivity to the actions of their children is so high that they are able to understand the meaning of every cry, word and gesture of their children. For this reason, they are in the best position to provide the physical and emotional care that is necessary for their children.¹³⁴

This would suggest that the sensitivity of a mother to the cries or feelings of her child is innate. It is not acquired by any means. In other words, a mother who gives birth will by this very natural circumstance be sensitive to her child's feelings and consequently react adequately. There is a biological (hormonal) bond that ties the mother to the child and makes possible this sensitivity.¹³⁵

A closer look at the definition of this responsiveness reveals that this aspect of child-rearing has two dimensions, namely sensitivity to the needs and feelings of the baby and an adequate reaction. This would suggest that in order to be responsive, a parent must be able to show sensitivity and react according to the need of the child. Responsiveness is an important factor for child development. For the purpose of this study, responsiveness should be understood as the ability to identify the child's need and bring a proper satisfaction to that need at the right time. Children's development is dependent on a warm environment and responsiveness from their parents. However, too much warmth and responsiveness may negatively affect the child's development. A balance is therefore needed; this is done through the control of the child.¹³⁶

Rollins and Thomas define parental control as the behaviour of the parents towards their child with the intent of directing the child's behaviour in a manner desirable to

¹³⁴ Maccoby *The Two Sexes: Growing Up Apart, Coming Together* 175.

¹³⁵ Maccoby *The Two Sexes: Growing Up Apart, Coming Together* 176.

¹³⁶ Rollins and Thomas "Parent support, power and control techniques in the socialisation of children" in Burr, Finey and Reis (eds) *Contemporary Theories about Family* 320.

parents.¹³⁷ According to Rollins and Thomas, parental control can be coercive or demanding. Coercive control refers to the use of external pressure on their child in order to obtain from them the conformity with their desires. Coercive control is therefore the use of physical punishment, deprivation of privileges and also threats. Demanding control refers to the parents' capacity to supervise and monitor their children. In this regard, parents must set rules and standards but at the same time they must encourage children's independence and individuality.¹³⁸ The goal of demanding control is to obtain children's compliance to parents' desires by using inductive discipline which refers to parents' dialogue with children, raising and pointing to the consequences of the children's behaviours for themselves and for others.¹³⁹

Studies on parental behaviour have indicated that parental support and demanding control are associated with positive development of children whereas coercive control is associated with children's social incompetency and behavioural problems.¹⁴⁰

It is worth noting that child-rearing is not only about warmth, responsiveness and control, it is also about supporting children. One of the functions of parents is to support their children in their choices and decisions. However, children should not be supported in all their choices and decisions; parental support in their children's decisions and choices should be provided only for decisions and choices that are in the children's best interests. Based on the dimensions of support and control, two parenting styles have been identified. These inter alia include authoritarian parenting and neglect parenting. Authoritarian parenting consists of high control and low support and neglect parenting consists of low support and low control.¹⁴¹ In addition to these extreme parenting styles, I envisage a more nuanced parenting style which would strive to create a balance between demanding control and support. This will help the parents not to be too authoritarian, they will punish only when necessary

¹³⁷ Rollins and Thomas in Burr *et al* (eds) 321.

¹³⁸ Rollins and Thomas in Burr *et al* (eds) 321.

¹³⁹ Rollins and Thomas in Burr *et al* (eds) 322. See also Maccoby and Martin *Socialisation* 20.

¹⁴⁰ Rollins and Thomas in Burr *et al* (eds) 323.

¹⁴¹ Baumrind "The Discipline controversy revised" 1996 *FR* 408.

and for the best interests of the child. The effect of the punishment will not be to destroy the child; rather, it will tend to redress the child and build him or her. It will also assist parents not to neglect their children; parents will support their children in the choices and decisions that can help their children develop to their full potential. As a result there will be cooperation and collaboration between parents and children, depending on the age of children.

Authoritarian parenting and neglect parenting are reported to have an impact on children's outcomes. However, in my view the nuanced parenting style is the most effective parenting style. In fact, in view of the fact that the control that parents exercise and support that they provide to their children is exclusively for their best interests, this style will certainly be associated with positive social and cognitive development of children. This style will in my view reduce the chances for children to be rebellious, and will cause parents to be more concerned by the best interests of their children.

Furthermore, with regard to parental control, it has been emphasised that relationships between parental discipline (firm control or strictness) and positive outcomes are dependent on the quality of the parent-child relationship. Firm control associated with verbal cooperation often results in positive child outcomes. If children perceive parents' rules as legitimate, and if parents have respect for children's individuality, children's outcomes will be likely to be positive.¹⁴²

Having said this, it is now important to turn to the analysis of how children are reared in lesbian and gay families.

2.5.3.2.2 Child-rearing in lesbian and gay families

Most studies that analysed child-rearing in lesbian and gay families were comparative studies. Researchers compared lesbians and gay men to single

¹⁴² Halmbeck, Parkoff and Brooks-Gun "Parenting adolescents" In Bornstein (ed) *Handbook of Parenting: Children and Parenting* 101.

parents, divorced parents and in a few cases to heterosexual parents with high levels of conflict.¹⁴³

In line with the three dimensions of child-rearing discussed above, MacCandish simply reports that both birth and non-birth mothers developed a strong attachment to the child. Other studies indicate that non-birth mothers in lesbian families demonstrated a higher quality of parent-child interaction and parenting awareness skills. In addition, most studies observed that the two-mother family experiences high levels of synchronicity in parenting.¹⁴⁴ Bos *et al* also reports that lesbian birth mothers are significantly more emotionally involved in child-rearing than heterosexual fathers.¹⁴⁵

Lesbian families had been described as a warm environment. In fact, Brewaeys *et al* reported in their study conducted in 1997 that children in lesbian families grew up in a warm and secure environment in the first year of their lives.¹⁴⁶

It is not clear whether lesbians and gay men used authoritarian or neglect parenting styles. However, it can be argued that due to the fact that lesbians and gays become parents through ARTs, their parenting styles might be influenced by the value they place on their children. They might tend to be over-protective and therefore low in control and high in support. This issue will be discussed further down but at this stage of the study, it is important to note that children growing up in lesbian and gay families might receive high support and low control from their parents.

Little has been said on child-rearing in gay men's families. However, Bigner and Jacobsen observed that there were responsiveness and warmth in these families. According to them, gay fathers' families were better off than heterosexual families. Their parenting behaviours were characterised by greater warmth and

¹⁴³ Gonzalez, Angeles and Chacon "Psychological adjustment and social integration of children from gay-lesbian families" 2004 *ASB* 327.

¹⁴⁴ Bos, Van Balen and Van den Boom 2005 *PEC* 272.

¹⁴⁵ Bos, Van Balen and Van den Boom "Minority stress, experience of parenthood and child adjustment in lesbian families" 2004 *JRIP* 11.

¹⁴⁶ Brewaeys *et al* 1997 *HR* 1356-7.

responsiveness, and they were reported to be more cooperative with their children.¹⁴⁷

Unfortunately, the study of Bigner and Jacobsen does not give further details on how warm and responsive gay parents are. It is not clear how attachment and responsiveness are developed between gay fathers and their children since their nature cannot allow them to give birth or to breastfeed, which as discussed above creates a natural bond between a mother and her child and thus provides an adequate explanation for her responsiveness to her child. However, it can be argued that the time gay fathers spend with their children can result in a bond that may explain their acquired responsiveness.

Another aspect of family functioning is the parent-child relationship. The quality of the parent-child relationship is a determinant of the child's development.

2.5.3.3 *Parent-child relationships*

The way in which parents and children interact within the family is an important aspect of family functioning. Children's behavioural problems can be explained by examining the parent-child relationship. It is generally agreed that loyalty is the most important element in the parent-child relationship.¹⁴⁸

Child loyalty can be vertical or horizontal. Vertical loyalty refers to the relationship between parents and their children. The child is born to the parents, for this reason the child owes loyalty to the parents, and in return, the parents owe care and affection to the child. Horizontal loyalty refers to the relationship between the child and the other family members.¹⁴⁹

¹⁴⁷ Bigner and Jacobson "Parenting behaviors of homosexual and heterosexual fathers" 1989 *JH* 173.

¹⁴⁸ Nagy, Grunebaum and Ulrich "Contextual family therapy" in Gurman and Kniskern (eds) *Handbook of Family Therapy* 212.

¹⁴⁹ Van As and Janssens 2002 *IJCFW* 44.

The satisfaction of the mutual parent-child relationships is dependent upon the ability of the parents and children to fulfil their own needs and to consider the needs of others. They must be able to give care and gratitude. The parent-child relationship is not always symmetrical; it is thought to be sometimes asymmetrical. Because of age and development parents are more capable of giving than their young children.¹⁵⁰

In lesbian and gay families, parent-child relationships have simply been described as good, even better than in heterosexual families. Vanfraussen *et al* for instance reported in their study that the parent-child relationships experienced by social mothers are comparable to that of biological mothers.¹⁵¹ Other studies indicate that gay fathers were found to be more responsive and child-oriented than heterosexual fathers.¹⁵²

The last aspect of family functioning that is discussed in this study is the family structure. Child development to its full potential is considered dependent on the structure of the family.¹⁵³

2.5.3.4 *Family structure*

There is a debate over the influence of the structure of the family on the well-being of the child. On the one hand, some researchers point out that family structure matters for the child and that the family structure that helps children the most is the family headed by two biological parents in a low conflict marriage.¹⁵⁴ On the other hand, another researcher observes that family structure is not important; it is rather the quality of parenting that is determinant in the well-being of the child.¹⁵⁵

¹⁵⁰ Van As and Janssens 2002 *IJCFW* 44

¹⁵¹ Vanfraussen, Kristofferssen and Brewaeys "What does it mean for youngsters to grow up in a lesbian family created by means of donor insemination?" 2002 *JRIP* 272.

¹⁵² Johnson and O'Connor *The Gay Baby Boom: The Psychology of Gay Parenthood* 67.

¹⁵³ Jekeliel and Emig *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can Be Done about It?* 6.

¹⁵⁴ *Ibid.*

¹⁵⁵ Lubbe 2007 *SAJP* 260.

Nevertheless, Van As and Janssens commented on the functioning of the family and claimed the following:

“The function of the family is to support, regulate, nurture and socialise its members. Family members have always to find some balance between dependency and relatedness on the one hand, and autonomy and individuation on the other hand. To function adequately, families need structure and hierarchy. Family structure has to do with the organisation of the family, and is described with the concept of family subsystems and boundaries”.¹⁵⁶

This would suggest that the organisation of family members and the interaction within the family is crucial for the functioning of the family and therefore an important factor in studying children’s behaviour.

According to Van As and Janssens, family structure is about the family organisation and is described in terms of the concepts of family subsystems and boundaries. Family subsystems refer to various subgroups within the family. Each subsystem serves a specific function in the family. While the subsystem of parents serves the function of marital intimacy, support, parental tasks and responsibilities, the subsystem of siblings serves the function of the first peers for the child. Boundaries in the family refer to the rules that define who participates in which subsystem, who is in charge of children, and who takes decisions in child-rearing issues.¹⁵⁷

The proper functioning of the family requires the boundaries to be strong, clear and permeable. Rigid and impermeable boundaries will result in a lack of contact and communication between members of various subsystems. Similarly, when the boundaries are not clear, members of various subsystems will not adequately carry out their tasks.¹⁵⁸ In other words, good family functioning will depend on the quality of contact and communication between members of different subsystems within the family. Shankoff and Phillips maintain that the relationships that children have with

¹⁵⁶ Van As and Janssens 2002 *IJCFW* 43-44.

¹⁵⁷ Van As and Janssens 2002 *IJCFW* 44.

¹⁵⁸ Van As and Janssens 2002 *IJCFW* 44.

other family members are important factors that influence the child's healthy development and psychological well-being.¹⁵⁹ Therefore, the lack of vertical and horizontal loyalty will result in the entire family not functioning properly. As a result, the child's well-being will be negatively affected.

There is an ongoing debate over the potential ability of lesbian and gay family structures to assure proper child development and hence contribute to the child's well-being. On the one hand proponents of homosexual marriage assume that lesbian and gay families are as good as heterosexual families and constitute a good, even a better environment for the child's development. They confirm that there is no difference between a child growing up in a homosexual family and a child growing up in a heterosexual family.¹⁶⁰ On the other hand, opponents of homosexual marriages are of the view that lesbian families cannot constitute a good environment for proper child development. They point out that growing up in lesbian or gay families puts children in danger.¹⁶¹

As already stated above, this study will bring a contribution in order to further this debate. The discussion of children's experience within homosexual families is one step in this process.

2.6 CHILDREN IN HOMOSEXUAL FAMILIES

Homosexual families have particular characteristics. Some homosexual families are headed by one, two, three or even four parents. In these families sometimes there is no man among the parents, sometimes no woman. Some families comprise more than one household. Often there is a biological parent who is not member of the family at all. Usually there is at least one parent who has no biological tie with the children. In some instances children are related to neither of the parents.¹⁶²

¹⁵⁹ Shankoff and Phillips *From Neurons to Neighbourhood: The Science of Early Childhood Development* 15.

¹⁶⁰ Golombok *et al* 2002 *CD* 959, Patterson *et al* 2004 *JAD* 179.

¹⁶¹ Stacey and Biblarz 2001 *ASR* 163.

¹⁶² April "Issues for lesbian- and gay-parented families", available at <http://parenthood.library.wisc.edu/Martin/Martin.html> (date of use 26 March 2015).

This section discusses the experience of children growing up in homosexual families. A particular focus is given to child development within the environment of homosexual families. The section therefore examines the development of the child within his or her family as well as outside the family.

2.6.1 Experience of the child within his or her family

In general, children within homosexual family environments often experience homophobic attacks on their gay and lesbian parents from heterosexual parents or stepparents. Homophobic behaviours include rejection and unpleasant comments. Sometimes, heterosexual parents rely on religion to limit the contact between children and their homosexual parents or to challenge the custody of those children by homosexual parents.¹⁶³

This section has a particular interest in analysing some aspects of child development, including the gender identity and psychological development of the child growing up in a homosexual family. This analysis will help understand how children have been developing in lesbian and gay families.

2.6.1.1 Children's gender identity development

Fairtlough defines gender identity as “a set of norms regarding the behaviour and attitude of what is masculine and what is feminine”.¹⁶⁴ A number of studies have found that children growing up in lesbian and gay families were confused about their gender identity.

Sarantakos reported in his study that children growing up in homosexual families were characterised by a gender identity disorder.¹⁶⁵ Girls growing up in two fathers’

¹⁶³ Fairtlough “Growing up with a lesbian or gay parent: Young people’s perspectives” 2008 *HSCC* 526.

¹⁶⁴ Bigner “Raising our sons” 2000 *JGLSS* 67-68.

¹⁶⁵ Gender identity disorder is also referred to as gender dysphoria. See Lev “Gender dysphoria: Two steps forward, one step back” 2013 *CSWJ* 1. However, as the sources I consulted use the term “gender identity disorder”, I will use this term in my thesis.

family tended to behave like boys. As Sarantakos pointed out, they were reported having “boyish” attitudes and behaviours. Similarly boys raised by lesbian mothers were more “effeminate” in their behaviour and mannerism than boys of heterosexual parents, and displayed a greater attraction for sport, games, toys, and activities usually chosen by girls. They were also reported to cry more than the boys of heterosexual couples when put under the same stressful circumstances.¹⁶⁶

This finding is consistent with the finding in a study conducted by Stacey and Biblarz. They reported that children growing up in families headed by lesbian and gay parents, in particular girls are more likely to depart from traditional gender roles by showing more interest in both masculine and feminine activities.¹⁶⁷

This confusion was further confirmed in another study. Bailey *et al* points out that male child of homosexual couples were generally described by teachers as more expressive, more effeminate and more confused about their gender than children of heterosexual couples.¹⁶⁸

To summarise, although there is a tendency to ignore the experience of children growing up in homosexual families with regard to their gender identity, the above studies reveal that children, irrespective of their gender, will behave like their parents. They will do what they see their parents doing; they will speak like their parents speak, and they will behave like them. This is an unescapable reality. According to these studies, a boy raised by two mothers will speak, walk and behave like them. The two mothers will be the only life models for that boy. Whatever they do, he will also do. The same applies to the girl who grows up in a two-father family. Obviously, if she has no contact with a woman, she will behave like her fathers.

Some studies suggest that children raised in homosexual families had a tendency to become gay and lesbian or bisexual. Stacey and Biblarz for instance reported that

¹⁶⁶ Sarantakos “Children in three contexts: Family, education, and school development” 1996 CA 23-25.

¹⁶⁷ Stacey and Biblarz 2001 ASR 171-72.

¹⁶⁸ Sarantakos 1996 CA 25.

children who grow up in lesbian and gay families are more likely to experience homosexual behaviours.¹⁶⁹ Bailey *et al* also found that some boys raised by homosexual parents were gay or bisexual.¹⁷⁰

Likewise, Baurmind noted that there would be no way for children's own sexual identities to remain uninfluenced by the sexual identities of their parents.¹⁷¹ In their longitudinal study comparing children of heterosexual mothers with those of lesbian mothers when children were ten years of age and again in adulthood (at twenty-four years of age), Golombok and Tasker found a higher rate of homosexual attraction in children growing up with homosexual parents than those in heterosexual families. As they pointed out, thirty-six per cent of children raised by lesbian mothers reported homosexual behaviour compared to only twenty per cent of those raised by heterosexual mothers.¹⁷² Of these twenty per cent of children of heterosexual mothers, none of them had experienced a homosexual relationship whereas sixty seven per cent of children of lesbian mothers had experienced such a relationship.¹⁷³

The results of the study of Bailey and colleagues indicated that nine per cent of the sons were bisexual, somewhat higher than the two-to-five per cent rate of male homosexuals thought to exist in the general population.¹⁷⁴ Thus, available studies have provided the evidence that children (particularly girls) raised by lesbian mothers and gay fathers are more likely to experience homoerotic attraction or engage in homosexual behaviours. Lesbian mothers tend to have a feminising effect on their sons and gay fathers a masculinising effect on their daughters.¹⁷⁵ According to Stacey and Biblarz, such gender non-conformity behaviour in childhood strongly predicts homosexuality in adulthood.¹⁷⁶

¹⁶⁹ Stacey and Biblarz 2001 *ASR* 173.

¹⁷⁰ Bailey *et al* "Sexual orientation of adult sons of gay fathers" 1995 *DP* 126-127.

¹⁷¹ Baurmind "Commentary on sexual orientation: Research and social policy implications" 1995 *DP* 134.

¹⁷² Golombok and Tasker "Do parents influence the sexual orientation of their children? Findings from a longitudinal study of lesbian families" 1996 *DP* 3.

¹⁷³ Golombok and Tasker 1996 *DP* 7-8.

¹⁷⁴ Bailey *et al* 1995 *DP* 126-7

¹⁷⁵ Byrd "Gender complementarity and child rearing: Where tradition and science agree" 2005 *JLFS* 219.

¹⁷⁶ Byrd 2005 *JLFS* 219.

Another set of researchers argue that children's sexual orientation is rather influenced by factors other than the parents' sexual orientation. According to Steinberg, from a theoretical perspective, aspects of parenting that are conceived to be important for the psychological adjustment of adolescents include parental warmth in combination with appropriate control and autonomy.¹⁷⁷ Bailey and colleagues pointed out that a complex interaction between biological, psychological and social factors is involved in the determination of the child's sexual orientation. For instance, biological studies indicated that genetic factors play a part in determining sexual orientation.¹⁷⁸

The parental hormonal environment is also thought to play an important role in the development of sexual orientation. Gonadal hormones appear to influence sex-role and sex-difference in brain morphology.¹⁷⁹ Brewaeys *et al* reported that, with regard to the emotional behavioural adjustment, there was no ground for supporting any effect of the father's presence in the emotional development of the child. According to them, the claim that the father's absence would increase the child's emotional problems lacks any foundation. They argue the role of parents is a minor one in the acquisition of the child's sex-typed behaviour.¹⁸⁰

For Maccoby, learning about gender roles is a complex process in which children actively socialise themselves as male or female by observing many men, boys, women and girls.¹⁸¹ According to Wardle, children learn about appropriate gender role behaviour by observing and internalising the behaviours of their parents. Children learn to be adult by observing or watching adults.¹⁸² Biermat observed that culture plays a role in the child's acquisition of gender identity. Children are bombarded with sex-appropriate behavioural cues via the media. This culminates in adolescence with the peers' pressure for the conformity to gender roles and identity

¹⁷⁷ Steinberg "We know something: Parent-adolescent relation in retrospect and prospect" 2001 *JRA* 11.

¹⁷⁸ Bailey *et al* "Heritable factors that influence sexual orientation in women" 1993 *AG P* 219.

¹⁷⁹ Le Vay "A difference in hypothalamic structure between heterosexual and homosexual men" 1991 *Science* 1036.

¹⁸⁰ Brewaeys *et al* 1997 *HR* 1356-7.

¹⁸¹ Maccoby "The role of parents in the socialisation of children" 1992 *DP* 1011.

¹⁸² Wardle "The potential impact of homosexual parenting on children" 1997 *UILLR* 860-861.

standards based largely on stereotypes.¹⁸³ Bailey and colleagues concluded in their study that the sexual orientation of an adult has little influence on that of children.¹⁸⁴

Parental behaviours, in particular the expression of affection between lesbian partners, was held to influence children's sexual orientation. Golombok and Tasker found that children's sexual orientation and their lesbian mothers' openness in showing physical affection to their partners were correlated.¹⁸⁵

To summarise, on the one hand researchers argue that the sexual orientation of the parents is the most important factor in the determination of the sexual orientation of their children. On the other hand, scholars maintain that external factors and biological factors are responsible for the sexual orientation of children growing up in homosexual families. However, it is interesting to note that before children start being influenced by the social factors such as media, as Biermat pointed out, and the observation of men and women in society, as Maccoby emphasised, children's first contacts are their parents and their first observation starts with them.

In short there are various points of view on the issue of the influence of parental behaviours on children's gender identity and sexual orientation. While some argue that parents play a determinant role in their children's gender identity, others maintain that biological, social and media factors are determinant factors rather than parents.

2.6.1.2 *Children psychological and emotional development*

The family environment in which children are growing up may influence their psychological and emotional behaviours. It is important to emphasise that most of the problems experienced by children in homosexual families are amplified by the absence of either a mother or a father. The role played by a father or a mother in a

¹⁸³ Biermat "gender stereotypes and the relationships between masculinity and femininity" 1991 *JPSP* 356.

¹⁸⁴ Bailey *et al* 1995 *DP* 69.

¹⁸⁵ Golombok and Tasker "Adults raised in lesbian families" 1995 *AJO* 210-211.

child's psychological development cannot be overestimated. While Park *et al* confirm that the role of a father is important in a girl's psychological development in reducing internalising behaviours;¹⁸⁶ Lamb and Lewis maintain that mothers and fathers have a different influence on their children's development.¹⁸⁷ Psychological problems experienced by children born from ARTs growing up in homosexual families include a lack of happiness, life satisfaction and psychological adjustment.¹⁸⁸ Bullying and teasing,¹⁸⁹ and peer rejection¹⁹⁰ were also reported. According to East, Jackson and O' Brien, children in lesbian families were more likely to become delinquent.¹⁹¹

The reasons behind children's experiences in lesbian and gay families are diverse and controversial. On the one hand researchers point out that child development depends on the role played by a mother and a father in the life of their children. According to Park *et al* a father figure has a positive effect on a girl's psychological development; it reduces internalising behaviours such as depression and self-destructive behaviours.¹⁹²

In the words of Lamb and Lewis:

“Whatever the difference between maternal and paternal behavioural styles, there is impressive evidence that mothers and fathers may have a different effect on child development”.¹⁹³

They further stress that children learn from their fathers how to manage their emotions. The child's development of an appropriate cognitive representational model of relations is dependent on the father-child relationship. Fathers play

¹⁸⁶ Parker *et al* *Fathering* 327.

¹⁸⁷ Lamb and Lewis “The development and significance of father-child relationships in two-parent families” in Lamb (ed) *The Role of the Father in Child Development* 272, 277.

¹⁸⁸ Lamb and Lewis in Lamb (ed) 291-292.

¹⁸⁹ Roy and Gregory 2001 *FM* 8.

¹⁹⁰ Bozett 1989 *JH* 138.

¹⁹¹ East, Jackson and O'Brien “Father absence and adolescent development: A review of the literature” 2006 *JCHC* 283.

¹⁹² Parker *et al* *Fathering* 327.

¹⁹³ Lamb and Lewis in Lamb (ed) 272,277.

important roles in the lives of their children, including being their advisor, social guide and rule provider as well as the provider of social opportunities for the child.¹⁹⁴

In short, these different views converge in one direction and confirm that parents have an important role to play in the physical, psychological and gender identity development of their children. The child's development in all the aspects discussed above seems to depend on how parents are involved in the lives of their children.

On the other hand, researchers are of the view that the role played by parents in their children's development is a minor one. Researchers have pointed out that "[s]tructural variables such as the gender composition of families and the division of parental performances are less important than process variables such as the quality of the relationships and the quality of the care given to children".¹⁹⁵

In short, all these studies point to the fact that parents' sexual orientation is not responsible for the child's development of physical, emotional, or psychological behaviours. Factors such as biology, culture and social environment are the most important in this process.¹⁹⁶

Family studies literature indicate that it is the family process (such as the quality of parenting and relationships within the family) that contribute to the determination of the child's well-being and outcomes rather than the family structure per se such as the number, gender, sexuality and co-habitant status of parents. The research also indicated that parenting practices and children's outcomes in families parented by lesbian and gay parents are likely to be at least as favourable as those of families of heterosexual parents, despite the reality that considerable legal discrimination and inequality remain significant challenges for these families.¹⁹⁷ According to Robinson,

¹⁹⁴ Lamb and Lewis in Lamb (ed) 286.

¹⁹⁵ Clarke "Stereotype, attack and stigmatise those who disagree: employing scientific rhetoric in debates about in lesbian and gay parenting" 2000 *FP* 154, Dune "Opting into motherhood: Lesbians blurring boundaries and transforming the meaning of parenthood and kinship" 2000 *GS* 19. See also Stacey and Biblarz 2001 *ASR* 174.

¹⁹⁶ Bailey *et al* 1993 *AG* 219. See also Brewaeys *et al* 1997 *HR* 1356-1357.

¹⁹⁷ Short *et al* "Lesbian, gay, bisexual and transgender (LGBT) parented families" 2007 *APS* 4.

children's development is more influenced by relationships and interactions within the family than its structural form.¹⁹⁸

It is important to note that children experience developmental problems in the family environment as well as outside that environment.

2.6.2 Children's experience outside the family environment

The analysis of children's experience outside the family environment will focus on children's outcomes and experience at school as well as their experience in the social environment.

2.6.2.1 Children's experience at school

According to Rivers *et al*, children of lesbian parents were found to be less likely to draw on school support through school teachers, nurses and counsellors.¹⁹⁹ With regard to educational achievement, Sarantakos found the following: In languages, children of homosexual couples scored low compared to children of married heterosexual couples: 5.5 against 7.7. In mathematics, children of homosexual couples scored lower than children of heterosexual couples: 5.5 against 7.9. In social studies, children of homosexual couples tend to perform slightly better than children of heterosexual couples. As far as sociability is concerned, children of homosexual couples scored 5 against 7.5 for children of married heterosexual couples.²⁰⁰

Furthermore, at school, children of homosexual couples are reported to be timid, they are not interested to work in teams or to talk about family life, holidays and

¹⁹⁸ Robinson "Homosexual parenting evenly divides Americans" (2003), available at <http://www.gallup.com/poll/8740/homosexual-parenting-evenly-divides-americans.aspx> (date of use: 2 February 2016) 51.

¹⁹⁹ Rivers, Poteat and Noret "Victimisation, social support, and psychological functioning among children of same-sex and opposite couples in the United Kingdom" 2008 *DP* 129.

²⁰⁰ Sarantakos 1996 *CA* 25

school activities in general. They feel uncomfortable when having to work with children of heterosexual couples. They are characterised as loners and introverts.²⁰¹

2.6.2.2 *Children's experience in the social environment*

In their social environment, children of homosexual couples were often isolated, while other children enjoyed playing in team sports. They were sometimes ridiculed by other children for personal habits or beliefs or for the sexual preferences of their parents. In certain cases, children of homosexual couples were called sissies, lesbians or gays or asked to tell "what their parents do at home, where they slept and so forth".²⁰²

Such incidents were some of the reasons why children were moved to other schools or even why parents moved away from the neighbourhood. Parents and teachers also reported that comments such as "the pervs are coming, don't mix with sissies; or sisterhood is filthy" made by some pupils were not uncommon.²⁰³

The study of Sarantakos also found that children of homosexual couples usually find it difficult to socialise with their peers as boys or girls. In many cases children of homosexual couples were harassed or ridiculed by their peers for having homosexual parents, for being "queers" and even referred to as homosexuals themselves.²⁰⁴ This view was confirmed in a study conducted in South Africa. Carrien Lubbe described children growing up in homosexual families as being fearful to communicate their family structure to friends.²⁰⁵ These children live with this feeling because of homophobic attacks that can follow the disclosure of the homosexual structure or nature of their families.

²⁰¹ Sarantakos 1996 CA 25.

²⁰² Sarantakos 1996 CA 26.

²⁰³ Sarantakos 1996 CA 26.

²⁰⁴ Sarantakos 1996 CA 26.

²⁰⁵ Lubbe "To tell or not to tell: How children of same-gendered parents negotiate their lives at school" (2007) available at http://www.glhv.org.au/files/to_tell_or_not_tell_edu_change_0.pdf. (date of use 10 August 2016)

Other studies confirmed that children of homosexual parents were often the target of harassment.²⁰⁶ Vanfraussen *et al* concluded that for some peers it is hard to understand that someone has two mothers without having a father somewhere. Compared with children from heterosexual families, children from homosexual families are not more likely to be teased but they are more prone to family-related teasing incidents.²⁰⁷ Teachers also indicated that children from lesbian families experienced more attention problems compared to children from heterosexual households.²⁰⁸

Bullying and teasing are part of the experience of children growing up in homosexual families. In Australia, Ray and Gregory reported that even though having lesbian parents was seen as “cool” by teenagers, 44% of the grade 3 to 6 children (aged 8-12 years) in their sample experienced teasing, bullying or derogatory language in relation to their family, and in grade 7 to 10 (aged 12-16 years) 45% had been bullied. Such behaviour ranged from verbal abuse, teasing and joking to physical and sexual violence.²⁰⁹

Examples of the homophobic and stigmatising behaviour experienced by Australian children growing up in families headed by lesbian mothers involve peers, teachers and school principals. Research indicated that such experience have made it harder or more anxiety provoking for some children to talk about their families with their peers or at school, that some are more reluctant to have children to their home to visit, and that they, like their parents, develop a range of strategies to prevent being stigmatised, discriminated against, or treated poorly.²¹⁰

²⁰⁶ Cohill and Tobia *Policy issues* 31.

²⁰⁷ Vanfraussen, Kristofferssen and Brewaeys 2002 *JRI* 317.

²⁰⁸ Vanfraussen, Kristofferssen and Brewaeys 2002 *JRI* 317.

²⁰⁹ Ray and Gregory “School experiences of the children of lesbian and gay parents” 2001 *Family Matters* 8.

²¹⁰ Lindsay *et al* “Stigma or respect: Lesbian parented families negotiating school settings” 2006 *Sociology* 1064.

Children living with lesbian and gay parents frequently report concerns about peer rejection and often consider keeping their parents' sexuality secret.²¹¹ According to Bozett, a research conducted with adult offspring of gay men revealed that they had fear that their peers would assume that they were themselves gay or lesbian and react negatively.²¹²

2.7 INTERIM CONCLUSION

The overview of homosexual families has revealed that society throughout the world has undergone various changes that have resulted in a decline of the nuclear family and the emergence of other forms of family including lesbian and gay families. Assisted reproductive technologies are one of the methods for gay and lesbian to have children and build families.

The absence of a father or a mother and therefore the non-existence of a biological link between one or both of the parents and the children they raise, associated with domestic violence, parents' health and psychological problems as well as the use of ARTs, are the common characteristics of homosexual families.

Efforts have been made to paint homosexual families as similar to the nuclear family. Homosexual families were described as a good or even better environment for child-rearing compared to the nuclear family. The functioning of these families, which is one of the very important factors for children's development, has been described as not distinguishable from the one in the nuclear family. Parents in homosexual families were purposely described as having good parental behaviours, good relationships with their children and the entire unit was painted as a warm environment where children can properly develop to their full potential.

In my view this finding did not seriously consider some important traits characterising homosexual individuals and their families. These include the asymmetry observed

²¹¹ Tasker "Lesbian mothers, gay fathers and their children: A review" 2005 *JDBP* 224.

²¹² Bozett 1989 *JH* 138.

especially in the lesbian division of parental responsibilities which has an impact on the parent-child relationship, which in turn impacts on the child's psychological and emotional development. The feeling of jealousy of the non-birth mother resulting from the fact that she did not bear the child in her womb and is not breastfeeding may have a negative impact not only on the relationship between the non-birth mother and her partner, but also and importantly between her and the child. Gay fathers were portrayed as being even better than heterosexual fathers in respect of their child care responsibilities. Additionally, despite their risk of being overprotective because of the value they give to their children and hence being low in control and support, homosexual parents were presented as having better parenting behaviours than heterosexual parents.

Family structure was also held purposely to have no impact on the child's development despite the fact that the father and the mother have unique roles they play in the psychological, emotional and even gender identity development of their children. Additionally, in spite of many challenges, including gender identity disorder, homophobic behaviours, rejection from peers, bullying and teasing children growing up in homosexual families face, they are painted as being psychologically and emotionally as well adjusted as children growing up in the nuclear family.

Although homosexual families are painted as similar to the nuclear family, there are some indications that children growing up in these families might be at risk of not developing to their full potential, and that their best interests might suffer from poor protection. The fact that these children are born and can only be born as a result of ARTs might be one of the reasons for the risk to which they are exposed and the reason for the inadequate protection of their interests. It is therefore important to analyse whether ARTs may have adverse effects on children resulting from its various procedures. This is the purpose of the next chapter.

CHAPTER THREE

THE EFFECTS OF ASSISTED REPRODUCTIVE TECHNOLOGIES ON CHILDREN

3.1 INTRODUCTION

Children born as a result of ARTs can be born to heterosexual and homosexual individuals and couples. Irrespective of the family type into which they are born, they all experience the same physical adverse effects due to their mode of birth or conception. However, psychological adverse effects might to some extent differ based on the type of family in which these children will grow up. It is important to note that psychological effects of ARTs on children might be worsened in some countries by the legislation regulating ARTs within the jurisdictions of those countries.

This chapter will analyse the potential effects that ARTs may have on resulting children. The chapter begins with a brief overview of ARTs before discussing the ARTs in South Africa. The chapter will then discuss the effects of those procedures on children.

3.2 ASSISTED REPRODUCTIVE TECHNOLOGIES – A BRIEF OVERVIEW

Assisted reproductive technologies have enabled millions of people in the world who otherwise would not have been able to do so, to have children. Assisted reproductive technologies were from the start meant to initiate pregnancy without sexual intercourse, and allow infertile heterosexual couples to have children. In this regard, Golombok, MacCallum and Rutter noted that donor insemination, which is one of the variances of ARTs, has been successfully used as an alternative for couples with an infertile male partner to have children.²¹³

²¹³ Golombok, MacCallum and Rutter “Families with children conceived by donor insemination: a follow up at age twelve” 2002 *CD* 952.

It was not conceivable for a woman to fall pregnant without sexual intercourse with a man until 1978 when Steptoe and Edwards made possible the fertilisation of an egg in a test tube and the transfer of the embryo into a woman's body in order to initiate pregnancy in the absence of sexual intercourse. 1978 marked the dawn of a new era in medical technology. The achievement of Steptoe and Edwards opened the way to a new technology of reproduction, which has a range of techniques and is referred to as ARTs.²¹⁴

Assisted reproductive technologies are therefore the use of non-coital technologies to conceive and initiate pregnancy.²¹⁵ They consist of an array of techniques enabling people to reproduce without engaging in sexual activity at all. Some techniques are used to initiate pregnancy and others more specifically used to increase the possibility of pregnancy and/or to test for the presence of certain genes, so that prospective parents can choose which embryo to implant after in vitro fertilisation.²¹⁶

There are three principal ways of initiating pregnancy: Alternative insemination, the prescription of fertility-enhancing drugs, and in vitro fertilisation. Alternative insemination (AI) is also known as artificial insemination. It refers to several procedures, all of which involve inserting sperm into a woman's body. The sperm is placed in the woman's vagina, cervix or fallopian tubes.²¹⁷

Fertility enhancing drugs, as suggested by their name, are drugs that can be taken orally or through injection. The most common drug used is Clomiphene Citrate (brand name Clomid or Serophene), which is taken through the mouth to enable women who are not ovulating or are ovulating irregularly to produce one or more mature eggs. Gonadotropins are the drugs that can be taken through injection. They

²¹⁴ Carara and Filippi 2010 *HRU* 98.

²¹⁵ Robertson 2005 *CWLR* 324.

²¹⁶ Galpern 2007 *CGS* 7-9.

²¹⁷ Galpern 2007 *CGS* 9.

have the ability of stimulating the ovary for the production of more follicles in one cycle.²¹⁸

Although there are many techniques used in ARTs, in vitro fertilisation and related procedures (gamete intra fallopian transfer (GIFT) and zygote intra fallopian transfer (ZIFT)) are the most invasive ARTs used. GIFT and ZIFT are variations of in vitro fertilisation (IVF).²¹⁹ Sperm donation, donation of eggs and embryo donation also fall under GIFT and ZIFT.²²⁰

Surrogacy, a procedure in which a woman is recruited for the purpose of bearing and giving birth to a child that she agrees to hand over to individuals or couples she contracted with,²²¹ is also a variety of ARTs. Golombok *et al* have described two types of surrogacy: Partial or genetic surrogacy, in which the surrogate mother and the commissioning father are the genetic parents of the child; and full surrogacy or non-genetic surrogacy, in which the commissioning parents (mother and father), or only one of them, are the genetic parents of the child.²²² In other words, in genetic surrogacy the surrogate mother is inseminated with the sperm of the commissioning father. This would suggest that her egg was used in the procedures through which she will become pregnant. However, in non-genetic surrogacy, the egg and the sperm respectively of the commissioning mother and father or a donor are used and the embryo is transferred in the surrogate mother's womb.

It is worth noting that with partial surrogacy conception happens through artificial insemination, and in the case of full surrogacy conception is achieved through IVF. Artificial insemination, fertility enhancing drugs, in vitro fertilisation and its related procedures, as well as surrogacy as described above are not the only ARTs that are used to treat infertility, genetic screening techniques also form part of ARTs.²²³

²¹⁸ Galpern 2007 CGS 9.
²¹⁹ Galpern 2007 CGS 9.
²²⁰ Galpern 2007 CGS 9.
²²¹ Galpern 2007 CGS 11.
²²² Golombok *et al* 2004 DP 400.
²²³ Robertson 2005 CWRLR 324.

In summary, ARTs include the fairly simple procedure of artificial insemination, the use of an artificial instrument to inject sperm into the uterus of a woman who will carry and eventually give birth to the child.²²⁴ It also includes more complex procedures which manipulate both eggs and sperm outside of a woman's body before inserting them, or the resulting zygotes or embryos, into her fallopian tubes or cervix respectively.²²⁵

As a result, children who are born through ARTs are born to parents who sometimes do not share all the traditional factors of marriage, genetics, gestation, and intended parenthood. In the case of homosexual marriage, the intended parents can be two mothers or two fathers, who may or may not include a genetic parent, a gestational mother or both.²²⁶

3.3 ASSISTED REPRODUCTIVE TECHNOLOGIES IN SOUTH AFRICA

Pretoria and Cape Town were the first cities that welcomed the first two tertiary ART institutions in South Africa. The first "test tube" babies were born in 1984. Different forms of ART services are provided in the country. These include public services with units based in academic-centres, private services with units based in their private offices headed by independent specialists using corporate pathology laboratories, and services provided in larger established ART associates, which consist of clinical and laboratory ART specialists.²²⁷

In South Africa, the number of providers of ARTs is limited compared to the huge number of people who may be in need of ART services. This raises concerns over the adequacy of the services provided. Huyser and Boyd express this issue in the following terms:

²²⁴ Titshaw "Sorry ma' am, your baby is an alien: Outdated immigration rules and assisted reproductive technologies" 2010 *FCLR* 61.

²²⁵ Titshaw 2010 *FCLR* 63.

²²⁶ Titshaw 2010 *FCLR* 63.

²²⁷ Huyser and Boyd "ART in South Africa: The price to pay" 2013 *FVVOG* 92.

“It is questionable if the current (approximately) 28 national ART service providers are providing an adequate reproductive health service within a nation of 52 million people with a variety of cultures and languages”²²⁸

In other words, the limited number of ART service providers is an important factor to be taken into account when evaluating the quality of the service provided. It is important to note that all ART services pursue one ultimate goal, which is the achievement of one live and healthy baby.²²⁹

Huyser and Boyd are also of the view that the adequacy of ART interventions is dependent on many other factors such as the diagnostic tests and screening policies, the preparation methods, as well as the equipment or materials to be used. These factors can compromise the purpose of ARTs.²³⁰ In view of the fact in Sub-Saharan Africa in general and in South Africa in particular, the prevalence of HIV is very high; all patients who request ART services must undergo several blood tests, including screening for blood borne viruses (BBV), and bacteriological cultures and sensitivity tests for diagnostic purposes. All patients must further receive an appropriate treatment against prophylactic or empiric microbes.²³¹ Given the cost of all these treatments, Huyser and Boyd maintain that the likelihood of achieving a healthy and live child is very limited. They also maintain that the South African structure of ART services (private versus public/tertiary) will have an impact on the quality of services provided.²³² This is a serious alert when analysing the effects of ARTs on resulting children.

There are four national tertiary ART units in South Africa situated in three cities. Two units are situated in Cape Town (Groote Schuur and Tygerberg). There is one unit in Bloemfontein (Femspes Group) and one in Pretoria (Steve Biko Academic

²²⁸ Huyser and Boyd 2013 *FVVOG* 92.

²²⁹ Huyser and Boyd 2013 *FVVOG* 21.

²³⁰ Huyser and Boyd 2013 *FVVOG* 21.

²³¹ Huyser and Boyd “Assisted reproduction laboratory cost-drivers in South Africa: value, virtue and validity” 2012 *OGF* 17.

²³² Huyser and Boyd 2012 *OGF* 92.

Hospital).²³³ Two out of four tertiary ART units situated in Cape Town, and one out of four in Pretoria are entirely dependent on public funding.²³⁴

Assisted reproductive technologies services are very expensive in South Africa and the cost of these services is a very important factor that determines access to ARTs for all South Africans in need of overcoming sterility. The cost of ART services may vary from private to public units. Total cost estimations including medications, ultrasound scans and laboratory fees were obtained for a standard IUI, IVF and ICSI procedure. In the private sector, from 2012 to 2013 IVF procedures costs augmented from R25 000 to R50 000. There was similar increase for the ICSI procedures. The average costs (\pm standard deviation) per procedure in the private sector are: (i) IUI: R6 083 \pm R 2.371, (ii) IVF: R36 368 \pm R6 237 and (iii) ICSI: R38 611 \pm R7 204. The cost for an IUI procedure can vary depending on the number of inseminations.²³⁵ When people have to rely on insurance or other sources of finances, referred to here as general “out-of-pocket” costs, costs for a standard IVF cycle are R1 500 (subsidised in the public sector) and R7 000 (within the private sector) in South Africa.²³⁶

The high cost of ARTs is in part dependent on the fact that not all of the laboratory equipment is manufactured in South Africa; they are imported from diverse foreign countries. The maintenance of these imported equipments is not only expensive but also indispensable for the success of ARTs interventions.²³⁷

The cost of ARTs is one of the major barriers encountered by people in need of infertility treatment or ARTs. As stated above, the cost of ARTs is either not adequately or not covered at all by private health insurance. Access in the public health sector is limited to very few institutions, and patients usually have to contribute to the costs. Out-of-pocket payment for a standard IVF cycle with standard

²³³ Huyser and Boyd 2012 *OGF* 92-93.

²³⁴ Huyser and Boyd 2012 *OGF* 93.

²³⁵ Huyser and Boyd 2012 *OGF* 16.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

ovarian stimulation ranges from approximately R10 000 (subsidised care in the public sector) to R35 000 (private sector care).²³⁸

Additionally, geographical barriers to ARTs keep many people from accessing ART services. South Africa has a limited number of ART units, which are only located in a few cities. Other barriers encountered include a lack of knowledge that prevails among individuals in need of ARTs services, their religious beliefs, and their lack of trust in assisted reproductive procedures.²³⁹

This situation has resulted in only few babies born prior to 2011. According to a study undertaken in 2011, a total of 4 512 aspirations and 3 872 embryo transfers were conducted during the year 2009, which resulted in 1 303 clinical pregnancies. The clinical pregnancy rate (CPR) per aspiration and per embryo transfer was 28.9% and 33.6%, respectively.²⁴⁰

3.4 GAY AND LESBIAN REPRODUCTION IN SOUTH AFRICA

3.4.1 Gay reproduction: Surrogacy

Many parents have a dream that they unfortunately cannot fulfil naturally because of their infertility. Many infertile heterosexual couples are nowadays using the services of a surrogate mother as their only means of making their dream a reality.²⁴¹

The dissociation of sexuality and procreation and the reproductive self-determination right have made surrogacy a means for gay men to reproduce and build families of their own. Surrogate motherhood in South Africa is regulated in chapter 19 of the

²³⁸ Dryer and Kruger 2012 *SAMJ* 170, Huyser and Boyd 2012 *OGF* 94.

²³⁹ Dryer and Kruger 2012 *SAMJ* 170.

²⁴⁰ Dryer and Kruger 2012 *SAMJ* 172.

²⁴¹ Parisi "Surrogacy world's perspective – A review" 2015 *AMI* 137.

Children's Act, the first legislation to legally recognise surrogacy as a form of ARTs.²⁴²

Surrogacy has been established and accepted in the South African legal system. It involves one woman (the surrogate mother) carrying a child for another person or persons (the commissioning person or couple), based on a mutual agreement requiring the child to be handed over to the commissioning person or couple following birth.²⁴³

According to the Children's Act, a surrogate mother is an adult woman who enters a surrogate motherhood agreement with the commissioning parent.²⁴⁴ The Children's Act also defines the surrogate motherhood agreement. In terms of the Children's Act, a surrogate motherhood agreement is:

“an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.”²⁴⁵

In other words, a surrogate motherhood agreement, also referred to as a preconception agreement, more commonly known as a surrogate motherhood contract, is a contract in terms of which a gestational woman agrees to become pregnant and bear a child, relinquish all legal rights to and obligations in terms of the child, and deliver the child to an individual or couple.²⁴⁶

²⁴² Mahlobogwane “Surrogate motherhood arrangements in South Africa: Changing societal norms?” 2013 *SJ* 46.

²⁴³ Mahlobogwane 2013 *SJ* 46.

²⁴⁴ Section 1(1) of the Children's Act.

²⁴⁵ Section 1(1) of the Children's Act.

²⁴⁶ Barbour “Bartering for babies: Are preconception agreements in the best interests of children?” 2004-2005 *WLR* 430.

Two types of surrogacy can be distinguished:

- (1) Partial surrogacy, where the surrogate mother is impregnated using her own egg. The conceived child is intended to be relinquished and to be raised by other persons such as the biological father and his spouse or partner, either male or female. The child may be conceived via artificial insemination using fresh or frozen sperm which is performed at the fertility clinic. Sperm from the male partner of the commissioning couple may be used. It is important to note that in partial surrogacy, the surrogate mother is also the genetic or biological mother of the resulting child, as her own egg was fertilised.²⁴⁷
- (2) Gestational surrogacy or full surrogacy takes place where an already fertilised embryo from the biological parents or donors is transferred to the womb of the surrogate mother for its development to a child. It is worth noting that in the case of gestational surrogacy, the genetic material (gametes) are provided by the intended parents or donors and the surrogate mother is merely the host mother, she is merely offering her gestational function to an embryo which has been transferred.²⁴⁸ However, in the context of South Africa, it is a legal requirement that the commissioning parents give their gametes for the surrogacy to be valid.

Although in the case of gestational surrogacy the surrogate mother must go through a number of medical tests and preparation, in the context of South African law, she does not receive any payment either before, during or after the pregnancy. However, her medical costs are paid by the intended parents.²⁴⁹ The medical costs include: compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and the confirmation of the surrogate motherhood; the loss of earnings suffered by the surrogate mother as a result of the surrogate motherhood agreement; or the insurance to cover the

²⁴⁷ Golombok *et al* 2004 *DP* 400. See also Mahlobogwane 2013 *SJ* 47.

²⁴⁸ Golombok *et al* 2004 *DP* 400. See also Mahlobogwane 2013 *SJ* 48-49.

²⁴⁹ Mahlobogwane 2013 *SJ* 48-49.

surrogate mother for anything that may lead to death or disability brought about by the pregnancy.²⁵⁰

Therefore, commercial surrogacy is not allowed in South Africa.

The tests that the gestational surrogate mother must go through include the following:

- Hysteroscopy/HCG – this procedure determines whether the fallopian tubes are clear and the size and shape of the uterus;
- Infectious disease test, to ensure that there are no contagious diseases present;
- A mock cycle, to see how the uterine lining will react to hormone replacements (estrogen);
- A pap smear to check for a healthy uterus;
- A physical examination, to determine whether there are any physiological impediments that would hinder the surrogate in carrying the baby;
- A trial transfer, to check the length of the uterus to find out how far to insert the catheter, which will be loaded with embryos; and
- Psychological testing, to check motivations, attitudes, and commitment.²⁵¹

Sections 292, 294 and 295 of the Children's Act regulate the validity of the surrogate motherhood agreement. Section 292(1) provides that no surrogate motherhood is valid unless (a) the agreement is in writing and is signed by all the parties thereto; (b) the agreement is entered into in the Republic; (c) at least one of the commissioning parents, or where the commissioning parent is a single person, that person, is at the time of entering into the agreement domiciled in the Republic; (d) the surrogate mother and her husband or partner, if any, are at the time of entering into the agreement domiciled in the Republic; and (e) the agreement is confirmed by the

²⁵⁰ Children's Act s 301(2)(a), (b) and (c).

²⁵¹ Storey "Ethical problems surrounding surrogate motherhood", available at <http://www.yale.edu/ynhti/curriculum/units/2000/7/00.07.05.x.html> (date of use 29 June 2015).

High Court within whose area of jurisdiction the commissioning parent or parents are domiciled or habitually resident. In addition, the Children Act stipulates that

“[n]o 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”.²⁵²

The Children’s Act further provides that “[a] court may not confirm a surrogate motherhood agreement unless ... the commissioning parent or parents ... understand and accept the legal consequences of the agreement and their rights and obligations in terms thereof.”²⁵³

It is important to note that the best interests of a child to be born as a result of a surrogate motherhood agreement are one of the important conditions for the validity of that agreement. In terms of section 295 of Children’s Act, the surrogate motherhood agreement includes adequate provisions for the contract, care, upbringing and general welfare of the child that is to be born in a stable home environment, including the child’s position in the event of the death of the commissioning parents or one of them, or their divorce or separation before the birth of the child.²⁵⁴ Section 295 further provides that, in general, having regard to the personal circumstances and family situations of all the parties concerned, but above all the interests of the child to be born, the agreement should be confirmed.²⁵⁵

A closer look at these provisions reveals however that the drafters of the Children’s Act were concerned with the interests of the child to be born through a surrogate motherhood agreement at the time of the birth of the child. This is made clear when they provided in section 295(d) that the child has to be born into a stable

²⁵² Section 294 of the Children’s Act.
²⁵³ Section 295(b) (iii) of the Children’s Act.
²⁵⁴ Section 295(d) of the Children’s Act.
²⁵⁵ Section 295(e) of the Children’s Act.

environment. They also took into account the fact that there should be alternative solutions to keep the child in a stable home environment in the event that the commissioning parents die or divorce or separate from one another before the birth of the child. The protection of the interests of the child to be born through a surrogate motherhood agreement is also made clear by the provision in section 295(e) that the agreement should be confirmed with due regard of the interests of the child to be born.

It is clear from the discussion above that the Children's Act ensures some protection of the interests of the child to be born through a surrogate motherhood agreement. However it is important to note that this protection is focused on the child's post-birth period rather than while he or she is still in the mother's womb.

The surrogate motherhood agreement can be terminated according to the conditions prescribed in the Children's Act. In the terms of the Act:

- “(1) A surrogate mother who is also a genetic parent of the child concerned, may at any time prior to the lapse of a period of sixty days after the birth of the child, terminate the surrogate motherhood agreement by filing written notice with the court.
- (2) The court must terminate the confirmation of the agreement ... upon finding, after notice to the parties to the agreement and a hearing, that the surrogate mother has voluntarily terminated the agreement and that she understands the effects of the termination, and the court may issue any appropriate order if it is in the best interest of the child.
- (3) The surrogate mother incurs no liability to the commissioning parents for exercising her rights of termination in terms of this section, except for compensation for any payments made by the commissioning parents...”²⁵⁶

²⁵⁶ Section 298 of the Children's Act.

In Mahlobogwane's view, the Children's Act gives the power to the surrogate mother in partial surrogacy to terminate the surrogate motherhood contract within a prescribed period, but there is no provision in the Act that gives similar power to surrogate mother in full surrogacy. In Mahlobogwane's words:

"There appears to be a distinction between a surrogate mother who is a genetic parent and the one with no genetic relationship as far as termination of the agreement is concerned. The Children's Act presumes that the contracting couples are the legal parents but give the surrogate a period of time to change her mind. The court is empowered under this statute to give protection to the surrogate mother with genetic relationship to terminate the agreement 'prior to the lapse of a period of sixty days after the birth of the child', but there is no corresponding provision for the termination of the agreement to a surrogate mother with no genetic connection".²⁵⁷

Although up to date no fertility clinics in South Africa have made use of partial surrogacy, it should be noted that this power given to the partial surrogate mother can be the cause of conflict.

The surrogate motherhood agreement confirmation was at issue in *Ex Parte WH and others*.²⁵⁸ In this case a male same-sex couple domiciled in South Africa approached the court to seek the approval of their surrogate motherhood agreement contracted with a surrogate mother.²⁵⁹ In terms of this agreement, the egg that had to be used for the fertilisation would not come from the surrogate mother and the identity of the sperm donor was not indicated.²⁶⁰ However, the parties agreed that the commissioning parents would pay to the surrogate mother the following amounts of money:

- (a) R 20.000 for health insurance;
- (b) R 6.000 for life insurance; and

²⁵⁷ Mahlobogwane 2013 SJ 51.
²⁵⁸ *Ex Parte WH* 2011 (6) SA 514 (GNP)
²⁵⁹ Para [15].
²⁶⁰ Para [22].

(c) R 20.000 for various expenditure, including transport, maternity, clothes etc.

After considering all the information brought before the court, the court concluded that the parties made out a proper case for the relief they sought before the court, that the parties concluded the surrogate motherhood agreement for altruistic rather than commercial reasons, and that the payments were in line with the legislation. The court thus confirmed the agreement.²⁶¹

This judgment was subjected to quite a bit of criticism. In her criticism, Carnelly focuses on two issues, namely the genetic link and the issue of payment. Drawing on section 294, which requires the commissioning parents or at least one of them to be the sperm donor, and section 301, which describes the types of payment the surrogate mother may receive from the commissioning parents, she concluded that the judgment in this case is inadequate. Carnelly argues firstly that the fact that the judgment does not identify the donors of the sperm and eggs might be inconsistent with the Children's Act. Secondly, Carnelly argues that the payment of various expenditures by the commissioning parents is not covered by section 301 of the Children's Act. These amounts might amount to payment for the surrogate services rendered by the surrogate mother and hence make the agreement commercial.²⁶²

Pillay and Zaal are of the view that the judgment in this case reveals a favour that the court did to gay commissioning parents. According to them there is no valid explanation for the court to use less than a strict application of chapter 19 of the Children's Act, after noting that details provided before the court in respect of expenses in implementing the surrogate agreement were insufficient. They thus concluded that the court has encouraged commercial surrogacy in contravention of the Children's Act.²⁶³

²⁶¹ Para [79-80].

²⁶² Carnelly "Ex Parte WH 2011 6 SA 514 (GNP). Discussion of genetic links and monetary payments in South African and foreign surrogate motherhood agreements with particular reference to the English experience" 2012 *De Jure* 188.

²⁶³ Pillay and Zaal "Surrogate motherhood confirmation hearings: The advent of a fundamentally flawed process" 2013 *SALJ* 482

Louw concluded that the judgment in this case displays a lack of appreciation for the importance of certain crucial aspects relating to the surrogate mother agreement and its confirmation. She further recommended the reconsideration of the prohibition of altruist surrogacy in South Africa.²⁶⁴

It is clear from the discussion of this case and the criticisms thereof that commercial surrogacy is not legally allowed and the genetic link is an important factor in the confirmation of the surrogate motherhood agreement.

Unlike gay men, who reproduce by means of a valid agreement with a surrogate mother, lesbians do not need such a contract for their reproduction.

3.4.2 Lesbian reproduction: Artificial Insemination by donor (AID) and in Vitro Fertilisation (IVF)

Artificial insemination using donor semen (AID) is a process whereby semen is placed into a woman's vagina or uterus for the purpose of conception. The semen is obtained from a donor that is someone other than the woman's partner. AID is most likely to be used with infertile couples where the male is azoospermic (absence of sperm in the ejaculate) or oligospermic (insufficient sperm in the ejaculate to lead to conception).²⁶⁵

In South Africa, an AID service was started in 1979 in the Infertility Clinic at Groote Schuur Hospital, Cape Town in response to repeated requests by patients, doctors and social workers.²⁶⁶

AID and IVF are helping families to have children that they could not otherwise have. These techniques are also used by lesbians to have children and build families of

²⁶⁴ Louw "Surrogacy in South Africa: Should we reconsider the current approach" 2013 *THRHR* 564-588.

²⁶⁵ Daniels "Artificial insemination using donor semen and the issue of secrecy: The views of donors and recipient couples" 1988 *SSM* 377. See also s 1 of the National Health Act, 2003.

²⁶⁶ Allen, Alperstein and Tsalacopoulos "Artificial insemination by donor at Groote Schuur Hospital" 1985 *SAMJ* 3.

their own. Lesbians have the choice to be inseminated with gametes from known or unknown donors. The status of the donor as known or unknown can have legal consequences that will be discussed in the next section. The technique of in vitro fertilisation via oocyte donation separates the genetic and biological aspects of parentage on the one hand from the social aspects on the other hand. This in turn creates legal problems because it upsets the stability and certainty normally associated with family relationships, including the certainty in relation to the status of the IVF child. It is possible in such a conception for two women to claim motherhood of the child. Which of them is the real mother, the ovum mother or the womb mother?²⁶⁷

3.5 THE EFFECTS OF ASSISTED REPRODUCTIVE TECHNOLOGIES ON CHILDREN

It has been demonstrated in a number of studies that using ARTs is associated with numerous health problems for the child, and this raises concerns for the welfare of children born through ARTs.²⁶⁸ As Robertson points out:

“Concerns about the welfare of offspring resulting from ARTs cover a wide range of procedures and potential risks. In addition to physical risks from the techniques themselves, they include the risk of providing ART services to persons who could transmit infectious or genetic disease to offspring, such as persons with HIV or carriers of cystic fibrosis. Risks to offspring from inadequate parenting may arise if ARTs are provided to persons with mental illness or serious disability. Questions of offspring welfare also arise from the use of ARTs in novel family settings, such as surrogacy, the posthumous use of gametes and embryos, or with single parents or a same sex couples. Finally, both physical and psychological risks may result from alteration or manipulation of genes, gametes, and embryos.”²⁶⁹

²⁶⁷ Lupton 1985 *TSAR* 280.

²⁶⁸ McNair 2004 *VLRC* 14.

²⁶⁹ Robertson Procreative liberty and harm to offspring in assisted reproduction 2004 *AJLM* 7.

This would suggest that ARTs are not risk free. In fact, the use of ARTs may enable an infertile person or one who carries genes for serious disease to reproduce, but in doing so they risk having a child with diminished welfare.²⁷⁰

Assisted reproductive technologies may result in many adverse physical effects on resulting children. However, for the purpose of this study, physical effects of ARTs will be classified into two categories, namely effects inherent to the technique itself and effects resulting from modifying, selecting, or manipulating gametes and embryos.²⁷¹ It should be noted that in addition to the physical effects, children born as a result of the use of ARTs are also exposed to psychological effects which may be worsened by the legislation of some countries as stated in the introduction of this chapter.

3.5.1 Effects inherent to the technique itself

IVF and ICSI are the basic ART procedures that have been generally thought to be safe for both mother and children. IVF involves the hyper stimulation of the ovaries and retrieval of eggs. These procedures are reported to have many risks not only for the child, but also for the mother. For instance, it has been shown that although the incidence of ovarian hyper stimulation syndrome and other untoward effects have remained low, the incidence of morbidity and mortality has been shown to be very high for women who have undergone these procedures. Some studies suggest that women whose ovaries had been stimulated to produce multiple eggs had a higher rate of ovarian cancer.²⁷² The physical effects of ARTs, which are inherent to the technique, include perinatal and neonatal mortality, multiple pregnancies or gestations, and birth defects.

²⁷⁰

Ibid.

²⁷¹

Ibid.

²⁷²

Venn *et al* "Risk of cancer after use of fertility drugs with in-vitro fertilisation" 1999 *Lancet* 1586; Potashnik *et al* "Fertility drugs and the risk of breast and ovarian cancers: Results of a long-term follow-up study" 1999 *Fertility & Sterility* 853; Ness *et al* "Infertility, fertility drugs, and ovarian cancer: A pooled analysis of case-control studies" 2002 *AJE* 217.

Galpern has observed that IVF can impact infant health in the form of low birth weight, premature birth, and high rates of Caesarean deliveries, infant death, and congenital disability. Regarding congenital disability and illness, it has been proven that IVF could result in a 25 to 60% higher incidence of congenital disabilities and illness compared to 1 to 3% in the general population. IVF has also been linked to cancer in children. For example, a study of IVF children in the Netherlands has found a much higher than expected occurrence of retinoblastoma or eye cancer. This emphasises the concerns about the child's well-being.²⁷³

3.5.1.1 *Perinatal and neonatal mortality*

Perinatal mortality is defined as stillbirth of a child of at least 20 weeks gestation and neonatal mortality as death of any child up to twenty eight days following birth.²⁷⁴ It is argued that the causes of perinatal mortality are multiple pregnancies and preterm delivery. A small percentage is due to severe birth defects.²⁷⁵

3.5.1.1.1 Multiple pregnancies

Multiple pregnancies are the carriage of more than one child during pregnancy and is the most important factor contributing to children's adverse outcomes from ARTs. The most serious health problem posed by ARTs is the high rate of multiple gestations. One-third of IVF procedures lead to multiple births. In addition, ovulation induction or enhancement followed by intrauterine insemination also leads to a high rate of multiple births. While the rate of triplets has been reduced, the rate of twins has increased or remained steady. Multiple births pose significantly higher risks of children's and to some extent mothers' morbidity.²⁷⁶

Twins and triplets are reported to stand a much higher risk of being born injured as a result of multiple gestations. They have more birth defects, more neurological

²⁷³ Galpern 2007 *CFGS* 8-14.

²⁷⁴ McNair 2004 *VLRC* 14.

²⁷⁵ McNair 2004 *VLRC* 32

²⁷⁶ Robertson 2004 *AJLM* 10.

problems, and create more stress for parents and other siblings.²⁷⁷ Multiple births put a higher burden on the healthcare system, and also raise economic and other costs.²⁷⁸ Assisted reproductive technologies can increase the rate of multiple pregnancies for the two following reasons:

- Fertility-enhancing drugs can increase the number of follicles that mature and release an egg per cycle.
- The transfer of more than one embryo to the uterus following IVF or ICSI is common, and results in multiple pregnancies if more than one embryo implants successfully.²⁷⁹

In their study Fasouliotis and Schenker found that multiple pregnancies occurred in 6 to 8 percent of clomiphene cycles and 15 to 53 per cent of gonadotrophins cycles.²⁸⁰ It has been demonstrated that many risks for children are associated with multiple pregnancies, including pregnancy complications on the one hand, and prematurity and low birth weight on the other hand.

It is important to note that these two risks increase the rate of infant morbidity. Neonatal outcomes include respiratory distress, the need for intensive monitoring and support, difficulties feeding and an increased risk of infection. In Australia, 63

²⁷⁷ Strong "Too many twins, triplets, quadruplets, and so on: A call for new priorities" 2003 *JLME* 272.

²⁷⁸ In the USA it is estimated that a multiple birth costs the healthcare system \$100 000 (President's Council on Bioethics, Reproduction and Responsibility "The regulation of new biotechnologies" (ch 2), available at <http://www.bioethics.gov/reports/reproductionandresponsibility/chapter2.html1> (date of use 23 June 2015)); Jain *et al* "Trends in embryo-transfer practice and in outcomes of the use of assisted reproductive technology in the United States" 2004 *NEJM* 1644, Centers for Disease Control "Contribution of assisted reproductive technology and ovulation-inducing drugs to triplet and higher-order multiple births – United States, 1980-997" Morbidity and Mortality Weekly Report (23.06.2000) available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4924a4.htm> (date of use 26 March 2015) 535.

²⁷⁹ McNair 2004 *VLRC* 33

²⁸⁰ Clomiphene and ganadotrophins are fertility enhancing drugs which have the effect of increasing the number of mature follicles. Clomiphene is common for women with irregular cycles and both clomiphene and gonadotrophins can be used for women who undergo artificial insemination and those who have sexual intercourse in order to fall pregnant. See McNair 2004 *VLRC* 33 (quoting Fasouliotis and Schenker "Social aspects in assisted reproduction" 1999 *HRU* 30).

percent of twins and 96 percent of triplets are delivered preterm.²⁸¹ Children born as a result of in vitro fertilisation have also been reported to present a high rate of respiratory and diarrhoea illness, and a high rate of longer-term neurological problems especially cerebral palsy.²⁸²

3.5.1.1.2 Pre-term delivery

Several studies have revealed that children born through ARTs are in most of the cases born before their time is due. In other words, those children are mostly born before nine months gestation. Koivurora *et al* reported that in vitro fertilisation singletons had a higher rate of prematurity and low birth weight.²⁸³ In Australia, 14 percent of singleton in vitro fertilisation pregnancies are delivered prematurely compared with 8 percent of the general population.²⁸⁴

3.5.1.1.3 Birth defects and genetic disorders

In Australia, the overall rate of severe birth defects such as a hole in the heart, cerebral palsy, or chromosomal abnormalities such as Down's syndrome are 2 to 3 percent, and rates of minor defects such as cleft palate, dislocated hip, and clubfoot are also 2 to 3 percent.²⁸⁵

The causes of birth defects include genetic and chromosomal abnormalities and maternal conditions such as rubella, smoking, diabetes, very poor nutrition and drug or alcohol intake. It is suggested that since 60 percent of birth defects have an unknown cause, it is possible that the technology itself may be the cause.²⁸⁶

²⁸¹ McNair 2004 VLRC 33.

²⁸² Strömberg *et al* "Neurological sequelae in children born after in-vitro fertilisation: A population-based study" 2002 *The Lancet* 463.

²⁸³ Koivurova *et al* "Growth, psychomotor development and morbidity up to 3 years of age in children born after IVF" 2003 *HR* 2331.

²⁸⁴ McNair 2004 VLRC 33.

²⁸⁵ McNair 2004 VLRC 34.

²⁸⁶ McNair 2004 VLRC 34.

After reviewing 26 studies comparing birth defects in children following ARTs with those of naturally conceived children, Kurinczuk *et al* reported in 2004 that ARTs are associated with an increase of birth defects in Australia.²⁸⁷

It is argued for example that ovulation stimulating drugs could be responsible for these defects. These drugs could mature inappropriate eggs, and the culture medium for the embryo prior to the transfer to the uterus may alter the gene function and lead to new chromosomal abnormalities.²⁸⁸

Studies of children born as a result of IVF or ICSI have revealed that there may be a high incidence of certain rare birth defects and lower birth weight among children. For example, one study reported that singletons conceived using ARTs were at an increased risk of low birth weight, while another study suggested an increased risk of neurological problems, especially cerebral palsy.²⁸⁹

ICSI, which now occurs in almost half of IVF treatments in the USA, has been reported to have a higher risk of sex chromosome and imprinting disorders.²⁹⁰

In South Africa, a more recent study indicated that assisted reproductive technologies can increase the risk of being born with birth defects from 3% to 5% when a child is naturally conceived to 30% to 40% when a child is a result of the use of ARTs. The most important birth defects resulting from the use of ARTs are cardiovascular, musculoskeletal, urogenital and gastrointestinal.²⁹¹ According to this study, even singleton pregnancies are also at high risk, probably because of

²⁸⁷ Kurinczuk, Hansen and Bower "The risk of birth defects in children born after assisted reproductive technologies" 2004 *COOG* 203.

²⁸⁸ McNair 2004 *VLRC* 36.

²⁸⁹ Kovalevsky *et al* "Do assisted reproductive technologies cause adverse fetal outcomes?" 2003 *FS* 1272. This article discusses the Strömberg study on children and cerebral palsy.

²⁹⁰ Cox *et al* "Intracytoplasmic sperm injection may increase the risk of imprinting defects" 2002 *AJHG* 162; Schultz and Williams "The science of ART" 2002 *Science* 2188.

²⁹¹ Walmsley "Obstetric outcomes after assisted conception" 2014 *OBF* 32

subfertility and aspects of the ART process.²⁹² This excess risk is so serious that it requires particular attention when using ART procedures.

3.5.2 Effects resulting from modifying, selecting, or manipulating gametes and embryos

The modification, selection and manipulation of gametes and embryos often involve the use of genetic knowledge to choose the genes or genomes of children. Robertson distinguishes four uses of genetic knowledge, namely the screening of prospective offspring for susceptibility or late-onset medical conditions; screening for gender and other non-medical characteristics involving selecting or choosing certain aspects of the genetic makeup of children by excluding negative aspects; reproductive cloning; and positive genetic alteration of offspring genomes, which involve positive selection or alteration of genes of offspring.²⁹³

Most uses of genomic knowledge in reproduction will involve preimplantation screening or screening before birth to prevent the birth of children with genetic disease or predisposition to disease. The presence of family diseases in some groups of the population is often considered as the reason for screening.²⁹⁴ A history of family or autosomal diseases, such as cystic fibrosis, sickle cell anemia, and Tay Sachs,²⁹⁵ also constitutes a justification for screening. Through screening, carriers of autosomal mutations may also learn whether their reproductive partners are also carriers. If so, they can decide to risk having children with disease, adopt, be without children, use donor gametes, or conceive and screen at the embryonic or fetal stage, and then decide not to start or not to continue a pregnancy.²⁹⁶ Embryo or prenatal screening might also occur when the determination of dominant or X linked diseases, such as Huntington's disease, hemophilia, or Duchenne's muscular dystrophy is needed.²⁹⁷

²⁹² Walmsley 2014 *OBF* 34.

²⁹³ Robertson "Procreative liberty in the era of genomics" 2003 *AJLM* 456.

²⁹⁴ Robertson 2003 *AJLM* 456

²⁹⁵ Robertson "Liberty, identity, and human cloning" 1998 *TLR* 1407.

²⁹⁶ Elsas "Medical genetics: present and future benefits" 2000 *ELJ* 814-815

²⁹⁷ Andrews "Prenatal screening and the culture of motherhood" 1996 *HLJ* 969-72.

Although these procedures seem to benefit parents in their endeavour to ensure a healthy child, they have a serious negative impact on resulting children. The first negative impact is the fact that these procedures seem to send the message that the life of children is not desired and valued or that it would be better for them that they had not been born.²⁹⁸

The manipulation of embryos and gametes also involve non-medical selection, such as “for gender, sexual orientation, hearing, perfect pitch, hair or eye color, intelligence, size, strength, memory, beauty, or other traits, which parents might find desirable”.²⁹⁹ Screening of embryos to determine sex is more accurate than sperm separation, but requires an expensive and intrusive cycle of IVF and the willingness to discard embryos.³⁰⁰

Wertz distinguishes two different groups of people who request for preimplantation genetic diagnosis for non-medical gender selection. The first group consists of persons who wish their first born child to be of a particular sex. According to Wertz most of people prefer their first born child to be male because their culture values males more than females.³⁰¹ In the second group there are people who already have a child of one gender and wish to have a child of the opposite gender. In many cases, the requests are made by people who already have two or more children of the same gender, with no greater preference for males than for females.³⁰²

The risks of IVF and ICSI which arise from the manipulation of gametes, embryos, and the conditions of conception and implantation, are inevitable when attempting to enable infertile couples to conceive or become pregnant. Additionally, there is another set of risks that originates from manipulations done to determine the quality or make-up of gametes or embryos, or to modify, transfer, or remove genetic

²⁹⁸ Field “Killing ‘the handicapped’ – Before and after birth” 1993 *HWLJ* 123-124.

²⁹⁹ Robertson 2003 *AJLM* 460.

³⁰⁰ Robertson 2003 *AJLM* 460

³⁰¹ Wertz “International perspectives on ethics and human genetics” 1993 *SULR* 1430-1432.

³⁰² Ethics Committee of the American Society of Reproductive Medicine “Preconception gender selection for nonmedical reasons” 2002 *FS* 861-862.

material.³⁰³ Preimplantation genetic diagnosis to screen embryos, for example, carries some risk that embryo biopsies might affect the physical well-being of resulting children.³⁰⁴ Similarly, flow cytometry to select male or female bearing sperm for preconception sex selection subjects sperm to a fluorescent dye and laser energy with still unknown effects on sperm, embryos, and offspring.³⁰⁵

Children born through assisted reproductive technologies are not the only children to experience health problems. There is evidence that children conceived naturally can also experience such problems. However, it is important to note that in most cases, health problems experienced by children conceived naturally have their origin in the parents' genetic or health state, and almost all these problems, if detected early, can be successfully managed. Generally, if one of the parents, in particular the pregnant mother, is infected by a virus, there is a chance that the virus will be transmitted to the child who is conceived while the mother is infected. A more recent study reported in this regard that a number of viruses responsible for various health problems can be transmitted from an infected mother to the foetus she is bearing. In fact, Seopela reported that the cytomegalo virus, the genital herpes simplex virus, and the rubella virus can be transmitted transplacentally or during the passage of the newborn through the birth canal by contact with genital lesion.³⁰⁶ The cytomegalo virus is responsible for sensorineural hearing loss and mental retardation,³⁰⁷ the genital herpes simplex virus causes microcephaly and hepatosplenomegaly,³⁰⁸ and the rubella virus is responsible for severe birth defects, known as the rubella syndrome. Its congenital and late manifestations include sensorineural deafness, cardiac defects, ophthalmic defects, retinopathy and cataracts, central nervous system defects, mental retardation, and microcephaly.³⁰⁹ All these infections are manageable during pregnancy.³¹⁰

³⁰³ Robertson 2004 *AJLM* 12.

³⁰⁴ Robertson 2004 *AJLM* 12

³⁰⁵ Human Fertilisation and Embryology Authority "Sex selection: Options for regulation" (2003), available at <http://www.hfea.gov.uk/AboutHFEA/Consultations> (date of use 26 March 2015).

³⁰⁶ Seopela "Congenital and neonatal infections" 2015 *OGF* 27-29.

³⁰⁷ Seopela 2015 *OGF* 28.

³⁰⁸ Seopela 2015 *OGF* 28.

³⁰⁹ Seopela 2015 *OGF* 29.

³¹⁰ Seopela 2015 *OGF* 28.

It should be noted that in addition to the physical effects of ARTs on children, most children born as a result of the use of these procedures are also exposed to psychological effects.

3.5.3 Psychological effects of assisted reproductive technologies on children

In ARTs, the act of becoming parent is founded upon the assumption that freezing, mass storage, experimentation upon, quality control, and destruction of particular parents' offspring is a legitimate technological extension of natural methods of reproduction. This removes reproduction from the realm of the private and the intimate and sets it in a context of third party oversight and control.³¹¹ ARTs have made it possible for a man to become a father to a live-born child even decades after his death.³¹² All these facts, coupled with the secrecy that surrounds ARTs, can cause serious psychological harm to the resulting children.

It is suggested that there is a possibility for a person to be harmed by the manner of his or her conception as far as it relates to the question of origins.³¹³ Many children born as a result of ARTs do not know that they are donor conceived children. Those who know are not aware of the potential significance of it. Research on the behaviour of these children is often biased because of the fact that third parties such as teachers are often engaged by researchers to report on children's behaviour, but since the former are kept in as much ignorance as the latter, one should not expect them to know what signs of distress or psychological dislocation to look at.³¹⁴

In South Africa, for instance, although the gamete donors are the genitors of the child resulting from the use of their gametes, they are legally excluded from the list of family members where the child resulting from their genetic materials is going to

³¹¹ Laing and Oderberg "Artificial reproduction, the 'welfare principle', and the common good" 2005 *MLR* 338.

³¹² Laing and Oderberg 2005 *MLR* 339.

³¹³ Laing and Oderberg 2005 *MLR* 341.

³¹⁴ Laing and Oderberg 2005 *MLR* 342-343

grow up. In this way children born from ARTs cannot establish a genetic link, or trace their origins, especially when they are conceived from unknown gamete donors.

It is important to note that the children's ignorance of their origins is an obstacle to drawing conclusions about the real impact of those abnormal origins on the children's psychological and emotional development.³¹⁵ Children born of ARTs who are now adults expressed their concern for the lack of fundamental information about their parentage, ancestry, and medical inheritance, which could result in a situation where those children could marry their own siblings or could have siblings they would never know because of the deliberate actions of their biological parents.³¹⁶

Secrecy and anonymity of the donor have ruled ARTs for decades but recently the need to ensure the best interests of the child has brought to attention the need of knowing the identity of the donor for social or medical reasons.³¹⁷

The knowledge of genetic origins contains two parts: the first is the secrecy issue which touches on the question whether the person is informed that he or she was conceived by means of donor material. The second part is donor anonymity that concerns the release of the identity of the donor to the offspring.³¹⁸

The secrecy issue revolves around two questions. The first is whether it is necessary to inform an ART-born child that he or she was born as a result of ART procedures. The second question is whether that information would be in the best interests of the child.

With regard to the first question, it is the practice in many countries in the world not to disclose the methods of conception to the ARTs-born child. A few reasons are given in support of this practice. These include the following: the nondisclosure may

³¹⁵ Laing and Oderberg 2005 *MLR* 342.

³¹⁶ Laing and Oderberg 2005 *MLR* 344.

³¹⁷ Zyberaj and Ikonomi "The Complications of donor ARTs anonymity" 2013 *AJIS* 578.

³¹⁸ Zyberaj and Ikonomi 2013 *AJIS* 579.

be perceived as a way of ensuring that, firstly, the non-genetic parent feels connected to the child; secondly, the child develops a strong bond with the genetic parent; thirdly, the appearance of a “normal” family is maintained; fourthly, there is as little disruption of the child’s stability as possible; and finally, the genetic parent’s infertility (a condition that may still carry a negative stigma in some societies) is able to remain undisclosed. Another reason is that the “nondisclosure model” favours the interests of the would-be parents, the child’s need for stability and normality, and the privacy rights of the sperm donor.³¹⁹

Some studies have revealed the reasons why intended parents support non-disclosure. These include the following: Some intended parents indicate that their views were ambivalent, dominated by a focus both on their own role as parents and their desire to act in their children’s best interests.³²⁰ For other parents the main reason why mothers were against disclosure or unsure about telling the truth was because they wished to protect their children and were concerned that other family members might perceive the child in a different light if the child’s real genetic parentage was extensively known.³²¹ They insist that the truth may at times damage complex kinship relationships, and parents are often afraid of the consequences of such knowledge in the interests of the family.³²² The interests of truth may have to be sacrificed, at times, for family stability and security in the interests of the child. Legal truth (founded exclusively on genetic testing) can cut through and disrupt these relationships.³²³

In addition, some scholars are of the view that the openness could have negative impacts on the child, parents and the family as a whole. According to Turkmendag *et al*, for example, parents may be of the view that nondisclosure is the wisest way to

³¹⁹ Clark “A balancing Act? The rights of donor-conceived children to know their biological origins” 2012 *GJICL* 939-940.

³²⁰ Grace *et al* “The donor, the father, and the imaginary constitution of the family: Parents’ constructions in the case of donor insemination” 2008 *SSM* 304.

³²¹ Smart “Law and the regulation of family secrets” 2010 *IJLPF* 400.

³²² Smart 2010 *IJLPF* 400.

³²³ Smart 2010 *IJLPF* 564-5.

protect the child, themselves, and the wider family.³²⁴ As a result, they tell their child that they were assisted in the conception process rather than disclose the child's genetic parents.³²⁵ This is another approach to secrecy – revealing the child's method of conception to ARTs-born children, but not revealing the identity of the gamete donors.

However, Kirkman reminds us that donor-conceived people still exist within a culture that “valorises genes” and that they “may feel cheated of their heritage and suffer a crisis of identity”.³²⁶ McNair, learning from adopted children's experience, argued that calls from adoptive adults, in addition to a growing realisation of the negative psycho-social consequences of secrecy, led to the encouragement of openness from an early age. Social change in the adoption movement has progressed even further with the development of “open” adoption, which encourages birth mothers to have some role in the selection of the adoptive parents and to maintain contact with their child. According to McNair, advocates of this approach find that it helps adoptive children to have a more fully formed identity.³²⁷

In contrast, others suggest that openness can lead to confusion for children if there are conflicting parental values, and this could create identity conflict.³²⁸ Although the debate continues, open adoption is now a key element of public adoption policy.³²⁹

In short, the second group of authors is of the view that it is important to reveal to ART-born children how they were conceived and born. The secrecy around the identity of the donor is the other issue that needs to be discussed.

³²⁴ Turkmendag *et al* “The removal of donor anonymity in the UK: The silencing of claims by would-be parents” 2008 *IJLPF* 292.

³²⁵ Turkmendag *et al* 2008 *IJLPF* 292.

³²⁶ Kirkman “Parents’ contribution to the narrative identity of offspring of donor-assisted conception” 2003 *SSM* 2231.

³²⁷ McNair “Outcomes for children born of ART in a diverse range of families” 2004 *VLRC* 41.

³²⁸ Grotevant, Pery and McRoy “Openness in adoption: Outcomes for adolescents within their adoptive kinship network” in Brodzinsky DM and Palacios J (eds) *Psychological Issues in Adoption: Research and Practice* 173-174.

³²⁹ McNair 2004 *VLRC* 40.

Regarding the second question, it is important to note that the anonymity of the donor is a common principle in ART procedures. Turner and Coyle have noted that secrecy has been advocated within the ART field since it began and non-disclosure remains the policy in many countries, to the extent that some countries including Denmark, Norway, Spain and France have legislated to ensure secrecy of donor identity.³³⁰

Arguments supporting secrecy largely revolve around protection of the privacy of the non-biological father regarding his infertility. Others have claimed that disclosure to the child would damage the child's identity and relationships with her or his family, although the opposite has been found to be the case.³³¹ The fear that donors would not donate if they could be traced by offspring is among factors that exercise pressure to maintain such policies.³³²

Most parents support secrecy around the identity of the donor who is the biological parent of the child. The tradition of secrecy embedded into ART policy has been upheld by many parents of donor-conceived children. The reasons for secrecy given by the DI parents in the European longitudinal study were most commonly to protect the child. They were concerned that the children would be distressed if they found out that they were donor-conceived, and that telling them would negatively influence their relationship with their non-biological fathers.³³³ Other reasons were to prevent people outside the family from knowing the truth. Several parents believed there was no need to disclose to their children.³³⁴

³³⁰ Turner and Coyle "What does it mean to be a donor offspring? The identity experiences of adults conceived by donor insemination and the implications for counselling and therapy" 2000 *HR* 2048.

³³¹ Daniels and Burn "Access to assisted human reproduction services by minority groups" 1997 *ANZJOG* 81.

³³² Murray and Golombok "Oocyte and semen donation: a survey of UK licensed centres" 2000 *HR* 2135.

³³³ Golombok *et al* "The European study of ARTs families: the transition to adolescence" 2002 *HR* 836.

³³⁴ Grace *et al* "The donor, the father, and the imaginary constitution of the family: Parents' constructions in the case of donor insemination" 2008 *SSM* 304

Other parents, however, wanted to reveal the identity of the donors to their ARTs-born children. A study on a predominantly Australian sample of donor families, for example, revealed that a majority of parents would like to tell their children, but were constrained by not knowing how or when to do so.³³⁵

Golombok reported in her European longitudinal study that 8.6% of DI children, 50% of IVF children, and 95% of adoptive children had been told, and more single mothers intend to disclose to their children the identity of the donors of the genetic materials that have contributed to their existence.³³⁶ In another study, MacCallum reported that parents of children born of surrogacy are also more open, with one study showing that 100% planned to tell their children before the age of five.³³⁷

The anonymity of the donor or the non-disclosure of the donor's identity may have consequences or implications for the child's identity and for family relationships. Some of these relate to the fact of having a donor father (or mother) and most relate to the impact of delayed discovery of donor status.³³⁸

With regard to the implications of the donor's anonymity, some donor-conceived persons describe feeling that their conception was impersonal, and that their donor is a deliberate stranger who has chosen to avoid a parenting responsibility. Feeling like a "freak" or the "product of an experiment" is described. Others feel incomplete or that they don't completely belong. These sentiments suggest that identity is related to genetic inheritance in some way.³³⁹ Kirkman found that genes were significant to many donor-conceived adults and that they had a "severe disruption and fractured sense of identity" as a result of not being able to know.³⁴⁰

³³⁵ Kirkman 2003 *SSM* 2232.

³³⁶ Golombok *et al* 2002 *HR* 837.

³³⁷ MacCallum *et al* "Surrogacy: the experience of commissioning couples" 2003 *HR* 1337.

³³⁸ McNair 2004 *VLRC* 42.

³³⁹ McNair 2004 *VLRC* 42

³⁴⁰ Kirkman "Genetic connection and relationships in narratives of donor assisted conception" 2004 *AJETS* 15.

Regarding family relationships, consequences of secrecy for some donor-conceived persons include feeling that their parents had been dishonest, which can lead to mistrust and hostility towards their parents.³⁴¹ This can result in reduced self-esteem and difficulty in forming trusting relationships.³⁴² Longer-term consequences of being unable to know the identity of their donor involved concerns that they could inadvertently form an intimate relationship with a sibling or other close relative.³⁴³

Some countries, including South Africa, Australia and Sweden have fixed the age at which children born of ARTs can find out the identity of their genitor. In these three countries the age is fixed at 18. Children who knew earlier that they can obtain their donor's identity were overwhelmingly curious about their donor.³⁴⁴ Most commonly they were interested to know what they were like as a person, whether their appearance was similar to theirs and whether they would be able to meet them. All but one adolescent wanted a photograph. Therefore, knowing the donor as a person was important to these children. However, while they reported that the donor could be important in their lives, none regarded him as a parent.³⁴⁵

Victoria was the first state in Australia to establish a donor registry. In 1988, Victoria led the way in establishing a donor registry, enabling release of the donor's identity to the child on request from the age of 18, but only if the donor consented to the release of that information. The law has now been amended so that any child born as a result of a donor treatment procedure since 1998 will automatically be able to access identifying information about the donor when they turn 18. Before a child turns 18, his or her parents can apply for identifying information about the donor, which can be provided with his consent.³⁴⁶

³⁴¹ Kirkman 2003 *SSM* 2234.

³⁴² MacNair 2004 *VLRC* 42.

³⁴³ MacNair 2004 *VLRC* 43.

³⁴⁴ Scheib, Riordan and Rubin "Choosing identity-release sperm donors: the parents' perspective 13-18 years later" 2003 *HR* 1121.

³⁴⁵ MacNair 2004 *VLRC* 43.

³⁴⁶ MacNair 2004 *VLRC* 45.

With regard to the time and how parents should inform their children about their genitors, MacNair suggests that parents need more information and assistance regarding why, when and how to inform their children of their donor status. Perhaps, most importantly, they need to understand that it is preferable to be honest with their children. This will lead to effective parent-child relationships, alongside knowledge of genetic heritage, and the potential for a future relationship with the donor if desired by child and donor.³⁴⁷

Regarding waiting for the child to reach 18 before accessing the information about his or her genitor, the American Academy of Pediatrics argues that it almost seems perverse for the law to insist on an irrebuttable presumption that children should not have access to identifying information about their parents until they turn 18. It also seems to be entirely at odds with the Academy's observation that "as children move into adolescence and adulthood, adoptive children may wish to seek out more information about their biological families."³⁴⁸

Because of the secrecy that surrounds ART procedures; many children born from donated sperm and eggs are not informed of their biological heritage.³⁴⁹ This lack of information results in several psychological impacts on the resulting child as demonstrated above. However, it is important to note that even those children who have the opportunity to have this information are still exposed to similar psychological effects. The parents to whom the custody of a child was given after birth (intended parents) may encourage their child born from ARTs not to disclose the information to the public. This might result in the child feeling as if he or she is harbouring a family secret or that he or she has something to be ashamed of.³⁵⁰ For the same reasons, the child may feel anger toward his or her gamete donor. This finding was confirmed in a study where a donor conceived child, now fifty-six years old, stated as follows:

³⁴⁷ MacNair 2004 *VLRC* 45.

³⁴⁸ American Academy of Pediatrics "Families and adoption: The pediatrician's role in supporting communication" 2003 *Pediatrics* 1439.

³⁴⁹ Vernado "Who's your daddy? A legitimate question given Louisiana's lack of legislation governing assisted reproductive technology" 2006 *Louisiana Law Review* 621.

³⁵⁰ Wolff "Return of the sperm bank babies" (March 2004) *Men's Health* 162.

“It is infuriating that most [sperm] banks remained wedded to the idea that sperm donation should be anonymous... They want to protect the donor as if he is a victim of some sort. But why should the medical professional have the power to deny someone their [sic] full genetic history? It’s not fair to allow a child to be deluded about who they [sic] are”.³⁵¹

This would suggest that keeping genetic origins secret may have negative emotional effects on the resulting child.

In another study, it is reported that once the child receives the information about his or her donor conceived status, he or she may be led to go on a search of his or her donor. This can result in a devastating situation if, once found, the donor refuses to engage in a relationship with the child born with his or her genetic materials.³⁵²

The birth defects discussed above also have psychological implications on children born through ARTs. Adashi *et al* reported in their research that disabled children born as a result of ARTs find it difficult to understand why they, and not their siblings, are affected, and may become jealous, angry or depressed.³⁵³

The psychological effects of ARTs on children may, in some countries, be worsened by legislation, particularly legislation dealing with parentage and inheritance. In these countries, notably the United States of America, Australia, and South Africa, a gamete donor is not viewed as a legal parent of a child born using his or her genetic material. Therefore a child born to a single parent or to a homosexual couple in a union that is not recognised as a marriage is regarded to have only one parent. Having one legal parent in turn results in being able to inherit intestate only from that parent. In addition, a child who finds himself or herself in this situation will lose not

³⁵¹ Villarosa “Once invisible sperm donors get to meet the family” *New York Times* 21 May 2002 at F5.

³⁵² Varnado 2006 *LLR* 622.

³⁵³ Adashi *et al* “Infertility therapy-associated multiple pregnancies (births): An ongoing epidemic” 2003 *Reprod Biomed Online* 521.

only financial, psychological or emotional support from the donor, but he or she will also lose his or her blood line. This will in turn result in the child losing his or her genetic origins. This may cause an identity crisis for such a child.³⁵⁴

3.6 INTERIM CONCLUSION

Assisted reproductive technologies have been viewed throughout the world as an appropriate remedy to the problem of infertility. Through ART procedures a number of individuals and couples, including gay and lesbian couples, can now have children that they could otherwise not have. This number is deemed to increase every year as ARTs are developing and becoming accessible to many individuals and couples.

The use of ARTS in South Africa raises concern about the quality of the service that is provided. The limited number of ART units and service providers cannot allow the multitude of individuals and couples to be adequately taken care of. The necessity of various blood and other tests for every person in need of ART services makes it harder for the services providers to provide a service of required quality. The inadequate geographical distribution of ART units in the country, the cost of the service, and the poor or absent insurance coverage of these services, as well as the lack of information, are the major factors that limit access to ART services in South Africa.

While gay couples and individuals may use the surrogate motherhood agreement to contract with a surrogate mother and have children, lesbians may choose from a fresh or frozen gamete from a known or unknown donor to be artificially inseminated and reproduce.

However, many studies have shown that ARTs are not risk free for children resulting from the use of the ARTs. Physical, emotional and psychological harm may befall

³⁵⁴ Kirkman "Genetic connection and relationships in narratives of donor assisted conception" 2004 *AJETS* 15.

children born as a result of artificial insemination and related techniques. The harm that ARTs cause to the resulting children can range from harm due to the techniques themselves including multiple gestation, birth defects and perinatal as well as neonatal mortality, to lack of happiness and psychological disorders.

In view of all the physical, psychological and emotional harm imposed on children born as a result of the use of ARTs in general and those growing up in homosexual families in particular, the question that may arise is: Is it necessary to expose the child to all these risks in the sole intention to satisfy the parents' desire to have children? In other words, are all these procedures in the best interests of the child?

The harm caused by ARTs to the resulting offspring is so serious that it should be taken into consideration by the makers and in any application of the best interests of the child which will be discussed in length in the next chapters.

CHAPTER FOUR

INTERNATIONAL AND SOUTH AFRICAN CONSTITUTIONAL PERSPECTIVES

4.1 INTRODUCTION

The family is an important institution that has received international and domestic protection. A number of international instruments provide particular protection to the family compared to the way South African Constitution treats this institution.

This chapter analyses international and domestic protection of the family. To this end the chapter discusses the protection of the family and its major components at international and domestic levels. The chapter begins with the international protection of the family. The definition and meaning of the family is provided in the first section while the second analyses the international law provisions relevant to the protection of the major components of the family, namely the parents and their children. The family protection will then be analysed in the context of the South African Constitution and legislation. The constitutional provisions relevant to the protection of the family and its components will also be discussed.

4.2 INTERNATIONAL PERSPECTIVES ON THE PROTECTION OF THE FAMILY

4.2.1 Introduction

International law places a high premium on family's values and parental interests. The International Covenant on Civil and Political Rights, for instance, recognises the family as "the natural and fundamental group unit" of society and proclaims that it must, as such, be protected by society and the state.³⁵⁵ The Covenant on Economic, Social and Cultural Rights³⁵⁶ similarly considers the family as the natural and

³⁵⁵ UN Human Rights Committee *CCPR General Comment No 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses* (1966) (hereinafter "General Comment 19") para [1].

³⁵⁶ Article 10(1) of the International Covenant on Economic, Social and Cultural Rights (1966).

fundamental group unit of society. The Convention on the Rights of the Child (“Convention”) mandates respect for the rights and duties of parents or legal guardians “to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.”³⁵⁷ It is important to note that the preamble of the Convention on the Rights of the Child proclaims that:

“the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community”, and recognises “that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.”³⁵⁸

This would suggest that international law is protective of the family and its values. The child as a member of this institution receives particular protection and the development of his or her personality is a major concern for international law. The preamble emphasises the role that the family environment must play in the child’s development and describes that environment as a place where happiness, love and understanding must reign.

4.2.2 International law provisions relevant to the protection of the family

The protection of the family is here analysed through the rights granted by international instruments to two categories of family members. The rights of parents will be analysed before analysing children’s rights.

³⁵⁷

Res. 44/25 of the Convention on the Rights of the Child, G.A.

³⁵⁸

Paras 5 and 6 of the Preamble of the Convention on the Rights of the Child.

4.2.2.1 *International protection of the rights of parents*

Although international law may provide many rights to individuals who may become parents if they so wish, this section focuses only on the right to marry and found a family as these rights directly involve children and are hence relevant for the purpose of this study.

4.2.2.1.1 The right to marry and found a family

A number of international instruments, including the United Nations Declaration of Human Rights,³⁵⁹ the International Covenant on Civil and Political Rights,³⁶⁰ and the International Covenant on Economic, Social and Cultural rights,³⁶¹ protect the right of every mature person to marry and found a family. Article 16 of the United Nations Declaration of Human Rights for instance states that “[m]en and women of full age, without any limitation due to the race, nationality or religion, have the right to marry and found a family.”³⁶²

It is clear from this statement that no mature person irrespective of his or her sex, race, and country of origin or religious beliefs should be prohibited from marrying and founding a family. It is important to note that family can be built using various methods, including reproduction and adoption. However, not all mature people who can marry if willing are naturally able to reproduce and found a family. Some who are infertile can either adopt children or use ARTs to build their families. In this context, the right to found a family can be enjoyed by people who are married to one another and who engage in sexual activities as well as individuals who have chosen not to engage in sexual activities or who for some reasons, despite engaging in sexual activities, can still not reproduce due to their infertility status.

For the purpose of this study the right to found a family of individuals who can reproduce through sexual intercourse are referred to as “sexual and reproductive

³⁵⁹ United Declaration of Human Rights (1948).

³⁶⁰ International Covenant on Civil and Political Rights (1966).

³⁶¹ International Covenant on Economic, Social and Cultural rights (1966).

³⁶² Article 16(1) of the United Nations Universal Declaration of Human Rights

rights”, and the right to found a family of individuals who cannot reproduce naturally are referred to as “reproductive rights”. There are different views on the scope of these rights. Cook, for instance, is of the view that the right to found a family encompasses the right to abort a non-desired child in order to protect the existing child. In Cook’s words:

“The right to found a family incorporates the right to maximise the survival prospects of a conceived or existing child through birth spacing by contraception or abortion. This right complements the right of a woman herself to survive pregnancy, for instance by delaying a first pregnancy...”³⁶³

This would suggest that the right to found a family requires the prospective parents to do their best to secure the life of the conceived baby if any or child who is already born to them. They can do so by observing birth spacing, by using contraception methods or by aborting an unwanted pregnancy. In other words, the survival of an existing child may require the passing of a certain period of time before having the next child, or the termination of the unwanted pregnancy. This in turn would suggest that the right to found a family is so broad that it encompasses the stopping of the life of a child in gestation provided that this is done in order to protect the existing child. As it will become clear further down, it can be argued that this view of the right to found a family undermines the interests of the unborn child.

With regard to the right to found a family for individuals who engage in sexual activities (sexual and reproductive rights), it is important to note that these rights were for the first time officially recognised in 1994 at the International Conference on Population and Development in Cairo.³⁶⁴ Those rights are now considered human rights for all people, and include universal access to reproductive health.³⁶⁵ Sexual and reproductive rights can be defined as follows:

³⁶³ Cook “International protection of women’s reproductive rights”1992 *NYUJILP* 644.

³⁶⁴ European Humanist Federation “What are sexual and reproductive health and rights?”2015 *EUH* 1.

³⁶⁵ European Humanist Federation 2015 *EUH* 1.

“The right for everyone to make a decision about their sexual and reproductive health, including the choice to marry and determine the number, timing and spacing of their children; to sexual and reproductive security free from coercion and violence, to be informed and have access to safe and legal family planning services and to have access to health care services enabling women to go safely through pregnancy and child birth.”³⁶⁶

To summarise, every adult mature person has the right to marry and found his or her family. A person can exercise that right in engaging in sexual activities in or outside the marriage environment or by having recourse to ARTs. This right is held to be free from any limitation due to the race, country of origin or religious beliefs.

4.2.2.2 *International protection of the rights of children*

Various children’s rights are protected under different international instruments. For the purpose of this study, only those rights applicable which are applicable to this study will be discussed. These include the right to life and the right to be free from violence, abuse and neglect. The best interests of the child will also be discussed under this section.

4.2.2.2.1 The child’s right to life

The right to life is protected in many international instruments, including the International Covenant on Civil and Political Rights. In terms of this convention, everyone has the inherent right to life. This right shall be protected by law, and no one shall be arbitrarily deprived of his or her life.³⁶⁷

The right to life is a very important right for all human beings. In view of this it appears reasonable to ask whether the right to life as defined in this instrument as well as in other international instruments can be extended to unborn children. This is

³⁶⁶ European Humanist Federation 2015 *EUH 2*.

³⁶⁷ Article 6 para 1 of the International Covenant on Civil and Political Rights (1996).

a very critical question in the context of this study because the victim of all the assisted reproductive adverse effects described in the previous chapter is the unborn child. It is common for the unborn child victim not to survive due to all the manipulations that are done on him or her and most of those who survive are born with several health challenges and birth defects.³⁶⁸

The answer to the question of whether international instruments protect the right to life of an unborn child requires an analysis of the international provision defining the child. The Convention on the Rights of the Child states as follows:

“A child is every human being below the age of eighteen years unless under the laws applicable to the child, majority is attained early”.³⁶⁹

A close look at this provision reveals that the ground for the definition of the child is his or her majority. In this context a child is every human being who is not yet mature according to the laws applicable to the child’s maturity.

This provision also reveals that children who have attained the age of maturity or eighteen years of age are excluded from the definition of “child” for the purpose of the Convention. This would suggest that all other human beings who are younger than eighteen are included in the definition of “child” for the purpose of the Convention. However, this does not yet mean that the unborn child is included in this definition.

An analysis of other provisions of the Convention appears to bring more light on this issue. Article 6 of the Convention states that states parties recognise that every child has the inherent right to life,³⁷⁰ and that states parties shall ensure to the maximum possible the survival and development of the child.³⁷¹ It can be argued that the survival and development of the child in this provision refer to the born child who

³⁶⁸ See Para 3.4 above.

³⁶⁹ Article 1 of the Convention on the Rights of the Child (1989) (hereafter “the Convention”).

³⁷⁰ Article 6 para 1 of the Convention.

³⁷¹ Article 6 para 2 of the Convention.

must develop as well as the unborn child who must survive and be born. Another view is that the intention of the drafters of the Convention was limited to born children, but when one looks at the preamble of the Convention, there is a possibility of confirming that the Convention protects the child's right to life before and after its birth. In paragraph 9 of its preamble the Convention on the Rights of the Child quotes the 1959 Declaration on the Rights of the Child, which clearly and explicitly states as follows?

“Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth, [and] whereas the need for such special safeguards has been...recognised in the Universal Declaration of Human Rights and in the statutes of specialised agencies and international organisations concerned with the welfare of children..., the General Assembly...calls upon...national Governments to recognize these rights and strive for their observance by legislative and other measures progressively taken...”³⁷²

The preamble to the Convention on the Rights of the Child also states that:

“[A]s indicated in the Declaration of the Rights of the Child, ‘the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth’.”

In another international instrument, special protection is granted to pregnant women. According to the provisions of the Geneva Conventions (Protection of Civilian Persons in Time of War), people to be considered subjects of particular protection include expectant mothers;³⁷³ they are also included among the people who must be transferred to hospitals and other safe zones.³⁷⁴ Pregnant women were also counted among people who must benefit from essentials: food, clothing and tonics.³⁷⁵

³⁷² Preamble to the Declaration of the Rights of the Child.

³⁷³ Article 16 of the Geneva Convention (Protection of Civilian Persons in the time of War) of 1949 (hereafter “the Geneva Convention”).

³⁷⁴ Article 14 of the Geneva Convention.

³⁷⁵ Article 23 of the Geneva Convention.

These provisions tend to protect not only the woman who has in her womb an unborn child but most importantly that child. If the intention was not to protect the unborn child in the womb of her mother, there would be no reasonable ground for giving preferable or special treatment to pregnant women in the time of war. They could be treated as all other civilians. This view seems to be supported by Schabas who maintains that the provision that prohibits the execution of pregnant women was added out of the consideration of the interest of the unborn child.³⁷⁶

To summarise, although in some international instruments the right to life of an unborn child is not explicitly addressed, I do agree with Flood, who concluded his article on the survey of international instruments with regard to the rights of the unborn child by stating the following:

“This essay has argued that existing human rights and humanitarian legal instruments and high-level intergovernmental declarations provide important recognition of the right to life of an unborn child and a degree of protection to that child. They add up to a decided preference for life, even in provisions where unborn children are not mentioned directly but are inevitably among the beneficiaries. These children may be silent and unnamed, but they are there”.³⁷⁷

International law is undoubtedly interested in protecting the potential life of a child while still in the womb of its mother. It can therefore be argued from the discussion above that the definition of the child in international instruments includes the born child as well as the unborn child.

³⁷⁶ Schabas *The Abolition of the Death Penalty in International Law* 122-3.

³⁷⁷ Flood “Does international law protect the unborn child?” 2006 *Life and Learning* 37.

4.2.2.2.2 The right to be free from violence

The child's right to be free from violence is protected in a number of international instruments, including the Convention on the Rights of the Child. Article 19 of the Convention reads as follows:

- “(1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child;
- (2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”

According to the Committee on the Rights of the Child, violence can be understood as follows:

“All forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse” as listed in article 19, paragraph 1, of the Convention”.³⁷⁸

It is important to note that the violence as defined above can have several consequences for children who are submitted to it:

³⁷⁸ Committee on the Rights of the Child *General Comment No 13 (2011) on the Right of the Child to Freedom from all Forms of Violence* (Art 19) para 3 (hereafter “General Comment 13”).

- “(a) The short- and long-term health consequences of violence against children and child maltreatment include: fatal injury; non-fatal injury (possibly leading to disability); physical health problems (including failure to thrive, later lung, heart and liver disease and sexually transmitted infections); cognitive impairment (including impaired school and work performance); psychological and emotional consequences (such as feelings of rejection and abandonment, impaired attachment, trauma, fear, anxiety, insecurity and shattered self-esteem); mental health problems (such as anxiety and depressive disorders, hallucinations, memory disturbances and suicide attempts); and health-risk behaviours (such as substance abuse and early initiation of sexual behaviour);
- (b) Developmental and behavioural consequences (such as school non-attendance and aggressive, antisocial, self-destructive and interpersonal destructive behaviours) can lead, inter alia, to deterioration of relationships, exclusion from school and coming into conflict with the law). There is evidence that exposure to violence increases a child’s risk of further victimisation and an accumulation of violent experiences, including later intimate partner violence;
- (c) The impact on children, in particular adolescents, of high-handed or ‘zero tolerance’ State policies in response to child violence is highly destructive as it is a punitive approach victimising children by reacting to violence with more violence. Such policies are often shaped by public concerns over citizens’ security and by the high profile given to these issues by mass media. State policies on public security must carefully consider the root causes of children’s offences in order to provide a way out of a vicious circle of retaliating violence.”³⁷⁹

However, for the purpose of this study, I am interested only in the first group of consequences, because some of them are the result of violence imposed to a child born as a result of ARTs. As stated in chapter three, ART procedures impose

³⁷⁹ General Comment 13 Para [15].

violence on the resulting child who may be born with physical health problems or birth defects.³⁸⁰

4.2.2.2.3 The right to preserve his or her identity

International law protects the child's right to preserve his or her identity. The Convention on the Rights of the Child, for instance, contains provisions that protect such right.³⁸¹ The inclusion of this right was intended to act as a safeguard to preserve the personal, legal and family identity of children throughout the world. It requires states not only to refrain from unlawful interference with a child's identity, but also to take active measures to ensure the effective enjoyment of a child's right to preserve his or her identity.³⁸² The Committee on the Rights of the Child stressed that birth recognition is one of the measures to secure the child's right to identity.³⁸³ It also stated that states must not only create but also maintain records critical to establishing a child's identity.³⁸⁴ Under article 8 of the Convention, the definition of the right to identity expressly includes family relations.³⁸⁵ It is important to note that a person's identity that extends to his or her genetic identity and family relations in this context refers to the genetic link with the genitor. This link is however lost for most children born as a result of ARTs to homosexual people.

4.2.2.2.4 The child's right to know his or her genetic origins

The identity of the child's genitors is referred to under this section as the child's genetic origins. With regard to the child's right to know his or her origins, Tobin is of

³⁸⁰ See ch 3 para 3.4 above.

³⁸¹ Article 8 of the Convention on the Rights of the Child.

³⁸² Tobin "The Convention on the Rights of the Child: The rights and best interests of children conceived through assisted reproduction" 2004 *VLRC* 38.

³⁸³ See for example Committee on the Rights of the Child Concluding Observations for Sierra Leone, CRC/C/15/Add116 Para 42. See also Committee on the Rights of the Child Concluding Observations for Paraguay, CRC/C/15/Add 27 Para 10; Paraguay CRC/C/15/Add75 para 18; Comoros CRC/C/15/Add141 para 27; Djibouti CRC/C/15/Add131 Para 31; Peru CRC/C/15/Add8 para 8.

³⁸⁴ In its report on Peru, the Committee expressed its concern that "due to the internal violence several registration centres have been destroyed, adversely affecting the situation of thousands of children who are often left without any identity document" (Concluding Observations for Peru, CRC/C/15/Add 8 Para 8).

³⁸⁵ Article 8 of the Convention on the Rights of the Child.

the view that international law supports the view that children should know their parents.³⁸⁶ Article 7 of the Convention indeed provides children with the right to know their parents. It is clear from this right that the Convention does not refer to parents who are raising the child concerned if they are not the genitors of the child, obviously the child will know them. The provision of the Convention providing the child with the right to know his or her parents refers to the biological parents or the child's genitors. In this regard, I agree with Tobin who points out that article 7 of the Convention should be interpreted as creating a presumption that children should be provided with access to information about their biological parents.³⁸⁷ It is therefore in line with the Convention that children born as a result of ARTs be given an opportunity to know their genitors. However, as Tobin maintains, this right is not absolute and must be balanced against a biological parent's right to privacy. It also remains subject to the overriding caveat that the release of identifying information must not be contrary to the child's best interests.³⁸⁸

4.2.2.2.5 The child's best interests

International law instruments have provisions relating to the best interests of the child and oblige states that have ratified them to adhere to the best interests standard in every matter where children are involved.³⁸⁹ The best interests standard has been described in the provisions of various international and regional instruments. Article 3(1) of the Convention describes the best interests of the child as a basic consideration and the African Charter on the Rights and Welfare of the Child (1990) (hereafter "the African Children's Charter"), a regional instrument and therefore applicable only to South Africa in this study, phrases it in even stronger terms in article 4(1) because it is not merely termed a basic consideration, but the basic consideration.³⁹⁰

³⁸⁶ Tobin 2004 *VLRC* 37.

³⁸⁷ Tobin 2004 *VLRC* 37.

³⁸⁸ Tobin 2004 *VLRC* 37.

³⁸⁹ Davel "In the best interests of the child: Conceptualisation and guidelines in the context of education" 2007 *CWEP* 222.

³⁹⁰ Davel 2007 *CWEP* 222.

The best interests of the child criterion is part of a comprehensive child protection. It broadly describes the well-being of the child, which must be determined by a variety of individual circumstances such as the child's age, the level of maturity of the child, the presence or absence of parents, the child environment and the child's experience.³⁹¹ In the process of determining the best interests of the child, the welfare of the child must be the primary consideration, be it in actions affecting children in general or those affecting a specific group of children.³⁹² The principle of the best interests of the child was originally devised to guide judges' decisions in custody disputes as a result of divorce or petitions for adoption. This principle was primarily meant to ensure that measures were put in place to allow for proper consideration of the well-being of children when making decisions that affect them.³⁹³ It can accordingly be argued that the well-being of the child is a central factor when deciding what is in the best interests of the child in divorce or adoption procedures, as well as in every other matter involving the child.

It is important to note that children have needs and rights in addition to those of adults. Therefore, in the process of determining what is in the best interests of the child care must be taken to ensure that specific needs, capacities and rights of children of all ages and backgrounds are perceived, understood and attended to.³⁹⁴ In this process specific attention should be given to specific situations. In other words, when deciding what is in the best interests of a child with a disability, specific attention should be given to the fact that the child has a physical or mental handicap. This would suggest that the application of the best interests of the child will vary with the situation of the child concerned. What is in the best interests of child A, might not necessarily be in the best interests of child B as the two children have different situations. This would further suggest that in the case of ART-conceived or ART-born children, if their welfare is the primary consideration in the decision of bringing them into this world; their welfare must respectively be protected while in utero and in the post-natal period. Such protection would in my view prevent those children from

³⁹¹ United Nations High Commissioner for Refugees UNHCR Guidelines for Determining the Best Interests of the Child (2008) (hereafter "UNHCR Guidelines") 13-14.

³⁹² UNHCR Guidelines 14.

³⁹³ UNHCR Guidelines 14.

³⁹⁴ UNHCR Guidelines 15.

being born with the health problems described above.³⁹⁵ The best interests of the child would further mean that the environment in which the child will live after birth must promote the well-being of ART-born children.

All the international and regional instruments discussed above impose negative and positive obligations respectively on states parties to take appropriate measures for the realisations of the rights therein protected and to refrain from violating or restricting these rights. In fact, in terms of the General Comment 19, states parties must ensure the protection of the family provided under article 23. To this end, states parties must adopt legislative, administrative and other measures.³⁹⁶ In response to its international obligations, South Africa has adopted measures for the realisation of some of these rights. Further, the interpretation of the rights protected in South African legal instruments, particularly the Constitution, has been inspired by international instruments. South Africa has for instance adopted the minimum core principle (which is inspired from the United Nations Committee on Economic, Social and Cultural Rights) in the realisation of the right to health.

The South African Constitution also has its own perspective on the family and its members. The analysis of that perspective is the object of the next section.

4.3 THE SOUTH AFRICAN CONSTITUTIONAL PERSPECTIVE TO FAMILY AND FAMILY MEMBERS

4.3.1 Constitutional protection of the family

Although South Africa has ratified most of international law instruments which protect the family and its values, the family appears to be under-protected in the South African Constitution. The South African Constitution does not protect the family as the basic unit of society and does not consider the right to marry or to establish a

³⁹⁵ See para 3.5 above.

³⁹⁶ General Comment 19 para [3].

family life as a fundamental right worthy of constitutional protection.³⁹⁷ According to the Constitutional Court this omission is to be understood in the context of South Africa's multi-culturalism. The court held as follows in this regard:

"The absence of marriage and family rights in many African and Asian countries reflects the multi-cultural and multi-faith character of such societies. Families are constituted, function and are dissolved in such a variety of ways, and the possible outcomes of constitutionalising family rights are so uncertain, that constitution-makers appear frequently to prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutionalised terms. International experience accordingly suggests that a wide range of options on the subject would have been compatible with CP [constitutional principle] II. On the one hand, the provisions of the NT [new text] would clearly prohibit any arbitrary State interference with the right to marry or to establish and raise a family. NT 7(1) enshrines the values of human dignity, equality and freedom, while NT 10 states that everyone has the right to have their dignity respected and protected".³⁹⁸

Although the right to family life is not protected through express constitutional provisions that would meet international obligations to protect the rights of every one to marry and found a family, the Constitutional Court considered other constitutional safeguards. The Constitutional Court explained its stance on this issue in *Dawood, Shalabi and Thomas v Minister of Home Affairs*.³⁹⁹ In this case the court clarified the significance of marriage and family for people in South Africa and emphasised the relevance of the value of dignity in the interpretation of constitutional rights, as well as the importance of the right to dignity as protected in section 10 of the Constitution. The court further explained the importance of the right to dignity in matters involving marriage and family. The court held that prohibiting a marriage relationship or the raising of a family would "[i]mpair(s) the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance".⁴⁰⁰

³⁹⁷ Bonthuys "The best interests of the child in the South African Constitution" 2006 *IJLPF* 18.

³⁹⁸ *In re Certification of the Constitution of the RSA*, 1996 1996 (4) SA 744 (CC) paras [99]-[104].

³⁹⁹ *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) para [28].

⁴⁰⁰ *Ibid.*

It is important to note that it is through the constitutional recognition of the right to dignity that the value of human dignity is safeguarded and promoted. In *Makwanyane*,⁴⁰¹ the court explained the importance of the right to human dignity together with the right to life. In this case the court held as follows:

“The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others”.

This would suggest that if the rights to life and dignity are not valued in a society, there is no way for individuals in that society to enjoy all other rights they might have. It is in this context that marriage and family benefit from constitutional safeguards through the protection of the right to dignity, which is central to the enjoyment of all other rights, enshrined in the Bill of Rights.

The absence of express family protection was the subject of denouncement in a number of in South African documents, including the Green Paper on Families.⁴⁰² The Green Paper reports the following:

“Over the years, it became apparent to policy-makers, academics, civil society actors and concerned citizens that there was no policy framework that specifically addressed the family in South Africa. Given the history of the country and the nature of its political economy, as well as the multiplicity of social ills from the past, which continued to confront the country, the absence of a policy framework in this area was identified as a critical policy shortcoming that needed to be urgently addressed. On the other hand, it is evident that the detrimental effects of the policies of colonial

⁴⁰¹ *S v Makwanyane* 1995 (3) SA 391 (CC) para [144].

⁴⁰² Green Paper on Families *Promoting Family Life and Strengthening Families in South Africa* (2011), available at <http://www.thepresidency.gov.za/.../Green%20Paper%20on%20Families.pdf> (date of use 3 July 2015) (“the Green Paper”).

apartheid on the family, for example, land dispossessions, and the migrant labour and homeland systems, have a connection with contemporary South Africa”.⁴⁰³

The Green Paper also reports the following:

“The family continues to remain an auxiliary or, at times, an unintended target of policies in other spheres of government, such as, among others, education, health, human settlements, water and sanitation. As a result, it is quite difficult to determine the manner in which various government policies promote family life and strengthen families. Crucially, the role of safety-net played by the family continues to be eroded 17 years after apartheid, with the result that the country is still being confronted by a host of challenges which are in themselves direct offshoots of disintegrating families”.⁴⁰⁴

However, it can be argued that in contemporary South Africa, family is honoured through marriage as marriage is honoured and protected through the protection of the right to dignity as discussed above and in other legislation as well. With regard to marriage, the Green Paper reports the following:

“Marriage in South Africa is honoured by the country’s Constitution. The Constitution also prohibits marriage discrimination based on sexual orientation. Marriage is also safeguarded by legislation, such as the Marriage Act of 1961 (Act no. 25), the Customary Marriage Act of 1998 (Act no. 120), and the Civil Union Act of 2006 (Act no.17). These laws allow for the legal standing of marriages and civil partnerships between persons, regardless of their sexual orientation or gender. Broadly, family law supplements the roles of this legislation. It covers substantive and procedural family law rules and norms. These are important in the protection and preservation of families, because they deal with different aspects of the law that have a bearing on family life. Family law governs domestic or family-related issues that pertain to marriage or a legal status similar to marriage, the dissolution of marriage, and aspects relating to children and death.”⁴⁰⁵

⁴⁰³ Green Paper 10.

⁴⁰⁴ Green Paper 11.

⁴⁰⁵ Green Paper 19.

In short, international and domestic law protects families and the stability of the entire nation depends on that protection. As already said, ARTs have made it possible for children to arrive in different family structures.⁴⁰⁶ Irrespective of the family structure, every ARTs-born child must have his or her best interests considered as paramount in every matter concerning him or her. The discussion in the next section aims at analysing whether the best interests of ARTs-born children are considered as paramount. This is done through the analysis of constitutional provisions relevant to family members' protection.

4.3.2 Constitutional provisions relevant to the protection of family members

The Constitution does not expressly protect the family, as stated above. There is no express provision in the Constitution that can directly be viewed as relevant to the protection of the family or family life. However, under some provisions, the Constitution explicitly protects the rights of individuals who can be viewed as family members even though it is not clearly indicated that this protection is in the context of the family. Individuals who can be prospective parents and children have their rights protected in the Constitution. This section discusses some of those rights.

4.3.2.1 Provisions relevant to the protection of prospective parents

Many mature people who may one day decide to become parents have many of their rights enshrined in the Constitution. For the purpose of this study, only reproductive rights will be discussed.

4.3.2.1.1 Reproductive rights

As already stated above, every mature person has the right to marry and found a family.⁴⁰⁷ This right implies the possibility to procreate and live together. In this regard, General Comment 19 requires that family planning policies that a state party

⁴⁰⁶ See para 3.1 above.

⁴⁰⁷ See para 4.2.2.1.1 above

adopts should not be compulsory or discriminatory.⁴⁰⁸ The right to procreate which is the implication of the international right to marry and found a family is referred to here as reproductive rights. This right encompasses the use of ARTs for people who cannot for some reason naturally reproduce.

A number of constitutional rights pertaining to specifically women may be grouped together as female reproductive rights. These include the right to life;⁴⁰⁹ the right to privacy;⁴¹⁰ the right to bodily and psychological integrity which includes the right to make decisions concerning reproduction;⁴¹¹ the right to equality;⁴¹² the right to dignity;⁴¹³ the right to have access to health care services, including reproductive health care;⁴¹⁴ and the right of to be informed.⁴¹⁵ The preamble of the Choice on Termination of Pregnancy Act⁴¹⁶ recognises that all these rights are important elements in the promotion of reproductive rights.

The analysis of reproductive rights will therefore consist in a brief discussion of all the rights enumerated above and also their possible limitation in terms of section 36 of the Constitution. The analysis of the reproductive rights is important to the extent that it opens a way for the discussion of the relationship between the best interests of the child and the interests of other family members.⁴¹⁷

a The right to life

Section 11 of the Constitution provides that everyone has the right to life. The right to life was at issue in *S v Makwanyane*,⁴¹⁸ where O'Regan J maintained that the right to

⁴⁰⁸ General Comment 19 para [5].

⁴⁰⁹ Section 11 of the Constitution.

⁴¹⁰ Section 14 of the Constitution.

⁴¹¹ Section 12(2) of the Constitution.

⁴¹² Section 9 of the Constitution.

⁴¹³ Section 10 of the Constitution.

⁴¹⁴ Section 27(1) (c) of the Constitution.

⁴¹⁵ Section 32 of the Constitution.

⁴¹⁶ Choice on Termination of Pregnancy Act 92 of 1996 (hereafter "the Choice Act").

⁴¹⁷ See para 5.8 below.

⁴¹⁸ *S v Makwanyane* 1995 (3) SA 391 (CC) (hereafter "the Makwanyane" case)

life goes beyond mere existence; it includes the right to live as human being, to be part of a broader community, and to share in the presence of humanity.⁴¹⁹

According to O’Sullivan, there is a link between the Constitution and the Choice Act. Sullivan asserts that section 11 of the Constitution is promoted by the Choice Act to the extent that its less restrictive provisions provide women with access to reproductive health care services that will prevent or reduce the majority of deaths associated with illegal and unsafe termination of pregnancies.⁴²⁰ This would suggest that under the Choice Act, women must access the reproductive health services in order to avoid unsafe abortions and hence reduce to the minimum the rate of woman’s death as a result of unsafe termination of pregnancies. In other words, the Choice Act promotes a women’s right to life as enshrined in section 11 of the Constitution.

b The right to have access to health care services

In terms of section 27 of the Constitution, everyone has the right to have access to health care services, including reproductive health care,⁴²¹ and the state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of this right.⁴²² According to O’Sullivan, reproductive health implies that people have the ability to engage in safe sexual relationships and that women can safely progress through their pregnancies. In this regard, access to safe termination services contributes to reproductive rights through the reduction of maternal morbidity and mortality.⁴²³ The right to have access to health care services was at issue in *Soobramoney v Minister of Health*.⁴²⁴ In respect of the right to have access to health care services, the court held that the obligation that section 27 of the Constitution imposes on the state are dependent on available

⁴¹⁹ *S v Makwanyane* 1995 (3) SA 391 (CC) 506 D.

⁴²⁰ O’Sullivan “Reproductive rights” In Woolman *et al* (eds) *Constitutional Law of South Africa* 37-7.

⁴²¹ Section 27(1) (a) of the Constitution.

⁴²² Section 27(2) of the Constitution.

⁴²³ O’Sullivan in Woolman *et al* (eds) 37-24.

⁴²⁴ 1998 (1) SA 765 (CC) (hereafter “the *Soobramoney* case”).

resources that the state can allocate to such purposes.⁴²⁵ This would suggest that the availability of state resources can enhance or limit woman's access to health care. The right to have access to health care services was also at issue in *Minister of Health v Treatment Action Campaign*.⁴²⁶ In this case the Constitutional Court noted that the right to have access to health care services includes at least the minimum necessities of life, consistent with human dignity, and as such no one should be condemned to a life below the basic level of dignified human existence.⁴²⁷ It is important to note that this applies to children born or to be born as a result of the use of ARTs. The realisation of this right requires the State to take appropriate legislative, administrative, budgetary, judicial and other measures.⁴²⁸

c The right to have access to information

The South African Constitution protects the right of every individual to have access to information. In terms of section 32(1) of the Constitution, everyone has the right of access to any information held by the state,⁴²⁹ and any information that is held by another person and that is required for the exercise or protection of any right.⁴³⁰ With regard to reproductive rights, information is crucial. O'Sullivan submits that women's exercise of their right to reproductive decision making is dependent on the information they have concerning reproductive health. O'Sullivan goes on to say that if a woman lacks such important information, she will be limited in the exercise of the control she has over her body.⁴³¹ This would suggest that information concerning reproductive health must be provided to every woman to help her make the right decision regarding reproduction and hence properly exercise control over her body. It is in this respect that the Choice Act imposes an obligation on medical practitioners to provide reproductive services to all women. In terms of section 6 of the Choice

⁴²⁵ 1998 (1) SA 765 (CC) 771 G.

⁴²⁶ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC).

⁴²⁷ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) para [28].

⁴²⁸ Brand and *Russel Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* 18.

⁴²⁹ Section 31(1) (a) of the Constitution.

⁴³⁰ Section 31(1) (b) of the Constitution.

⁴³¹ O'Sullivan in Woolman *et al* (eds) 37-24.

Act, medical practitioners and midwives must provide women with information concerning their rights in relation to the Act.⁴³²

Naturally speaking, women play an important role in the reproduction of humankind. In many patriarchal societies, there is a tendency to use women merely as reproductive machines. It is therefore important to protect women against this treatment. In this regard, Pickles emphasises that women need to be provided with information in order to have such protection without which they may be reduced to inferior standard citizens merely filling the role of reproducing human beings in society.⁴³³

d The right to equality

The right to equality is set out in section 9 of the Constitution. In terms of this section everyone is equal before the law and has the right to equal protection and benefit of the law.⁴³⁴ The Constitution further states that the right to 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.⁴³⁵ 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.⁴³⁶ No person may unfairly discriminate directly or indirectly on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.⁴³⁷

⁴³² Section 6 of the Choice Act.

⁴³³ Pickles "Termination-of-pregnancy rights and foetal interests in continued existence in South Africa: The Choice on Termination of Pregnancy Act 92 of 1996" 2012 *PELJ* 415.

⁴³⁴ Section 9(1) of the Constitution

⁴³⁵ Section 9(2) of the Constitution.

⁴³⁶ Section 9(3) of the Constitution.

⁴³⁷ Section 9(4) of the Constitution.

In *Minister of Home Affairs v Fourie, Lesbian and Gay Equality Project v Minister of Home Affairs* meaning was given to this right.⁴³⁸ In this case, the court held that the right to equality is the right to be different and requires equal concern and respect across those differences.⁴³⁹ In its narrow sense, equality maintains that differences are not the ground for excluding, marginalising or stigmatising other people.⁴⁴⁰

With regard to the right of equality, Birembaum contends that the fact that a woman is the only person who can fall pregnant in a society has consequences attached to it. In the case of gender discrimination, rules that apply neutrally or equally without taking into consideration the fact of falling pregnant and all consequences attached to it would discriminate against women when the Bill of Rights is interpreted under a substantive perspective.⁴⁴¹ As far as reproductive rights are concerned, the substantive approach of equality establishes a relationship between the discrimination against women and their reproductive role in the family.⁴⁴² In O'Sullivan's opinion, the fact that section 9(3) considers pregnancy as one of prohibited grounds for discrimination puts pregnant women in the group of disadvantaged individuals.⁴⁴³ O'Sullivan further maintains that under the substantive equality approach, the state is under an obligation to provide the necessary resources to allow individuals to enjoy their rights.⁴⁴⁴ In this regard, Ngwena points out that public hospitals are required to provide free termination of pregnancy services.⁴⁴⁵

e The right to bodily and psychological integrity

According to section 12(2) of the Constitution, everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning

⁴³⁸ 2006 (1) SA 524 (CC.)

⁴³⁹ 2006 (1) SA 524 (CC) 549 B

⁴⁴⁰ 2006 (1) SA 524 (CC) 549 C-D.

⁴⁴¹ Birembaum "Contextualising choice: Abortion, equality and the right to make decisions" 1996 *SAJHR* 488.

⁴⁴² O'Sullivan in Woolman *et al* (eds) 37-14.

⁴⁴³ O'Sullivan in Woolman *et al* (eds) 37-14.

⁴⁴⁴ O'Sullivan in Woolman *et al* (eds) 37-14.

⁴⁴⁵ Ngwena "An appraisal of abortion laws in Southern Africa from a reproductive health rights perspective" 2004 *JLME* 716.

reproduction,⁴⁴⁶ and the right to security in and control over their body,⁴⁴⁷ and not to be subjected to medical or scientific experiments without their informed consent.⁴⁴⁸ These rights were at issue in *Christian Lawyers Association of South Africa v The Minister of Health (Reproductive Health Alliance as Amicus Curiae)*,⁴⁴⁹ where the court stated that section 12(2) provides women with the constitutional right to terminate pregnancy. This section also entrenches freedom of choice, which is reinforced by the rights to life, dignity, privacy, and access to reproductive health care.⁴⁵⁰ It is also submitted that section 12(2) directly confronts the fact that women do not enjoy security in and control over their bodies, taking into account the high rates of sexual violence against women, and that the circumstances in which women become pregnant are often beyond their control.⁴⁵¹ In this regard O’Sullivan contends that the Choice Acts plays the role of promoting a woman’s right to freedom and security of her body by affording her the right to choose to terminate her pregnancy safely. The woman concerned is in the best position to make that decision; only her consent is needed in terms of the Act.⁴⁵²

f Pregnant children’s rights

The rights contained in section 12(2) of the Constitution are held to be afforded to children as they are included in “everyone”. This would suggest that a pregnant child also has the constitutional right to bodily and psychological integrity, which includes the right to terminate her pregnancy. This was the position of the court in *Christian Lawyers Association of South Africa v The Minister of Health (Reproductive Health Alliance as Amicus Curiae)*,⁴⁵³ where the court held that the constitutional rights afforded in terms of section 12(2) (a) and (b) are afforded to “everyone”, including girls under the age of eighteen, and that the Choice Act allows a woman with the capacity to give informed consent to terminate her pregnancy.⁴⁵⁴ The right to

⁴⁴⁶ Section 12(2)(a) of the Constitution.

⁴⁴⁷ Section 12(2)(b) of the Constitution.

⁴⁴⁸ Section 12(2)(c) of the Constitution

⁴⁴⁹ 2005 (1) SA 509 (T) at 527D.

⁴⁵⁰ O’Sullivan in Woolman *et al* (eds) 37-15.

⁴⁵¹ O’Sullivan in Woolman *et al* (eds) 37-15.

⁴⁵² Choice Act s 5(2). See also O’Sullivan in Woolman *et al* (eds) 37-18.

⁴⁵³ 2005 (1) SA 509 (T).

⁴⁵⁴ Choice Act s 5(1).

terminate a pregnancy stems from fundamental constitutional rights; it would be irrational to limit the exercise of that right based on the woman's age.⁴⁵⁵

g The right to privacy

Section 14 of the Constitution provides that everyone has the right to privacy, which includes the right not to have the privacy of their communications infringed.⁴⁵⁶ Meaning was given to privacy in *Bernstein v Bester*.⁴⁵⁷ In this case the court held that the right to privacy constitutes the protection of a person's inner sanctum (family life, sexual preference and home environment) from erosion by the exercise of conflicting rights of the community.⁴⁵⁸ The court further held that privacy is based on the notion of what is necessary to have one's own autonomous identity.⁴⁵⁹ Some authors, including O'Sullivan and McQuoid-Mason have attempted to give their understanding of the right to privacy. McQuoid-Mason, for instance, is of the view that the right to privacy is a substantive right which permits individuals to make decisions about their lives without state interference and empowers them to exercise control over procreation, contraception and child-rearing.⁴⁶⁰ For O'Sullivan, privacy is the right to be left alone.⁴⁶¹ O'Sullivan is of the view that the right to privacy should be used in conjunction with equality rights, since relying on privacy rights in isolation introduces a number of negative aspects.⁴⁶² In this regard she argues that it is easier to justify limiting a woman's access to termination of pregnancy services on the grounds that the termination of pregnancy is considered to fall within the woman's private sphere, thus removing a duty on the state to provide public funding or to intervene and protect women.⁴⁶³

⁴⁵⁵ 512B.

⁴⁵⁶ Section 14(d) of the Constitution.

⁴⁵⁷ 1996 (2) SA 751 (CC).

⁴⁵⁸ 1996 (2) SA 751 (CC) 788D.

⁴⁵⁹ 1996 (2) SA 751 (CC) 788D.

⁴⁶⁰ McQuoid-Mason in Woolman *et al* (eds) 38-1–38-43.

⁴⁶¹ O'Sullivan in Woolman *et al* (eds) 37-8.

⁴⁶² O'Sullivan in Woolman *et al* (eds) 37-12.

⁴⁶³ O'Sullivan in Woolman *et al* (eds) 37-12. See also Ngwena 2004 *JLME* 716.

h The right to dignity

In terms of the section 10 of the Constitution, everyone has inherent dignity and the right to have their dignity respected and protected.⁴⁶⁴ The right to dignity has been a concern in a number of cases decided in South Africa. In each case, the court tried to explain the content of the right to dignity. *In S v Makwanyane*,⁴⁶⁵ for instance, the court described the right to dignity together with the right to life as the most important human rights. The court further held that entrenching a right to personal dignity is an acknowledgement that human beings are entitled to be treated as worthy of respect and concern.⁴⁶⁶

The right to dignity was also at issue in the *National Coalition for Gay and Lesbian Equality v Minister of Justice*.⁴⁶⁷ In this case the court held that honouring someone's dignity requires at the very least to acknowledge the value and worth of all individuals as members of society.⁴⁶⁸ The views of authors, including O'Sullivan and Woolman are important for this discussion. O'Sullivan points out that "denying a woman the freedom to make and act upon a decision concerning reproduction treats her as a means to an end and strips her of her dignity."⁴⁶⁹ Woolman goes even deeper and explains what should be done in order to ensure that a woman is not treated as a means to an end. According to Woolman, in terms of being an individual as an end in herself, women should not be treated as mere instrumental objects of the will of others. Dignity taken under this perspective sets a standard below which ethical and legal behaviour may not fall.⁴⁷⁰ Woolman observes that in *Christian Lawyers Association of South Africa v The Minister of Health (Reproductive Health Alliance as Amicus Curiae)*,⁴⁷¹ and *Christian Lawyers Association of South Africa v The Minister of Health*,⁴⁷² the court expressly recognised that the right to dignity summarises two definitions especially relevant to women in relation to reproductive

⁴⁶⁴ Section 10 of the Constitution.

⁴⁶⁵ 1995 (3) SA 391 (CC)

⁴⁶⁶ 1995 (3) SA 391 (CC) 507 A-B.

⁴⁶⁷ 1991 (1) SA 6 (CC)

⁴⁶⁸ 1991 (1) SA 6 (CC) 28 D-E.

⁴⁶⁹ O'Sullivan in Woolman *et al* (eds) 37-23.

⁴⁷⁰ Woolman "Dignity" in Woolman *et al* (eds) *Constitutional Law* 36-9.

⁴⁷¹ 2005 (1) SA 509 (T).

⁴⁷² 1998 (4) SA 113 (T).

rights: “equal concern and equal respect” and “self-affectualisation”.⁴⁷³ According to Woolman “equal concern and equal respect” is primarily a negative option not to treat another merely as a means, but rather to recognise the moral autonomy that another person has.⁴⁷⁴ According to this approach dignity is a formal entitlement to equal concern and respect.⁴⁷⁵ With regard to self-affectualisation, women are entitled to respect since they hold the capacity to create meaning for them and pursue their own ends.⁴⁷⁶

Reproductive rights were at issue in *AB Surrogacy Advisory Group v Minister of Social Development (Centre for Child Law as Amicus Curiae)*.⁴⁷⁷ In this case the first applicant was an infertile mother who desperately wanted to have a child using ARTs. It was established that with both her egg and her husband’s sperm, they failed to have a child after undergoing many IVF procedures. She divorced her husband and after that she underwent fourteen IVF cycles. She used eggs and sperm from unknown donors for fourteen of these proceedings, without any success. She then decided to try to use a surrogate mother for the purpose of carrying and giving birth to a child for her. Through the services of an organisation called “Baby 2 Mom”, she contacted a surrogate mother who agreed to act as a surrogate mother. However, she was advised by the Surrogacy Advisory Group that her plans would not work as section 294 of the Children’s Act does not allow a single person who is infertile in the sense that he or she cannot contribute his or her own gamete to use surrogacy as a means to have a child. She then decided to challenge the constitutional validity of the provisions of section 294 of the Children’s Act on the grounds that the genetic link requirement violates her rights to equality, dignity, reproductive health care, autonomy and privacy.

At issue in the case is the constitutionality of section 294 of Children’s Act, which provides that “[n]o 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

⁴⁷³ Woolman in Woolman *et al* (eds) 36-34.

⁴⁷⁴ Woolman in Woolman *et al* (eds) 36-10.

⁴⁷⁵ Woolman in Woolman *et al* (eds) 36-10

⁴⁷⁶ Woolman in Woolman *et al* (eds) 37-11.

⁴⁷⁷ [2015] 4 All SA 24 (GP).

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.”

In support of her claim, the first applicant submitted that, although it is accepted that most people would prefer to use their own gametes in order to establish a genetic link with a child, there is no justification for the limitation of these rights on this basis and for the enforcement of such a preference on everyone in the context of surrogacy, especially where such a limitation does not exist in the context of IVF.⁴⁷⁸

The court was of the view that no strong evidence was provided to support the allegation that the genetic link between a child and the commissioning single parent or its lack would have any effect on the best interests of the child in the context of surrogacy. In the words of the judge:

“The court observed that it was not persuaded that the respondent has placed any persuasive and credible data before the court to show that the presence or absence of a genetic link between a parent and child in the context of surrogacy appears to have an adverse effect on the child’s psychological well-being”.⁴⁷⁹

The court held that the purpose of regulating surrogacy in legislation was to allow commissioning parents, including a single parent, to have a child. This is also the purpose of the legislation in the IVF context. Requiring that a genetic link should exist between the parent(s) and the child in the context of surrogacy, while such a requirement is not set in the context of IVF, defeats the purpose and in the absence of a legitimate governmental purpose should be struck down.⁴⁸⁰

The court then held that section 294 of Children’s Act is inconsistent with the Constitution. In this case, the court took into account the child’s psychological well-

⁴⁷⁸ [2015] 4 All SA 24 (GP) para [8].

⁴⁷⁹ [2015] 4 All SA 24 (GP) para [86].

⁴⁸⁰ [2015] 4 All SA 24 (GP) para [87].

being, the state interests in regulating ARTs and the right of the commissioning parents to have a child, in order to determine whether the challenged section of the Children's Act was consistent with the Constitution. The court found that it was in the interests of the commissioning parents that the state should make it possible for them to have a child through ARTs; the state has interests in regulating surrogacy and the use of IVF to make ART services available to those who for some reasons cannot reproduce naturally. Lastly it is in the best interests of the child that the means used to bring them into the world should not in the context of this case have adverse effects on their psychological well-being.

The court concluded that the presence or absence of a genetic link between the parent(s) and child did not have adverse effects on resulting children, that it was only through surrogacy that the commissioning parents could have their child, and that it was this end that was the purpose for the state to regulate surrogacy.

This case is one of leading examples of the way South African courts approach ARTs and interpret reproductive rights. From the reasoning of the court, it can be argued that through its decision the court seems to support the view that the judiciary and the legislature as well as the executive's efforts in respect of ARTs should be to make sure that every person enjoys his or her reproductive rights to have a child. In addition, the court seems not to consider the child's right to know his or her origins protected in international law,⁴⁸¹ as being in the best interests of the child.

It is important to note that not only women have their reproductive rights protected; Men also have reproductive rights and can claim it when they feel that those rights are not protected. Single men, gay couples, and men in heterosexual relationships cannot be denied their right to reproduce even in the case they must use assisted reproduction. The question that arises is what can be the scope of the reproductive rights?

⁴⁸¹ For a brief discussion on this right see Paragraph 4.2.2.2.4 above.

4.3.2.1.2 The scope of the reproductive rights

It is widely accepted that the right to have or not to have children is an important personal liberty. As a result, the state cannot restrict decisions about reproduction except in cases which could lead to serious harm. In this regard Robertson maintains that even persons with severe mental illness or retardation are protected against compulsory sterilisation or contraception.⁴⁸² In South Africa, personal liberty is protected under the right to equality⁴⁸³ enshrined in the Bill of Rights. In terms of the Bill of Rights, equality is viewed as including the full and equal enjoyment of all rights and freedoms.⁴⁸⁴ To protect the right to equality, the Bill of Rights clearly states that 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.⁴⁸⁵ It is this personal liberty that is referred to in this study as the parental procreative right. As discussed above,⁴⁸⁶ the procreative right is a right that is constitutionally protected. In terms of the South African Constitution, everyone has the right to bodily and psychological integrity, which includes the right to make decisions regarding reproduction. This would suggest that in South Africa, every mature person has the right to decide whether or not to reproduce or have children.

However, the South African Constitution neither contains a provision that recognises the family as the basic unit of society nor does it provide that people have the right to freely marry and build families.⁴⁸⁷ A number of people in the world, including in South Africa, have used their right to procreate. These include infertile people, gay men and lesbian women who are not able to or choose not to reproduce naturally. They therefore have used ARTs to overcome infertility or achieve other reproductive goals. The right to procreate can be interpreted to include the use of ARTs and other

⁴⁸² Robertson 2004 *AJLM* 19-20.

⁴⁸³ See para 4.3.2.1.1.d.

⁴⁸⁴ Section 9(2) of the Constitution.

⁴⁸⁵ Section 9(3) of the Constitution.

⁴⁸⁶ See ch 4 para 4.3.2.1.1 above.

⁴⁸⁷ *In re Certification of the Constitution of the RSA*, 1996 1996 (4) SA 744 (CC) para [96].

related procedures for the purposes of having children. The Children's Act recognises ARTs as one of the means to reproduce.⁴⁸⁸ Proponents of the unlimited right to procreate, including Robertson, are of the view that this interest should presumptively be protected against limitation.⁴⁸⁹ In other words, no one should suffer any limitation of his or her right to procreate.

However, the use of ARTs is associated with many risks, as was already indicated in chapter three.⁴⁹⁰ In addition, Robertson reports that the parents' strong desire to reproduce sometimes causes them to decide to have children through ARTs even though they are informed that the resulting child will be born with physical defects or many other health challenges. They do so simply because ARTs are the only means for them to have children. In the words of Robertson:

“People who reproduce have a strong interest in having healthy children, as do the ART providers who help make such births possible. In some cases, however, it may not be possible to guarantee a safe outcome. The techniques necessary to reproduce may carry inherent risks of physical defects or the social situation of the users may be less than ideal. In those situations, there may be no practical way to eliminate the risks of an unfavourable outcome and still enable the child to be born. The parents, however, may still wish to reproduce because it is the only way for them to have genetically related offspring whom they will rear or provide for”⁴⁹¹

This situation where parents are allowed to bring into this world children who will suffer from congenital diseases because they are ARTs-born children, and because having to resort to ARTs is the only way for these parents to have genetically related children, raises the question whether such decision could be regarded as part of their procreative liberty. In other words, does the procreative right enshrined in the South African Constitution encompass the decision to bring forth children who will possibly have health problems or physical defects?

⁴⁸⁸ Section 40 of the Children's Act.

⁴⁸⁹ Robertson 2004 *AJLM* 20.

⁴⁹⁰ See para 3.4 above.

⁴⁹¹ Robertson 2004 *AJLM* 39.

A second and similar question arises with the practice of genetic selection of offspring.⁴⁹² Genetic selection refers to a situation where the prospective parents request that the future child should (or should not) have certain genetic characteristics.⁴⁹³ Genetic selection commonly arises in two situations. The first is when genetic tests are carried out during the pregnancy, with the assumption, or expectation, that certain genetic disorders (for example, Tay Sachs, Cystic Fibrosis, and sometimes also Down Syndrome) would lead to abortion.⁴⁹⁴ The second type of genetic selection takes place even before pregnancy, and it necessarily includes ART. In this scenario, the intended parents resort to IVF for reasons of either physical or social infertility (gay, lesbian, or single-parent) and subsequently use the technique of pre-implantation genetic diagnosis (PGD) to screen for certain genetic characteristics. In this way, the intended parents (and doctors) can choose which embryos will be implanted in the womb.⁴⁹⁵ Historically, this screening was developed to address parental (as well as medical and societal) concerns, and was used to test for major genetic disorders and disabilities. PGD technology is increasingly used, however, for other reasons. These include sex selection (mainly on the basis of son preference) as well as attempts to create a child whose genetic tissue composition matches the one of an existing sick sibling for the purpose of being a cell donor (“tissue-matching sibling” or “saviour sibling”) and, presumably, also to answer parental requests for other traits that the future child will have (for example, height, hair colour or athletic potential).⁴⁹⁶

The genetic selection of offspring raises the question whether this practice can be regarded as part of the parental procreative liberty and both situations (the choice to bring forth children knowing that they are likely to suffer from congenital diseases and the genetic selection of offspring) also raise the question to what extent these choices can conflict with the rights of the children, once born.

⁴⁹² See para 3.5.2 above.

⁴⁹³ Sabatello “Are the kids all right? A child-centred approach to assisted reproductive technology” 2013 *NQHR* 87.

⁴⁹⁴ Asch, Gostin and Johnson “Respecting persons with disabilities and preventing disability: Is there a conflict?” in Herr, Gostin and Koh (eds) *The Human Rights of Persons with Intellectual Disabilities: Different but Equal?* 324–327.

⁴⁹⁵ Sabatello 2013 *NQHR* 87-88.

⁴⁹⁶ Sabatello 2013 *NQHR* 87-88.

It is important to note that the two abovementioned scenarios give rise to two different questions that can be reformulated as follows:

- (a) Are the choice to bring forth children with the knowledge of their high probability of being born with some health problems and the selection of offspring within the parental right of reproduction?; and
- (b) If so, to what extent can these choices conflict with the rights of the ARTs-born child?

A better approach to the first question requires that the two aspects of the choice (choice to have children with physical defects and choice to proceed to the genetic selection of offspring) be addressed separately.

With regard to the first aspect of the first question, it is important to remember that procreative or reproductive rights are ordinarily the rights against the state limiting or restricting an individual's reproductive choices or efforts to obtain reproductive services from a willing provider. These rights do not impose on the state the obligation to provide the services or resources needed, nor do they obligate private individuals to provide access to services or resources that the provider chooses not to provide. Like all rights, they are not absolute, and can be restricted or limited for a good cause.⁴⁹⁷ Put differently, decisions regarding matters affecting family life such as whether or not to have children, with whom to have them and when and how to have them are considered as personal matters. This is so because such issues are intricately connected to human emotions and human nature. Therefore, these issues are considered as "private matters" that only the individuals involved may decide on freely and without any undue interference.⁴⁹⁸ The answer to this complex question requires the distinction between the interest that parents may have in choosing to use ARTs and bring forth a child even though there is a risk that the child may be

⁴⁹⁷ Robertson 2004 *AJLM* 21.

⁴⁹⁸ Zawawi "Donated materials in assisted reproductive technologies: An ethico-legal analysis of ART legislations worldwide" 2010 *JMEHM* 1.

sick or disabled and their interest to choose a child with particular characteristics or sex.

With regard to the first aspect of this question, Robertson suggests that procreative rights should give access to ARTs only if the procreative need is implicated.⁴⁹⁹ This would suggest that the parents who request to undergo ART procedures and run the risk of reproducing a child with health problems must do so only if it is their only way of having children. In other words, if there is a reasonable need to have a genetically related child, then the prospective parents can use their procreative right and undergo ART procedures to have the child they need. In this regard, Robertson asks whether parents who are willing to use ARTs that risk leading to children with a greatly reduced quality of life are pursuing reproductive needs as commonly valued and understood, thus qualifying them for the special protection usually accorded to reproductive choice. Alternatively, a relevant question would be whether the contested use makes sense as a way to resolve an individual's goals of producing viable genetically related offspring in the next generation.⁵⁰⁰

Robertson further suggests that a relevant factor in assessing the reproductive interest of persons seeking to use ARTs that risk adverse effects on offspring welfare is whether they are committed to the well-being of the resulting child, and will rear and care for the resulting children just as parents who reproduce coitally do.⁵⁰¹ In this regard, it can be argued that not all ARTs-born children are genetically linked to their parents; there are scenarios where the ARTs-born child is a result of donated gametes fertilised in a test tube and the embryo implanted in the womb of a woman who is not the mother who will rear the child. However, Robertson concludes that choosing to use ARTs and having children who are likely to be sick or disabled falls within the parental procreative liberty.⁵⁰² This confirms that if the choice of parents to use ARTs in order to have a genetically related child can sometimes result in a child

⁴⁹⁹ Robertson 2004 *AJLM* 21.

⁵⁰⁰ Robertson 2004 *AJLM* 21.

⁵⁰¹ Robertson 2004 *AJLM* 21.

⁵⁰² Robertson 2004 *AJLM* 21.

with disability, that choice falls within their parental right of reproduction because parents commit themselves to rear and provide for such child.

Mills shares this view. She observes that much of the discussion around reproductive liberty emphasises the importance of defending the free choice of parents against state coercion. This emphasis construes reproductive liberty as a negative freedom, wherein what is at issue is the non-impedance of or absence of interference in parental choice.⁵⁰³ She suggests that reproductive freedom can also be understood as a form of positive freedom, that is the freedom to “make oneself” according to various ethical and aesthetic principles or values. She goes on suggesting that reproductive liberty understood as negative freedom is inseparable from such a positive freedom.⁵⁰⁴ She then argues that attempts to place limitations on procreative liberty have to establish that reproductive technologies would cause a sufficiently high degree of harm to warrant impinging on the rights of parents to choose according to their own interests and values.⁵⁰⁵ Mills concludes as follows:

“Recent changes in reproductive practices are such a problematisation of liberty; as individuals strive to enact self-formative ethical practices by shaping their lives in accordance with closely held values and principles, they illuminate the ways in which this dimension of being has presented itself to be thought. In doing so, they brought into contestation the nature and limits of freedom. Indeed, this contestation or ‘agonism’ can be seen as an essential aspect of reproductive liberty as new practices such as the deliberate selection of traits in children, including deafness and disability, test the limits of parental freedom and responsibility”.⁵⁰⁶

This would suggest that the ARTs-born child is a result of the exercise of parental rights which as such should not be limited. The view that the choice of using ARTs and reproducing a child with health problems falls within the parental procreative liberty, was subjected to criticism and rejection. Dillard rejects the view that

⁵⁰³ Mills “Reproductive autonomy as self-making: Procreative liberty and the practice of ethical subjectivity” 2013 *JMP* 640.

⁵⁰⁴ Mills 2013 *JMP* 640.

⁵⁰⁵ Mills 2013 *JMP* 641.

⁵⁰⁶ Mills 2013 *JMP* 654.

procreative liberty encompasses the choice of having a disabled child. He starts his argument by alleging that to procreate without restriction assumes a moral and legal interest to procreate freely, without being subject to law and without regard for others.⁵⁰⁷ He then suggests that the better approach to the procreative right is to determine what the procreative right consists of in the first place, rather than rushing to find a compelling state interest to justify derogating from the right, getting mired in the science and economics of sustainability, or relying exclusively on moral obligations owed to politically impotent future generations.⁵⁰⁸ Dillard views procreation in isolation, an act requiring its own justification and protection. Dillard argues that an act of procreation refers to any voluntary act taken by an individual that a proximate cause of the conception of a future person or persons, with such person or persons eventually being born.⁵⁰⁹ According to him individual persons engaging in sexual intercourse that results in the birth of a child, regardless of intent, will have procreated. A couple that enters into a surrogacy contract and bears no biological relationship to the resulting child, but whose acts might be considered the proximate cause of its conception and birth has arguably procreated. The relevant consideration is whether a person or persons have voluntarily acted to cause the creation of another being, and those actions have resulted in the birth of a child.⁵¹⁰ In the words of Dillard

“Despite the common assumption that there exists a vague, personal and broad (if not unlimited) procreative right, encompassing in its scope various distinct behaviours, that which can legally and morally be regarded as the valuable and protected procreative behavior is much more narrow. This is consistent with any theory of rights and of the public good, for the law must always define and balance behaviours to avoid conflicts. The right to procreate, correctly defined, is a right at least to replace oneself, and at most to procreate up to a point that optimizes the public good.... This satiable and narrow right is not arbitrary, but reflects specific competing rights and duties – especially the rights of prospective children – that both qualify and justify the right. While commentators, courts and even the U.S. Congress have in the abstract inflated the right as limitless in scope and even inviolable, in

⁵⁰⁷ Dillard “Rethinking the procreative right” 2007 *YHRDJ* 3.

⁵⁰⁸ Dillard 2007 *YHRDJ* 6.

⁵⁰⁹ Dillard 2007 *YHRDJ* 6.

⁵¹⁰ Dillard 2007 *YHRDJ* 9.

those instances where the right has been tested in conflicts with other rights, it is invariably limited. This is consistent with the normative relation between law and procreation, and with intuitive limits on the right based on the limited intrinsic value of procreating, its interpersonal nature, and the specific competing rights and duties at issue – those of the prospective children and those of society.”⁵¹¹

This means that the procreative right is not unlimited, and thus choosing to have children with congenital sicknesses or disabilities does not fall within the parental procreative right not only because this choice is in conflict with the rights of the child, but also because the resulting child is not procreated up to a point that optimises the public good. Steinbock also rejected the view that parents can choose a child even if the child will suffer from genetic diseases. According to him:

“It is wrong to have children who cannot have minimally decent lives, although reasonable people can disagree about what constitutes a decent minimum. Furthermore, such judgments should be based on a realistic assessment of the facts, not stereotypical thinking. In particular, it is important to remember that people can have lives that are well worth living, despite disabling conditions or poverty. Nevertheless, there are times when procreation is wrong, even though no one is harmed or wronged by birth. To explain these cases, we need to supplement a morality of person-affecting reasons with a comparative impersonal principle: the principle of substitution..... The morality of procreation, and the obligation to avoid procreation, is based in part on an objective assessment of the likely quality of the future child’s life, but also on the reasons, intentions and attitudes of those who would have children”.⁵¹²

This would suggest that deliberately choosing to have a child who will not have a decent life is not a choice that should be encouraged.

With regard to the second aspect of the first question (genetic selection of offspring), it is important to note that opinions are also divergent. Opponents of the genetic

⁵¹¹ Dillard 2007 *YHRDJ* 63.

⁵¹² Steinbock “Wrongful life and procreative decisions” in Roberts and Wasserman (eds) *Harming Future Persons: Ethics, Genetics and the Nonidentity Problem* 174.

selection of offspring argue that this practice is beyond the parental right of reproduction. Some reasons were offered in support of this opinion. Davis, for instance, raises the concern of the commodification of the child as a result of the gamete manipulation. He also argues that such selection views the child as a means to an end, in contravention with the notion of inherent dignity and worth of the human person in himself or herself.⁵¹³ According to Dolev and Shkedi, the selection of offspring can cause a possible destruction of the pre-embryo.⁵¹⁴ For Thomas, selection creates a “situation in which babies have become consumer products, accessories to our lifestyle”.⁵¹⁵ According to the Council of Europe, children have “rights-in-trust” that require the protection of adults (parents and others) for the child’s exercise of them later, in adulthood.⁵¹⁶ The Convention on Human Rights and Biomedicine allows only the performing of predictive genetic tests for medical purposes. This means that the predictive genetic test must be done only to detect a genetic disposition or susceptibility to a disease for health purposes and for some forms of treatment,⁵¹⁷ but that predictive genetic tests that are done with the purpose of selecting a preferred sex for a child is prohibited.⁵¹⁸ According to Mills the fact itself of causing the existence of a human being, is one of the most responsible actions in the range of human life. To undertake this responsibility, to bestow a life which may be either a curse or a blessing unless the being on whom it is to be bestowed will have at least the ordinary chances of a desirable existence, is a crime against that being.⁵¹⁹ Martín argues that even if one were to accept that procreative liberty is a fundamental moral or legal right, no compelling reasons have been provided for believing that sex selection falls within the scope of procreative liberty.

⁵¹³ Davis “The parental investment factor and the child’s right to an open future” 2009 *HCR* 25–26.

⁵¹⁴ Dolev and Shkedi “On new reproductive technologies and family ethics: Pre-implantation genetic diagnosis for sibling donor in Israel and Germany” 2007 *SSM* 2082.

⁵¹⁵ Thomas “Stop the baby trade” (2006), available at <http://childrenhaverights-saynotoreprotech.blogspot.com/2007/02/new-eugenics-californiacryobank.html> (date of use 27 August 2014).

⁵¹⁶ Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997), available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=164&CL=ENG> (date of use 20 March 2014).

⁵¹⁷ Articles 12-13 of the Convention on Human Rights and Biomedicine.

⁵¹⁸ Article 14 of the Convention on Human Rights and Biomedicine.

⁵¹⁹ Mills 2013 *JMP* 640.

Sex selection should be prohibited because it causes harm to the resulting child.⁵²⁰ In short these scholars are of the view that the genetic selection of offspring is not part of the procreative right of the parents because of the above reasons.

Another group of scholars argue that the practice is part of the parental right to reproduce. In support of this view, Robertson argues that if parents will not reproduce unless they can use sex selection, then the activity is constitutive of procreative liberty and therefore deserves a strong presumption against interference. Thus, for procreative liberty to implicate sex selection, the preference for a child of a particular sex cannot be simply a mere preference. It needs to be a necessary condition of a decision to have a child at all.⁵²¹ Sparrow is also of the view that even if sex selection is intended to choose better genes for the future child, and despite the fact that it is admitted that a “best child” does not exist, parents still have “some” reason to choose genes that would be likely to increase the welfare of their children.⁵²²

In short, according to the above opinions, prospective parents may use sex selection for the purpose of having a desired child; this choice falls within their procreative liberty because not only is it their preference and their only way of reproducing, but also because it increases the welfare of the resulting child.

This discussion is intended to provide at least in part an answer to the question whether ARTs could serve the best interests of the child. Another part of the answer will be provided in the discussion related to the second question, which is to what extent ARTs contravene the rights of the child.

With regard to this question, Blyth has noted that the key argument of the opponents of ARTs is that ART techniques are a form of child abuse. This argument has often been tied with the issue of the physical and mental risks that the procedures create.

⁵²⁰ Martín “Sex selection and the procreative liberty framework” 2013 *KIEJ* 13-14.

⁵²¹ Robertson 2003 *AJLM* 462.

⁵²² Sparrow “The real force of ‘procreative beneficence’” in Akayabashi (ed) *The Future of Bioethics: International Dialogues* 188.

The risks may be the result of the genetic selection of offspring and the gamete donor anonymity.⁵²³ Many scholars have commented in length on the child abuse issue. Marquardt, for instance, is of the view that the revolutions that have occurred in family structures and in the notion of who might be a parent, revolutions that owe at least a partial debt to ARTs, have created great uncertainties and vulnerabilities for ARTs-born children.⁵²⁴ The shifting boundaries from “natural parent” to “legal parent”; the possible separation between genetic, gestational and legal mother; the potential for nuclear families with a child created by three genetic contributors (that is, ooplasm transfer 3),⁵²⁵ or with more than two legal parents (so to formally include sperm and egg donors); and other such phenomena are arguably so detrimental to the child’s welfare that they reach the level of child abuse.⁵²⁶ The institution of parenthood is “core to children’s very survival” and its shattering shifts the very institution of parenthood so that its focus is now far more concerned with adults’ rights to children rather than “children’s needs for their mother and father”.⁵²⁷ Scholars thus suggest that the creation of ART families should be prohibited on the basis of the child’s right to be protected from abuse.⁵²⁸ Beyond that, some have made an explicit comparison between the arguable harms to ARTs-born children and the practice of the “slave trade”,⁵²⁹ with others emphasising that ARTs should be seen as an “aggravated offense”, whereby the parents, as perpetrators, promote “their own interests at the cost of their children”.⁵³⁰

⁵²³ Blyth “To be or not to be? A critical appraisal of the welfare of children conceived through new reproductive technologies” 2008 *IJCR* 506.

⁵²⁴ Marquardt “The revolution in parenthood, institute for American values” (2006), available at <http://familyscholars.org/2006/01/01/the-revolution-in-parenthood> (date of use 27 August 2014) (hereinafter “Marquardt”) 6, 10.

⁵²⁵ In this situation, a child is born from the genetic material of three different persons: A woman donates an egg that is fertilised with the gamete of another donor and the embryo is implanted in the womb of a third person who is going to give birth to the child. This procedure is referred to as ooplasm transfer 3. See Marquardt 15-16.

⁵²⁶ Marquardt 15-16.

⁵²⁷ Marquardt 15-16.

⁵²⁸ Article 19 of the Convention explicitly addresses the issue of child’s protection from abuse and neglect.

⁵²⁹ Thomas “Stop the baby trade” 2006, available at <http://childrenhaverights-saynotoreprotech.blogspot.com/2007/02/new-eugenics-california-cryobank.html> (date of use 27 August 2014).

⁵³⁰ Blyth 2008 *IJCR* 506.

In short, these scholars suggest that because of the harm caused by ARTs to the resulting children, ARTs should be prohibited and regarded as child abuse. In response to this argument, Sabatello argued as follows:

“Unless there is a clear indication in a given case for probable abuse by a parent (such as history of child abuse, addictive behaviour, and so on), a general argument that ARTs constitutes a form of child abuse should be rejected.”⁵³¹

The Committee on the Rights of the Child also supports this view. According to the Committee, ARTs are not listed among the practices that the Committee generally considers as violence against children, including physical and mental neglect.⁵³² This would suggest that ARTs are not to be viewed as harming children and hence should be considered as part of the parental right to procreate. It should be noted that this view undermines the harm suffered by ARTs-born children and does not consider the child welfare as important for the child born as a result of the use of ARTs.

It is clear that reproductive rights are very complex and seem to give a woman too much power on her reproduction by deciding whether or not to keep her pregnancy. Reproductive rights further give parents the right to bring about children who might suffer from several health problems. To some extent these rights appear to undermine the best interests of the child to be born. This raises the question of whether these rights can be limited in terms of section 36 of the Constitution.

4.3.2.1.3 Limitation of reproductive rights

Before analysing the limitation of reproductive rights it is important to briefly discuss how a fundamental constitutional right can be limited.

⁵³¹ Sabatello 2013 *NQHR* 83.

⁵³² Committee on the Rights of the Child *General Comment No 13 (2011) on the Right of the Child to Freedom from all Forms of Violence* (Art 19) paras 4, 20–31.

a Limitation of constitutional rights: General background

According to section 8(1) of the Constitution, The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state. In terms of section 36(1) the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- (a) The nature of the right;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation;
- (d) The relation between the limitation and its purpose; and
- (e) Less restrictive means to achieve the purpose

It appears from the provision of section 36 that two stages are required in the analysis of a constitutional right limitation. First there must a law or an action that is alleged to infringe the right enshrined in the Constitution. If it is established that the law or action infringes the right in question then the second stage is relevant. The second stage consists of analysing whether the infringement can be justifiable as a permissible limitation of the right. If it is established that the limitation is justifiable, it is important to also establish that the limitation is reasonable in an open and democratic society. In respect of the establishment of the reasonableness of the limitation, the court held in *S v Meake*⁵³³ that it is not necessarily required that vast amounts of sources be provided to substantiate an argument brought before a court. A “common sense analysis” of the purpose and need for legislation and of the “social and economic” setting that gives rise to the legislation would be sufficient. In *Phillips v Director of Public Prosecutions*⁵³⁴ the requirement of reasonableness was held to mean that a law or action limiting a right must have a reasonable goal and also that

⁵³³ 1998 (8) BCLR 1038 (W) at 1047A-G.

⁵³⁴ 2003 (3) SA 345 (CC) para [20].

the means for achieving that goal must be reasonable. In *S v Makwanyane*⁵³⁵ the court gave more light on this issue. The court held as follows:

“The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality... The fact that different rights have different implications for democracy and, in the case of our Constitution, for “an open and democratic society based on freedom and equality”, means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question”.

In other cases, the court used a similar explanation. For instance in *S v Manamela*,⁵³⁶ the Court explained that in the test of reasonableness, the court does not have to adhere mechanically to a list of factors; rather it has to engage in a balancing exercise and arrive at a global judgment on proportionality. In *Christian Education South Africa v Minister of Education*,⁵³⁷ the court held in respect of reasonableness that as a general rule, the seriousness of the impact of the legislation on the alleged infringed right will determine how persuasive or compelling the justification of the infringement must be. In this process the question to be answered is one of degree, to be assessed in the concrete and legislative and social setting of the measure, paying due regard to the means which are realistically available in the country but without losing sight of the ultimate values to be protected.

⁵³⁵ *S v Makwanyane* 1995 (3) SA 391 (CC) para [104].

⁵³⁶ *S v Manamela* 2000 (3) SA 1 (CC).

⁵³⁷ 2000 (4) SA 757 (CC) paras [29]-[35].

This would suggest that the requirement of the reasonableness of the measure or law limiting the right needs to be seriously engaged with. It is not about merely going through a list of factors, rather it is about balancing those factors with regard to their proportionality in order to reach an acceptable judgment. In the process it is important to assess the impact of the law or the measure on the society in general taking into account the available means for the realisation of the right and not undermining the values to be protected. This being said the question is what law can limit the reproductive rights in terms of section 36 of the Constitution.

b The Choice on Termination of Pregnancy Act 92 of 1996 and the limitation of reproductive rights.

It is submitted that the Choice Act may at the same time promote and limit female reproductive rights, and that in the process of limiting reproductive rights, “foetal interests” in continued existence are the principal factor that is taken into account.⁵³⁸ I mentioned in the first chapter of this thesis⁵³⁹ that there is a possible conflict of rights between children and their parents that can arise from the fact that parents who are using ARTs to reproduce are not doing so in the best interests of the child. I further mentioned that for the purpose of this study, that conflict must be resolved. In this regard, it is important to understand the context in which the conflict is happening and can be resolved. The discussion of the termination of pregnancy explains clearly the context in which parents exercise their right to reproduce by consenting to the termination of their pregnancy under certain circumstances. The discussion also makes clear how the Choice Act may in some circumstances limit the right of the mother to protect the rights of the child. The Choice Act therefore plays the role of enlightening this conflict in order to make clear the need of a balance of rights between parents and children which is viewed as a solution to that conflict. The discussion of the Choice Act is therefore important for the best understanding of the conflict of rights and the resolution thereof. Before engaging in an analysis of the

⁵³⁸ Pickles “Termination-of-pregnancy rights and foetal interests in continued existence in South Africa: The Choice on Termination of Pregnancy Act 92 of 1996” 2012 *PELJ* 403-404.

⁵³⁹ See para 1.3 above.

limitation of reproductive rights, it is important to understand what foetal interests are.

It should be reminded that South African common law and constitutional law afford legal subjectivity at birth and requires that the child must be separated from the mother's body and must survive independently of the mother after birth to be a legal subject.⁵⁴⁰ In other words, in terms of South African Law, a foetus or a viable unborn child is not viewed as a legal subject.

It is submitted that although an unborn child does not have a legal subjectivity in South African law, it at least has benefits of continued existence up to live birth. Those benefits in continued existence are referred to as foetal interests. This term is preferred to foetal rights because foetal rights implies that the foetus is a beneficiary of constitutional rights, which is not the case as it is clear in South African common and constitutional law.⁵⁴¹ Foetal interests were at issue in *Christian Lawyers Association of South Africa v The Minister of Health*⁵⁴² when the Choice Act was under the scrutiny of the Constitution. In this case the complainant asked the court to declare unconstitutional the Choice on Termination of Pregnancy Act in light of section 11 of the Constitution. In terms of section 11 of the constitution, everyone has the right to life. The complainant argued that the Choice Act, which allows a woman to terminate her pregnancy, violated the right to life of the unborn child.

An exception was raised on the grounds that there is no cause of action, since a foetus is not a bearer of constitutional rights in terms of section 11 of the Constitution, and that the relevant section does not preclude the termination of a pregnancy in the circumstances contemplated by the Choice Act.

⁵⁴⁰ Pickles 2012 *PELJ* 403.

⁵⁴¹ Pickles 2012 *PELJ* 403.

⁵⁴² 1998 (4) SA 113 (T).

The court held that it was concerned with determining whether the word “everyone” included a foetus.⁵⁴³ In other words, the question before the court was whether a foetus is bearer of constitutional rights. In this respect, the court held that there are no express legal provisions affording a foetus legal personality or protection.⁵⁴⁴ The court further observed that in terms of section 12(2) of the Constitution everyone has the right to make decisions concerning reproduction, and the court found that nowhere in the Constitution is it provided that this right is qualified in order to protect a foetus.⁵⁴⁵ The court concluded in this regard that this consideration does not restrict the state from enacting legislation that limits the terminations of pregnancies.⁵⁴⁶ The court went on to argue that the drafters of the Constitution did not intend to protect a foetus; if that was their intention section 28 would clearly be stated in the way that clearly includes the rights of the foetus.⁵⁴⁷ The court then determined that age begins at birth and therefore excluded the foetus from the provisions of section 28 because a foetus is not a child of any age. The court stated that if section 28 does not include the foetus in the ambit of its protection, it would be hard to say that other provisions of the Bill of Rights, including section 11, were intended to protect a foetus.⁵⁴⁸ The court further held that if section 11 were to be interpreted as affording constitutional protection to a foetus, far-reaching inconsistent consequences would ensue.⁵⁴⁹ These would include the fact that the foetus would enjoy the same protection as the pregnant woman, and this would result in termination of pregnancies being constitutionally prohibited even when the pregnancy poses serious threats to the woman’s life or where there is a likelihood that the foetus will suffer from serious mental or physical defects after birth, or when the pregnancy is the result of rape or incest.⁵⁵⁰ The court then held that the drafters of the Constitution could not have contemplated such far-reaching results without expressing themselves in no uncertain terms.⁵⁵¹ The court concluded that the Constitution is primarily based on equality, and that transformation of society has to

543 1118C.
544 1121G.
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546 1122A.
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548 1122F.
549 1122I.
550 1123A.
551 1123A.

be founded on the constitutional meaning of equality. Therefore, discrimination on the grounds of race, gender, class and other grounds of inequality have to be eliminated. Similarly as in the case *a quo*, the court is required to consider women's constitutional rights. The High Court then declared the Choice on Termination of Pregnancy Act constitutional.⁵⁵²

It is clear that the court reached this conclusion based on the reasoning that the foetus is not the bearer of rights and therefore cannot benefit from constitutional protection. However, seven years later, in *Christian Lawyers Association of South Africa v The Minister of Health (Reproductive Health Alliance as Amicus Curiae)*,⁵⁵³ the court found that the right to terminate the pregnancy is not an absolute right, since the state considers prenatal life an important value in society. In other words, reproductive rights in general and the right to terminate a pregnancy in particular can be limited in terms of section 36 of the Constitution.

In view of the fact that prenatal life is an important value in South African society, the court emphasised that the state has to play an important role in the protection of prenatal life by regulating and limiting women's access to termination-of-pregnancy services.⁵⁵⁴ However, the court held that because the right itself is derived from the Constitution, the regulation thereof by the state may amount to the denial of that right. Similarly, any limitation of this right constitutes a limitation of a woman's fundamental rights and is therefore valid only to the extent that such limitation is justifiable,⁵⁵⁵ in an open and democratic society based on human dignity, equality and freedom.⁵⁵⁶

⁵⁵² *Christian Lawyers Association of South Africa v The Minister of Health* 1998 (4) SA 1113 (T) 1123 A.

⁵⁵³ 2005 (1) SA 509 (T) 527D.

⁵⁵⁴ *Christian Lawyers* 2005 527 D.

⁵⁵⁵ In *S v Makwanyane* 1995 (3) SA 391 (CC) the Constitutional Court indicated the general approach towards the interpretation of s 36 of the Constitution.

⁵⁵⁶ *Christian Lawyers Association of South Africa v The Minister of Health (Reproductive Health Alliance as Amicus Curiae)* 2005 (1) SA 509 (T) 527D-F. See para 4.4.1 for a discussion of s 36(2) of the Constitution.

As stated above, a law of general application can limit a right enshrined in the Bill of Rights.⁵⁵⁷ The question that arises here is whether the Choice Act is a law of general application. Van der Vyver pointed out that a law of general application reflects a broad definition of law, including limitations sanctioned by statutory provisions and common law.⁵⁵⁸ Of course, the Choice Act complies with this definition of the law of general application. It was also indicated that the law of general application must infringe on the right enshrined in the constitution. In this respect it is important to see if any provision of the Choice on Termination Act infringes on the reproductive rights in general and the right to make decision on reproduction in particular. The relevant provisions of the Choice on Termination Act in this regard can be found in section 2, which sets out the circumstances and conditions that allow for the termination of the pregnancy. In terms of section 2 of the Choice on Termination of Pregnancy Act, a pregnancy may be terminated upon the request of a woman during the first twelve weeks of gestation;⁵⁵⁹ from the thirteenth week up to and including the twentieth week of gestation a pregnancy may be terminated only when a woman has consulted a medical practitioner and that medical practitioner is of the opinion that the continued pregnancy would pose a risk that the foetus would suffer from severe physical or mental abnormality that the pregnancy is a result of rape or incest, or that the continued pregnancy will severely affect a woman's social or economic circumstances,⁵⁶⁰ a pregnancy that has reached the twenty first week of gestation may be terminated if a medical practitioner, after consulting with another medical practitioner or alternatively a qualified and registered midwife is of the opinion that the continued pregnancy will endanger woman's life, will result in severe malformation of the foetus, or will pose a risk of injury to the foetus.⁵⁶¹

A close and thorough look at these provisions reveals two things; first although it is permitted for a woman to terminate a pregnancy in respect of the exercise of her reproductive rights, a pregnancy may not be terminated in all circumstances. Second some conditions must be met for the termination of the pregnancy to take place.

⁵⁵⁷ See section 4.3.2.1.2 above.

⁵⁵⁸ Van der Vyver "Constitutional protection of children and young persons" in Robinson (ed) *The Law of Children and Young Persons in South Africa* 271.

⁵⁵⁹ Section 2(1)(a) of the Choice Act.

⁵⁶⁰ Section 2(1)(b) of the Choice Act.

⁵⁶¹ Section 2(1)(c) of the Choice Act.

With regard to the circumstances under which a pregnancy may be terminated, it is clearly provided in section 2 of the Choice Act that in any circumstances that do not fall within the ambit of section 2, no pregnancy may be terminated. One may think about circumstances in which the continued pregnancy beyond the twentieth week of gestation does not pose any risks such as endangering a woman's life, causing severe malformation of the foetus, or posing a risk of injury to the foetus. In those circumstances a woman, even though she wishes to terminate her pregnancy, will be prohibited by the law to do so.

As far as the conditions under which a pregnancy may be terminated are concerned, it is important to note that in spite of her desire to terminate her pregnancy, a woman is required to comply with compelling conditions. For a pregnancy that is up to twelve weeks, it is required that the woman must give her informed consent,⁵⁶² and that consent will be enough for the termination of her pregnancy.⁵⁶³ However, her consent alone is not sufficient when the pregnancy reaches thirteen to twenty weeks of gestation. At this stage the law requires that the woman consults a medical practitioner who must give his or her opinion regarding the termination of the pregnancy.⁵⁶⁴ The termination will take place only if the medical practitioner is convinced that the continued pregnancy would pose a risk of injury to the woman's physical or mental health, there is a substantial risk that the foetus would suffer from a severe physical or mental abnormality, resulted from rape or incest, or would significantly affect the woman's social or economic circumstances.⁵⁶⁵

The conditions become even more stringent when the pregnancy reaches twenty one weeks. At this stage, not only is the consent of the woman not enough; the opinion of one medical practitioner will not suffice to decide about the termination of the pregnancy. The medical practitioner is required by the Choice Act to consult with a second medical practitioner or a registered midwife before making any decision as whether to proceed or not with the termination of the pregnancy. It should be noted

⁵⁶² Section 2(1) (a) read with s 5(1) of the Choice Act.

⁵⁶³ Section 5(2) of the Choice Act.

⁵⁶⁴ Section 2(1) (b) of the Choice Act.

⁵⁶⁵ *Ibid.*

that the decision will be dependent on the risks to which the woman or the foetus are exposed if the pregnancy were allowed to continue.⁵⁶⁶ Again here the termination will take place only if the medical practitioner is, after consultation with another medical practitioner or a registered midwife, of the opinion that the continued pregnancy would endanger the woman's life, result in a severe malformation of the foetus, or pose a risk of injury to the foetus.⁵⁶⁷

From the discussion above it is clear that the reproductive rights of a woman, in particular her right to terminate her pregnancy is progressively limited by the age and the circumstances of her pregnancy. She can enjoy her right to terminate her pregnancy only in conditions and circumstances contained in the Choice Act. In this sense, the Choice Act limits the reproductive rights enshrined in the Constitution.

Since it is established that there is a limitation of reproductive rights, it is important to ask whether this limitation is reasonable. In this respect, it must be demonstrated that the Choice Act has a reasonable goal in limiting a woman's reproductive rights and the means to achieve that goal must also be reasonable. In other words, the requirement of reasonableness implies that we proceed to the weighing up of values or an assessment based on proportionality. This means that we need to proceed to a balancing of the different interests at issue. In the process we must take into account some factors, such as the nature of the right that is limited and its importance in a democratic society based on freedom and equality; the purpose of the limitation, its efficacy and particularly where the limitation is necessary, whether the desired ends can be reasonably achieved through other means less demanding to the right in question.⁵⁶⁸

In short this would suggest that the interests of the woman to terminate her pregnancy and the interests for the unborn child to reach live birth must be balanced. In this balancing process we need to identify the nature of right that is limited; the importance of the purpose of the limitation; the nature and extent of the limitation; the

⁵⁶⁶ Section 2(1) (c) of the Choice Act.

⁵⁶⁷ *Ibid.*

⁵⁶⁸ Van der Vyver in Robinson (ed) 279.

relation between the limitation and its purpose; and whether the end can be achieved through less restrictive means. It is therefore important to proceed to the balancing exercise for the case at hand.

The nature of the right that is limited

The Choice Act limits reproductive rights in general and the woman's right to terminate her pregnancy in particular. The limitation here is relevant in the circumstances and conditions that fall outside the scope of the provisions of section 2 of the Choice Act. The right to terminate a pregnancy is a very important right that is included in the right to make decisions concerning reproduction enshrined in section 12(2) of the Bill of Rights. Currie and De Waal point out that the inclusion of this right in the Bill of Rights serves as recognition that the power to make decisions about reproduction is a crucial aspect of control over one's body.⁵⁶⁹ This constitutional right is reinforced by various other rights enshrined in the Bill of Rights, including the right to inherent dignity and to have one's dignity respected and protected, the right to privacy, and the right to have access to reproductive health care.⁵⁷⁰ A strong basis for the right to the termination of pregnancy is provided by the cumulative effect of the specific provision in section 12(2)(a) as reinforced by other constitutional rights.⁵⁷¹

With regard to the nature of this right, it is clear from a proper reading of section 12(2) that what this right entails is decisions concerning reproduction.⁵⁷² This right imposes a duty on the state to make available termination of pregnancy services. This right helps save a woman's life and protects a woman from health problems when the pregnancy is associated with some risks for her and for the foetus.

⁵⁶⁹ Currie and De Waal *Bill of Rights Handbook* 308.

⁵⁷⁰ *Christian Lawyers Association of South Africa v The Minister of Health (Reproductive Health Alliance as Amicus Curiae)* 2005 (1) SA 509 (TPD) 527A.

⁵⁷¹ 527B.

⁵⁷² Section 12(2) of the Constitution.

The importance of the purpose of the limitation

The purpose of the limitation of the right to terminate a pregnancy is to save the life of the unborn child where the pregnancy does not in any way constitute a threat to the life and health of the woman or child. The question that may arise here is whether society has any interests in protecting the interests of unborn children. Based on the analysis of a number of authors, it can be argued that society has an interest in protecting the interests of unborn children.

It is necessary to keep in mind that state interests in the unborn child were at issue in *Christian Lawyers Association of South Africa v The Minister of Health*,⁵⁷³ as discussed above. In respect of the court's decision in this case that a foetus was not a bearer of constitutional rights, Meyerson pointed out that, although a foetus is not a bearer of constitutional rights, there are foetal interests that may have to be taken into account, in this way ensuring the continued existence of the unborn child.⁵⁷⁴ Meyerson went on to say that if the state did not have interests in protecting unborn children, it would pass laws permitting late terminations of pregnancies for any reason whatsoever right up to the moment of birth.⁵⁷⁵ The state would also permit the creation of embryos for research purposes and authorise experimentation on them long past the point at which it is generally believed that such experimentation is acceptable.⁵⁷⁶ Women could be paid to terminate their pregnancies in order to ensure a ready supply of cadaver foetal brain tissue, which is valuable in the treatment of disease.⁵⁷⁷ The court's "rights bearer approach" in the case of termination of pregnancy was challenged and an alternative approach is suggested by Dworkin. With regard to the arguments about termination of the pregnancy, Dworkin suggests that the reasoning should not revolve around the argument that the foetus should not be protected because it is not a bearer of constitutional rights,

⁵⁷³ 1998 (4) SA 113 (T).

⁵⁷⁴ Meyerson "Abortion: The constitutional issues" 1999 *SALJ* 55.

⁵⁷⁵ Meyerson 1999 *SALJ* 55.

⁵⁷⁶ Meyerson 1999 *SALJ* 82

⁵⁷⁷ Meyerson 1999 *SALJ* 82.

but rather around the argument that some value of life and the potential for human life should be attached to the foetus.⁵⁷⁸

In this regard O'Sullivan observes that the interests of the state in potential life derives from the state's interests in protecting the sanctity of human life, therefore justifying the regulation of termination laws on grounds that are independent of the rights-bearing capacity of the foetus itself.⁵⁷⁹ Finally the life of an unborn child was held to be an important value in society, and that value is so important that it is deemed to limit a woman's access to termination of pregnancy services.⁵⁸⁰

Less restrictive means to achieve the purpose

In this process the end is to have the unborn child born alive in the circumstances and conditions where the continuation of the pregnancy would cause no harm to the mother or child. The question that arises here is whether this end can reasonably be reached through for instance other means that are less demanding for the right to terminate a pregnancy. In other words is there a way to allow a pregnant woman to terminate her pregnancy and still have the aborted child being born alive? Unfortunately in this case there is no way that such thing can happen; the only way to have the child born alive is to allow the continuation of the pregnancy to a live birth.

The justification of the limitation

The last stage in the process is to assess whether the limitation is justifiable in an open and democratic society. In other words, the question is whether allowing an unborn child to be born alive to the detriment of its mother's right to terminate her pregnancy can be justifiable in South Africa.

⁵⁷⁸ Dworkin *Life's Dominion: An Argument about Abortion, Euthanasia and Individual Freedom* 11.

⁵⁷⁹ O'Sullivan in Woolman *et al* (eds) 37-7.

⁵⁸⁰ *Christian Lawyers Association of South Africa v The Minister of Health (Reproductive Health Alliance as Amicus Curiae)* 2005 1 SA 509 (TPD) 527 D.

The limitation of the woman's right to terminate her pregnancy and other rights afforded to women can be justified in terms of the constitutional values enshrined in sections 1, 7(2), 36(1) and 39(1) and (2) of the Constitution. Human dignity, the achievement of equality, and the advancement of rights and freedoms are viewed in the Constitution as some of the specific values that the Republic of South Africa is founded on. Further, the Bill of Rights affirms the democratic values of human dignity, equality and freedom, and thus any limitations of rights contained in the Bill of Rights must be reasonable and justifiable in the light of the founding values. These founding values also play a central role when interpreting the Bill of Rights and legislation, or when developing the common and customary law.⁵⁸¹ According to Meyerson, even if no human rights are protected prior to birth, it is necessary to consider whether or not the value of human dignity might function as a constitutional limitation on the legislation that governs the termination of pregnancies.⁵⁸²

In this regard Woolman emphasises that the value of dignity can be invoked in three types of cases: where the value of dignity guides the interpretation of the right and by doing so shapes the ambit of the right; where the value of dignity can be used to justify the limitation of a right; and where the value of dignity can be used in cases where the Bill of Rights does not directly apply to the circumstances and, in this case, the value of dignity will inform the development of the common law or the interpretation of the statute.⁵⁸³ For Meyerson a foetus is not merely tissue, comparable to something like an appendix; it is rather a living organism, whose destruction is not a morally unimportant matter. Meyerson maintains that whoever proceeds to the destruction of the foetus should regret proceeding to such an immoral act.⁵⁸⁴ Meyerson goes on to say that in the process of the termination of a pregnancy, it is the value of human dignity that is under threat, because it is hard to deny that the destruction of foetal life, although it violates no constitutionally protected subject's right to life, undermines human dignity.⁵⁸⁵

⁵⁸¹ Pickles 2012 *PELJ* 419.

⁵⁸² Meyerson 1999 *SALJ* 56.

⁵⁸³ Woolman in Woolman *et al* (eds) *Constitutional Law* 36-24.

⁵⁸⁴ Meyerson 1999 *SALJ* 59.

⁵⁸⁵ Meyerson 1999 *SALJ* 59.

The decision taken by a woman to exercise her right to terminate her pregnancy is in opposition to the foetal interests to continued existence, since a successful termination terminates a foetal life.⁵⁸⁶ Even though a foetus is not a bearer of constitutional rights, as potential human being, a foetus is vested with intrinsic worth and finds worthiness in the constitutional value of dignity. This value of dignity is a reasonable ground for the state to limit female reproductive rights in terms of the Choice Act.

From the above discussion, it can be argued that the limitation of the right to terminate a pregnancy is justifiable in an open and democratic society based on human dignity, equality and freedom.

4.3.2.2 *Constitutional provisions relevant to the protection of the child*

4.3.2.2.1 General

A number of constitutional provisions are relevant for the protection of the child. However, for the purpose of this study a particular focus is put on a few provisions, including sections 11, 12, and 28 of the Constitution. In terms of section 11, everyone has the right to life.⁵⁸⁷ Section 12 of the Constitution provides that everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources.⁵⁸⁸ The Constitution is silent with regard to the meaning of violence in this section. However, the meaning of violence can be found in the Convention on the Rights of the Child (Convention) which South Africa has ratified. In terms of article 19 paragraph 1 of the Convention violence includes all forms of physical and mental violence, injury, abuse, neglect, maltreatment or exploitation including sexual abuse. Although the Children's Act does not clearly define violence, it nevertheless defines some of the behaviours listed in the Convention as constituting violence. The Children's Act

⁵⁸⁶ Pickles 2012 *PELJ* 428.

⁵⁸⁷ For a discussion on the right to life, see para 4.3.2.1.1 above.

⁵⁸⁸ Section 12(1) (c) of the Constitution.

provides that abuse in relation to a child means all forms of harm or ill-treatment deliberately inflicted on a child and includes:

- (a) Assaulting a child or inflicting any other form of deliberate injury to a child;
- (b) Sexually abusing a child or allowing a child to be sexually abused;
- (c) Bullying by another child;
- (d) A labour practice that exploits a child; or
- (e) Exposing or subjecting a child to behavior that may harm the child psychologically or emotionally.⁵⁸⁹

In the context of the Children's Act, it can thus be argued that child violence means in part the abuse of the child which in turn means all forms of harm and ill-treatment deliberately inflicted on a child. As it is clearly discussed above,⁵⁹⁰ children born as a result of ARTs are exposed to some forms of harm before and after their birth.

In terms of section 28 of the Constitution, a child's best interests are of paramount importance in any matter concerning the child.⁵⁹¹ Although the child's best interests are introduced in the Constitution, the Constitution does not say much about them apart from insisting that they must be of paramount importance in every matter concerning the child. It is therefore important to understand the possible meaning of the best interests of the child, how the Constitutional Court has interpreted the best interests of the child and what the possible application of the best interests of the child criterion can be.

⁵⁸⁹ Section 1 of the Children's Act.

⁵⁹⁰ See para 3.5 above.

⁵⁹¹ Section 28(2) of the Constitution.

4.3.2.2.2 Possible meaning of the child's best interests

The best understanding of the best interests of the child requires the analysis of how the best interests of the child has been used in matters that concerned children in South Africa. It is also important to the end of understanding the child's best interests to analyse how different writers have analysed this concept. A child's best interests may play various roles in the matters that involve the child. Bonthuys, relying on the findings of Friedman and Pantazis, states that the best interests of the child may be used firstly as an aid to interpret the other rights in section 28 of the Constitution, secondly to determine the scope of other fundamental rights and thirdly as a fundamental right in itself.⁵⁹² For the court, the best interests of the child can be used as a constitutional value, similar to the values of dignity, equality and freedom in section 7(1) of the Bill of Rights or as a rule of law, similar to the provisions relating to compensation for the expropriation of property (s 25(3)) and the rights of arrested and detained persons to be brought before a court (s 35(1)(d)) It is also possible that the best interests principle may be used as a "general guideline" with a meaning and content identical to that in common law.⁵⁹³

Friedman and Pantazis, analysing section 28(2) of the Constitution, pointed out that section 28(2) appears to be aimed at addressing the defencelessness of children, and ensuring that their rights do not frequently have to give way to the rights of others. According to them, section 28(2) implies that in every matter where a child's rights are (substantially) involved, those interests must be considered.⁵⁹⁴

Heaton has also commented on what should be understood by the best interests of the child and has suggested a particular approach towards the concept of the best interests of the child. To this end, Heaton identifies some problems inherent to the concept of the best interests of the child. Heaton points out that the child's best interests have a potential conflict. She argues that the best interests of the child can

⁵⁹² Bonthuys "The best interests of children in the South African Constitution" 2006 *IJLPF* 26 (quoting Friedman and Pantazis "Children's rights" in Woolman *et al* (eds) *Constitutional Law*).

⁵⁹³ *Jooste v Botha* 2000 (2) SA 199 (T) at 210C-E.

⁵⁹⁴ Friedman and Pantazis in Woolman *et al* (eds) 34-35.

in several cases conflict with the interests of other people involved including parents, the state or society.⁵⁹⁵ She further observes that the concept “best interests of the child” does not and cannot have a fixed meaning and content that are valid for all communities and in all circumstances. This would suggest the fact that the child’s best interests cannot have a comprehensive definition and is therefore indeterminate. However, Heaton maintains the indeterminacy of the best interests of the child does not preclude its application.⁵⁹⁶

With regard to the application of the best interests of the child, Heaton suggests that the approach towards this concept should always be flexible. She further asserts that the best interests of the child should not be defined in an exhaustive way. According to her the best interests of the child should be used as a tool that can help reach a decision in a particular case.⁵⁹⁷ This would suggest that what is deemed in the best interests of the child in case A is not necessarily in the best interests of the child in case B. It is therefore clear that in Heaton’s opinion, the meaning and the content of the best interests of the child may vary with the case under examination. In respect of the fact that the determination of the best interests of the child should vary with the case, Heaton suggests that an individualised, contextualised and child-centred approach to the best interests of the child should be followed. However, she emphasises that in approaching the best interests of the child in such a way, the interests of other people involved should not necessarily give way to the child’s interests. In Heaton’s words:

“In view of the wording of section 28(2) of the Constitution and the pronouncements of the Constitutional Court, one can conclude that it is no longer acceptable uncritically to apply general rules, presumptions or preferences, unquestioningly to rely on social theories and norms or historical, political or economic factors, to invoke the cultural and religious values of only one segment of the South African society, or to use personal prejudice or opinion when applying the concept of ‘the best interests of the child’. What is required is an individualised and contextualised evaluation of the position of each child from the point of view of how each factor affects the child.

⁵⁹⁵ Heaton “Some general remarks on the concept ‘best interests of the child’” 1990 *THRHR* 97.

⁵⁹⁶ Heaton 1990 *THRHR* 98.

⁵⁹⁷ Heaton 1990 *THRHR* 98.

All factors that are shown to be relevant because they have, or could have, a negative or positive impact on the individual child should be taken into account in a contextualised, child-centred way “without unduly obliterating other valuable and constitutionally-protected interests”.⁵⁹⁸

It is clear from the above discussion that the child’s best interests enshrined in the Bill of Rights can be interpreted in various ways. For the purpose of this thesis, it is important to note that the child’s best interests are a criterion or a standard that needs to be applied to all matters involving the child. It is therefore interesting to analyse how the Constitutional Court has interpreted the child’s best interests.

The constitutional protection of the best interests of the child is the result of the country’s obligation to give effect to ratified international instruments. In order to give effect to section 3 of the Convention on the Rights of the Child discussed above,⁵⁹⁹ two Acts were passed in South Africa, namely the Constitution of the Republic of South Africa, 1996 and the Children’s Act.

In terms of section 28(2) of the Constitution, a child’s best interests are of paramount importance in all matters concerning the child. The Children’s Act gives effect to section 28(2) of the Constitution and this is made clear in the objectives of the Act. In fact, according to section 2 of the Act, the objectives of the Act are:

- (a) To promote the preservation and strengthening of families;
- (b) To give effect to the following constitutional rights of children:
 - (i) Family care or parental care or appropriate care when removed from the family environment;
 - (ii) Social services;
 - (iii) Protection from maltreatment, neglect, abuse and degradation;
 - and

⁵⁹⁸ Heaton ““An individualized, contextualized and child-centred determination of the child’s best interests, and the implications of such an approach in the South African context” 2009 *JJS* 1.

⁵⁹⁹ See para 4.2.2.2 above.

- (iv) That the best interests of the child are of paramount importance in every matter concerning the child
- (c) To give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic;
- (d) To make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children;
- (e) To strengthen and develop community structures which can assist in providing care and protection for children;
- (f) To protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (g) To provide care and protection to children who are in need of care and protection;
- (h) To recognise the special needs that children with disabilities may have; and
- (i) Generally, to promote, the protection, development and well-being of children.

The Children's Act also provides a list of factors that must be taken into account when a provision of the Act requires the best interests of the child. Section 7(1) of Children's Act reads as follows:

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 child, including emotional and intellectual needs.
- (d) The likely effects 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 a 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 rights to maintain personal relations and direct contact with parents, or any specific parent on regular basis.
- (f) The need for the child-
 - (i) To remain in the care of his or her parents, family and extended family; and
 - (ii) To maintain connection with his or her parents, 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 and cultural development;
 - (i) Any disability that a child may have
 - (j) Any chronic illness from which the child may suffer;

- (k) The need for the child to be brought up within stable environment and, where this is not possible, in an environment resembling as closely as possible to a caring family;
- (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 violence involving the child or family member of child; and
- (n) Which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

Section 28(2) of the Constitution has been interpreted in various ways by researchers and the Constitutional Court. Bonthuys, for example, provides a survey of the South African courts' application of the best interests of the child. According to her, there is confusion and disagreement in courts about the best interests of the child. Courts, including the Constitutional Court, are not certain whether the best interests of the child is a rule, a right or a principle. She argues that the best interests of the child is more often used to articulate parental rights and interests or to cover up the fact that the fundamental constitutional rights of the child have not received proper consideration. She suggests that the best interests of the child principle should not be used to mediate the rights of other family members, but to compel the full and proper consideration of the constitutional rights of children alongside the rights of other family members.⁶⁰⁰

For Davel, the best interests of the child is both a right, a specific children's right protected in the Constitution, and a standard against which conduct must be measured. As a right, the best interests of the child is not an absolute right. It is

⁶⁰⁰ Bonthuys "The best interests of the child in the South African Constitution" 2006 *JLPPF* 41-42.

limited by the Constitution and has to be demarcated from the rights of others. As a standard, the best interests necessitates full knowledge of all the facts and the circumstances of the case.⁶⁰¹

The Constitutional Court has in some cases given guidance on the application of the best interests of the child. In *S v M (Centre for Child Law as Amicus Curiae)*,⁶⁰² for instance, the court provided clear guidance on how to apply the paramountcy principle. The court confirmed that the best interests principle can be limited and cannot assume dominance over other people's constitutional rights.⁶⁰³ The court stated that "s 28(2), read with s 28(1), establishes a set of children's rights that courts are obliged to enforce".⁶⁰⁴ The court added that statutes must be interpreted and common law developed in a manner which favours protecting and advancing the interests of children, and that the courts must function in a manner which at all times shows due respect for children's rights.⁶⁰⁵

In another case, *Van Rooyen v Van Rooyen*,⁶⁰⁶ the court contended that the lesbian lifestyle was not in the best interests of the child and subjected the contact of a lesbian mother with her children to a number of conditions. In that case, a lesbian mother approached the court to obtain contact rights to her son and daughter after being separated from them. On behalf of the court, Flemming DJP held that the mother may have the freedom of choosing her sexual orientation and enjoy her lifestyle, but that the children's best interests could be put at risk if children were to be exposed to their mother's lesbian relationship.

In the efforts of protecting the best interests of the children and at the same time the right of the mother to contact to her children, Flemming afforded the mother contact rights to her children but subjected that contact to a number of conditions, including

⁶⁰¹ Davel "In the best interests of the child: Conceptualisation and guidelines in the context of education" 2007 *CWEP* 225.

⁶⁰² 2008 (3) SA 232 (CC) (hereafter "the *S v M* case").

⁶⁰³ Para [25].

⁶⁰⁴ Para [14].

⁶⁰⁵ Para [15].

⁶⁰⁶ 1994 (2) SA 325 (W). See also Heaton *South African Family Law* 3 ed 177.

the exclusion of the mother's lesbian partner from her bedroom when children spend time with their mother. The mother was further ordered not to allow the children to access lesbian videos or photographs or any other items confirming homosexuality.

This case highlights the conflict of rights that may arise between parents and their children. The court's decision in this case connotes the view that living in a home headed by two mothers without a father, even for a very short time, would have adverse effects on children's development and would not be in their best interests.

In a similar case, the court reached a different decision and contended that regarding a homosexual lifestyle as abnormal would violate homosexual individuals' right to equality. In *V v V*,⁶⁰⁷ homosexual parents arranged to have joint care of their children for approximately two years prior to their divorce. Upon the divorce, the father asked for care of children, and that the mother would have supervisory contact that she could exercise only in the father's home.

The court examined the goodness and fitness of the woman and found that she was a good and fit mother and held that it would not be fair to her and her children to force her to have contact with the children in her ex-husband's home. On behalf of the Court, Foxcroft J held that describing homosexuality as abnormal violates the equality clause and that considering a lesbian home as less suitable than any other home was not justifiable. Foxcroft further held that Flemming's order preventing lesbian couple from living a normal life by sharing a bedroom, showing love for one another and using personal and communal items in their home in the presence of their children was manifestly inconsistent with the Constitution.

The court's decision in this case connotes the view that it is in the best interests of the child to be under the care of his or her father and mother even if one of the parents is homosexual. This is made clear in the court's maintaining of joint care after divorce against the wishes of the father. Unlike the decision in the *Van Rooyen*

⁶⁰⁷ 1998 (4) SA 169 (C) 189 (B). See also Heaton *South African Family Law* 3 ed 177-178.

case, the court's decision in *V v V* connotes the view that the lesbian lifestyle should not give way to the child's best interests. This case once again stresses the conflict that may exist between the interests of parents and their children.

In *Minister for Welfare and Population Development v Fitzpatrick*,⁶⁰⁸ Goldstone J held as follows:

“Section 28(2) requires that best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and s 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1).”⁶⁰⁹

From the different views expressed above it seems that the best interests of the child enshrined in international and domestic instruments are a right to which children are entitled, and a principle or standard or criterion that must be considered in all matters concerning the child. The best interests of the child criterion do not assume the dominance or the neglect of other persons involved in the case where these interests apply. This would suggest that these interests are limited and not absolute. Although the interpretation of these interests must be done in a manner that protects the rights of children, this must be done in respect of the circumstances of the particular case.

4.4 INTERIM CONCLUSION

Although the family is an important institution and the fundamental unit of every society in the world, it has not received the same protection at international and domestic level.

International law provides specific protection to the family and family members. Various international instruments clearly emphasise the value accorded to the family.

⁶⁰⁸ 2000 (3) SA 422 (CC) (hereafter “the *Fitzpatrick* case”).

⁶⁰⁹ Para [17].

Most of international instruments contain a clear recognition of the family as the natural and fundamental unit of society. Several provisions of those instruments also clearly afford protection to individual members of the family. While some of those provisions protect the rights of individuals who wish to become parents, including the right to marry and found a family; other relate to the protection of children, including their right to life and to be free from violence as well as the child's best interests.

The South African perspective to the family is peculiar. The South African Constitution neither expressly recognises the family as a fundamental unit of the society, nor does it contain any provision protecting family life. The Constitutional Court justifies this lack of a constitutional protection of the family on the ground that South Africa is multicultural society. However, the court has emphasised the significance of marriage for South African people. This would suggest that the family and the family life are safeguarded through the protection afforded to marriage in South Africa.

Although the South African Constitution does not expressly protect the family and family life, several constitutional provisions seem to protect the rights of family members. For instance, the reproductive rights of every mature person are guaranteed in the Constitution. This group of rights relates to people who can become parents. The South African Constitution also protects several rights afforded to children. These include the child's right to life, the right to be free from all forms of violence and their best interests.

It appears that the parents' reproductive rights could sometimes be in opposition with the best interests of the child. This fact explains the state interest in limiting a woman's reproductive rights through the regulation of the right to terminate her pregnancy. A foetal interest to a continued life was brought to the fore in the process of balancing different interests in presence, namely the interests of the woman in terminating her pregnancy, the state interests in protecting the value of the dignity of the unborn child, and the foetal interests to a continued life. The engagement in such a process demonstrates the way the court has applied the child's best interests in the matter concerning a mother's decision to terminate her pregnancy. This would

suggest that best interests of the child criterion can also be applied to the child born or to be born as a result of the use of ARTs. The question that might arise is how the best interests can be used to regulate ARTs? The next three chapters will attempt to provide an answer to this pertinent question, with reference to the legal positions in South Africa, the USA, and Australia.

CHAPTER FIVE

HOMOSEXUAL FAMILIES IN SOUTH AFRICA

5.1 INTRODUCTION

Homosexuality is a reality in South Africa. It was reported that sangomas⁶¹⁰ engage in sexual relationships with other women. This reality is known as ancestral marriages in which sangomas have secret homosexual relationships with ancestral wives. The secrecy around this phenomenon is so deep that many believed that homosexuality did not exist in South Africa.⁶¹¹ Homosexuality or having sexual relations with a partner of the same sex was regarded as a non-procreative sex activity, and punished as a criminal offence under the apartheid regime.⁶¹² As Thoreson pointed out, under the apartheid law, although homosexual practices were prohibited, people could nevertheless be branded homosexuals. In the words of Thoreson:

“While homosexual acts in private [were], in effect, of no legal consequence, the behaviours associated with homosexual practices, such as sodomy, ‘unnatural’ sexual acts including masturbation, and acts designed to promote ‘homosexual behaviour’ [were] proscribed. It was legal to be labelled as homosexual, but illegal to engage in homosexual practices”.⁶¹³

The advent of the South African democratic Constitution has provoked many socio-political changes, which include the legal recognition of homosexual families. Some of those changes are discussed in this chapter. The chapter begins with a discussion of the emergence of homosexual families before analysing the legal recognition of those families and the model for their recognition. Procreation within those families

⁶¹⁰ Sangomas is a term used to describe traditional healers in South Africa.

⁶¹¹ Nkabinde and Morgan “This happened since ancient times...it’s something that you are born with: Ancestral wives among same-sex sangomas in South Africa” 2011, available at http://www.tandfonline.com/loi/ragn20_9 (date of use 21 May 2015).

⁶¹² Nkabinde and Morgan http://www.tandfonline.com/loi/ragn20_9 (date of use 21 May 2015).

⁶¹³ Thoreson “Somewhere over the rainbow nation: Gay, lesbian and bisexual activism in South Africa” 2008 *JSAStud* 680.

and the status of the child born and growing up in those families will be analysed as well. The chapter will also discuss parental responsibilities and rights and the best interests of the child in those families. In the different parts of the discussion, the chapter will have a look at what happened under the apartheid regime and what is happening under the democratic constitutional dispensation.

5.2 THE EMERGENCE OF HOMOSEXUAL FAMILIES

Homosexual families emerged from homosexual marriage, adoption and procreation. Homosexual individuals, single or married, can adopt children or procreate in the context of their homosexual lifestyle and build their families as it was stated in previous chapters.⁶¹⁴

While homosexual reproduction in South Africa will be discussed later in this chapter, it is important to consider how marriage was conceived in South Africa and how from this conception emerged homosexual marriage and families.

5.2.1 The concept of marriage in South Africa

A good understanding of marriage as it stands in South Africa today requires a look at how marriage was conceived under the apartheid regime and how it evolved and underwent changes to become what it is today under the democratic constitutional dispensation.

5.2.1.1 The concept of marriage under the apartheid regime

To a substantial extent, the concept of marriage as it existed under the apartheid regime reflected the position in canon law and Roman-Dutch law.⁶¹⁵ Canon law had many sources including the Bible, the writings of the church fathers, Justinian's

⁶¹⁴ See para 2.6 above.

⁶¹⁵ Robinson "The evolution of the concept of marriage in South Africa: The influence of the Bill of Rights in 1994" (unpublished paper presented at the 12th World Conference of the International Society of Family Law, July 2005, Salt Lake City) 489 (hereinafter "Robinson").

codification of the *Corpus Iuris*, the canons of the church councils and the decretals of the popes.⁶¹⁶ According to the church, marriage was highly valued by God; therefore the Lord Jesus Christ raised marriage to the rank of a sacrament.⁶¹⁷ Marriage as conceived by the church was possible only between baptised persons. This would suggest that people engaged in the sacrament of marriage must be Christians. A sacrament can be understood as an outward sign instituted by Christ to give grace. The outward sign here means the mutual external manifestation of internal consent by the two parties to the marriage contract. The contract of marriage was thus a sacrament,⁶¹⁸ a status instituted by God himself. Robinson pointed out that marriage status connoted a natural relationship whose ends and essential properties were determined by natural law. These ends and properties could not be changed by human legislation, either civil or ecclesiastical, or by the consent of the parties involved. The most important goal of marriage as instituted by God was procreation and the rearing of children.⁶¹⁹

Marriage as conceived under the apartheid regime was hence a divine institution, a contract between baptised persons with the ultimate goal of procreation. The apartheid regime's definition of marriage seems to be borrowed from the Bible. According to the Bible, marriage is a relationship between one man and one woman.⁶²⁰

Marriage under the apartheid regime can therefore be characterised as heterosexual and monogamous. In other words, the union between one man and one woman was the only accepted and legally protected form of marriage. The other characteristic that can be drawn from the conception of marriage as discussed above is its procreative goal. To procreate and rear children were thus seen as the primary purpose of marriage. This would suggest that if people enter into a relationship that has not as its purpose the procreation and rearing of children, that relationship could not be considered a marriage.

⁶¹⁶ Robinson 490.

⁶¹⁷ *Ibid.*

⁶¹⁸ *Ibid.*

⁶¹⁹ *Ibid.*

⁶²⁰ Ephesians 5:23-33.

The conception of marriage as heterosexual and monogamous for the purpose of procreation and the rearing of children as it existed in Roman-Dutch Law was received into South African apartheid law. In addition to Roman-Dutch texts, which contained the definition of marriage as a union between one man and one woman, South African courts also often referred to the English Court decision in *Hyde v Hyde and Woodmansee*,⁶²¹ where the court held that marriage as understood in Christendom, may be defined as the voluntary union for life of one man and one woman to the exclusion of all others. The marriage law of that period was prescribed in the Political Ordinance of 1580 and the perpetual Edict of 154. Both these instruments reflected the philosophies of the reformation and to some extent secularised marriage law.⁶²²

As a consequence of this conception of marriage, homosexual practices were proscribed and punished. In fact, sexual acts between adults, whether homosexual or heterosexual, were criminalised if not directed towards procreation. These include male-female sodomy, bestiality and male to male intercourse which were viewed as “crimes against nature”. These crimes were punishable by the death penalty.⁶²³

In Cameron’s opinion, the conception of crimes against nature was narrow.⁶²⁴ Crimes against nature were so narrowly conceived that even masturbation, whether solitary or assisted, could fall under it. Masturbation was thus considered a “punishable misuse of the organs of procreation”.⁶²⁵ This view was confirmed in 1967, when a two-judge court in the Eastern Cape held that mutual masturbation between two men is criminal as an “unnatural offence”.⁶²⁶

To summarise, under the apartheid regime, marriage was regarded as having been instituted by God, it was heterosexual and monogamous, and all sexual acts within

⁶²¹ 1866 LR 1 Pand D.

⁶²² Robinson 490.

⁶²³ Cameron “Sexual orientation and the Constitution: A test case for human rights” 1993 *SALJ* 453. See also *R v Gough and Narroway* 1926 CPD 159 at 162.

⁶²⁴ Cameron 1993 *SALJ* 453.

⁶²⁵ *Ibid.*

⁶²⁶ *S v V* 1967 (2) SA 17 (E) at 18C-D.

marriage were primarily directed at procreation and child-rearing. Any other sexual activity that was not directed towards procreation was criminalised. It is in this context that the Sexual Offences Act 23 of 1957 rendered it a criminal offence for any male person to commit any act calculated to stimulate sexual passion or give sexual gratification with another male person at a party.⁶²⁷ The penalty prescribed for this criminal offence was a maximum fine of R4000 or two years' imprisonment.⁶²⁸ A party is defined in this Act as any occasion where more than two persons are present.⁶²⁹

It is worth noting that although the heterosexual and monogamous form of marriage was open to all population groups irrespective of race, nationality or religion, the law was, however, out of step with the fundamental views held by some groups from different cultural and religious backgrounds. Customary, Muslim and Hindu marriage, for instance, were neither recognised nor protected at that period.⁶³⁰

It is important to understand that marriage as conceived under the apartheid regime was associated with legal rights and obligations; it was regarded as the foundation of society, a fixed traditional structure essential for the raising of children and a healthy family. In spite of this uniquely privileged status that marriage has in fact enjoyed under the apartheid regime, the institution of marriage underwent significant changes in the post-apartheid period.⁶³¹

5.2.1.2 *The concept of marriage under the constitutional dispensation*

The democratic constitutional dispensation that came into force in 1994 radically departed from the apartheid regime era where Christianity and the world-view of the Afrikaners prevailed.⁶³² It also impacted on legal development in South Africa. The

⁶²⁷ Section 20A (1) of the Sexual Offences Act 23 of 1957 (hereafter "the Sexual Offence Act").

⁶²⁸ Section 22(g) of the Sexual Offences Act.

⁶²⁹ Section 2 of the Sexual Offences Act.

⁶³⁰ Robinson 491.

⁶³¹ Robinson 490.

⁶³² Robinson 492.

golden rule of the new constitutional dispensation is constituted by the equal protection and non-discrimination provisions within the Constitution.⁶³³

In 1996, the South African government approved the new Constitution. In addition to ending *de jure* apartheid, it was the first constitution in the world to protect the rights of homosexual individuals. Legislators made history by writing sexual orientation into the national non-discrimination clause, guaranteeing gay rights in the supreme law of the land.⁶³⁴ With the new constitutional dispensation, South Africa became “an open democratic society” as it was stated in *S v Solberg*,⁶³⁵ where the Court held as follows:

“South Africa is an open and democratic society with a non-sectarian state that guarantees freedom of worship; it is respectful of, and accommodatory towards, rather than hostile to or walled-off from, religion; acknowledges the multi-faith and multi-belief nature of the country; does not favour one religious creed or doctrinal truth above another; accepts the intensely personal nature of individual conscience and affirms the intrinsically voluntary and non-coerced character of belief; respects the rights of non-believers; and does not impose orthodoxies of thought or require conformity of conduct in terms of any particular world-view. The Constitution, then, is very much about the acknowledgement by the State of different belief systems and their accommodation within a non-hierarchical framework of equality and non-discrimination.”

This would suggest that the new constitutional dispensation brought changes in the sense of recognising the rights of those who were marginalised under the apartheid regime. Those changes also affected the institution of marriage. The Recognition of Customary Marriages Act 120 of 1998 and the recognition of homosexual relationships in the Civil Union Act are the proof of a change that was brought about in public policy on the essential values of the common law description of marriage, namely the exclusive nature of the marriage relationship and sex.⁶³⁶ All the changes

⁶³³ Section 9 of the Constitution.

⁶³⁴ Massoud “The evolution of gay rights in South Africa” 2003 *PRJSJ* 301.

⁶³⁵ 1997 (4) SA 1176 (CC) para [151].

⁶³⁶ Robinson 488.

that occurred to the institution of marriage are the result of a homosexual liberation movement for the recognition of the rights of homosexual people in South Africa which started under apartheid regime.

5.3 THE HOMOSEXUAL LIBERATION STRUGGLE

The homosexual liberation struggle refers to gay and lesbian movements that led to the recognition of the rights of homosexual individuals in South Africa. As already stated above, these movements started during the apartheid era, but did not have significant results. However, under the democratic Constitution, gays and lesbians obtained the recognition of their rights essentially through litigation and legislation.

5.3.1 The homosexual liberation struggle under the apartheid regime

Under the apartheid regime, and prior to the late 1980s, there was little indication of a gay rights struggle in South Africa. Some intermittent mobilisation occurred, but it was limited in both scope and effect, and the tendency was to group people of the same race.⁶³⁷ The apartheid regime period can be characterised by two major historical indicators that motivated the homosexual struggle in the context of South Africa.⁶³⁸

The first indicator is “the Raid in the Forest”, which took place in a suburb in the north of Johannesburg. The raid took place in 1966, when the police raided and arrested nine men for “masquerading as women”. This Raid was followed by a persistent parliamentary threat to extend anti-homosexual legislation.⁶³⁹ In opposition to this threat, the Homosexual Law Reform Movement emerged in 1968. The sole aim of the movement was to prevent a proposed antigay Bill from becoming law.⁶⁴⁰ The movement actually protested a proposed change to the apartheid government’s Immorality Act 5 of 1927, which pursued the criminalisation of homosexuality,

⁶³⁷ Croucher “South Africa’s democratisation and the politics of gay liberation” 2003 *JSASud* 317.

⁶³⁸ Butler and Ausbury “South African LGBT Youth” in Sears (ed) *Youth, Education, and Sexualities: An International Encyclopaedia* (2005) 814.

⁶³⁹ Butler and Ausbury in Sears 814.

⁶⁴⁰ Butler and Ausbury in Sears 814.

making it an offence punishable by compulsory imprisonment of up to three years.⁶⁴¹ Members of the movement were gay professionals, led by a well-known gay advocate, whose task was to raise the funds needed to retain a firm of attorneys to prepare evidence and lead the case against the proposed anti-homosexual discrimination.⁶⁴² To the satisfaction of the movement, the proposed legislation was dropped, and that served at least temporarily to stimulate into activity the gay subculture in South Africa. However, the movement did not attempt to link up with the broader opposition to apartheid.⁶⁴³ In other words, the gay movement did not expand its struggle to opposing the injustice and discrimination that prevailed under the apartheid era, rather the movement focused only on fighting for the recognition of gay and lesbian rights.

The second indicator is “South Africa’s Stonewall”. This occurred when Johannesburg police raided New Mandy’s bars in the late 1970s.⁶⁴⁴ In fact, throughout the 1970s and 1980s a gay subculture bloomed in the form of supper clubs, bars, gay-owned businesses and a gay newspaper such as *EXIT*, which devoted itself to club reviews.⁶⁴⁵ The raid of New Mandy’s bars led patrons of those bars who were homosexuals to fight back and request their civil rights to be protected.⁶⁴⁶

The homosexual liberation struggle under the apartheid regime was also characterised by the formation of gay and lesbian organisations in some areas of South Africa. These include the rich history of “moffee” in the coloured communities of the Western Cape.⁶⁴⁷ Homosexual behaviours became more evident in other subcultures as well. Lesbian sangomas are one of the examples. Also, much attention was focused on male homosexual activity that occurred in South Africa’s mining communities. The 1990s also saw an emerging gay scene in the townships

⁶⁴¹ Croucher *JSASud* 317.

⁶⁴² Buttler and Ausbury in Sears 814.

⁶⁴³ Croucher 2003 *JSASud* 317.

⁶⁴⁴ Buttler and Ausbury in Sears 814.

⁶⁴⁵ Croucher 2003 *JSASud* 317.

⁶⁴⁶ Croucher 2003 *JSASud* 317.

⁶⁴⁷ Croucher 2003 *JSASud* 318.

that is said to have its roots in the generalised youth rebellion of 1976 and the mid-1980s.⁶⁴⁸

The apartheid government was hostile to any form of homosexuality. The situation of severe repression of homosexual conduct that prevailed during the apartheid period led homosexual people to organise themselves and fight for their rights. It is in this context that some gay and lesbians organisations were formed throughout the country. The first national gay organisation in South Africa was formed in 1982 in Johannesburg: the Gay Association of South Africa (GASA). Although few black gay men were members of GASA, the primary purpose of GASA was to be a social meeting platform for white, middle-class gay men. Its mission was apolitical. GASA was committed to avoid politics, and to provide a non-militant, non-political answer to gay needs.⁶⁴⁹ The focus of GASA thus seemed to be on white gays' interests only. GASA's sole focus on white gays' interests became a fact in 1986, when GASA failed to support one of its few black members, Simon Nkoli, who was being put on trial for treason because of his role in the anti-apartheid struggle. This GASA racial behaviour not only caused it to be disrespected by gays and lesbians in South Africa committed to the anti-apartheid struggle, but the issue also captured the attention of the international gay community.⁶⁵⁰ In 1986 and 1987, GASA's racism became the central point of discussion at annual meetings of the International Lesbian and Gay Alliance (ILGA).⁶⁵¹ In 1986, ILGA's membership envisaged to expel GASA as a racist organisation. This intention forced Kevan Botha, the national Secretary of GASA, to appear at the meeting in Copenhagen to defend his organisation. In his defence, he justified GASA's failure to support Nkoli by the apolitical nature of GASA. He argued as follows:

⁶⁴⁸ Croucher 2003 *JSASud* 318.

⁶⁴⁹ See Gay and Lesbian Archives of South Africa (GALA), University of the Witwatersrand, GASA Collection, File 6, Address by Kevan Botha, National Secretary of GASA, 8th Annual Conference of the International Lesbian and Gay Alliance (ILGA), Copenhagen, 12 July 1986, 3–16 (hereinafter “the Botha defence”).

⁶⁵⁰ Croucher 2003 *JSASud* 318.

⁶⁵¹ Croucher 2003 *JSASud* 318.

“GASA is a support organisation without political aspirations; and because of GASA’s ‘non-political, non-militant, non-sectarian’ nature we cannot begin to enter any debate on political structures or ideologies, neither in our own country’s nor in any others”.⁶⁵²

Botha went on to deny GASA’s racism and its failure to engage in the opposition of apartheid discrimination, stated that GASA opposed the policy of apartheid, and mentioned various ways in which the organisation served and involved gay South Africans of all races. He also reprimanded ILGA for singling out South Africa when so few gay liberation organisations or movements in the world, including ILGA, were racially representative.⁶⁵³

The defence of Botha at the ILGA conference provoked many reactions from black gay men within the organisation. The year following Botha’s defence, Sipiwe Machela, a black gay man from South Africa, appeared before ILGA and criticised the international body for remaining unsupportive of the anti-apartheid struggle in South Africa. He characterised the gay community in South Africa as deeply divided into two camps: a white camp interested in gay social activities only, and a black camp which puts its weight behind all movements that are truly committed to the liberation of all South Africans. On that occasion, he challenged Botha’s speech to ILGA the previous year as inaccurate and misleading, and concluded that GASA does not represent the entire gay movement in South Africa. He declared that his organisation was not part of GASA and could not be represented by GASA without a proper mandate. This resulted in the official expulsion of GASA from the International Gay and Lesbian Alliance in 1987.⁶⁵⁴

From that time on, all gay and lesbian organisations existing in South Africa linked their struggle to the political and social context that was prevailing in South Africa. In 1988, another organisation, with predominantly black members, the Gays and Lesbians of the Witwatersrand (GLOW), was formed under the leadership of Simon Nkoli. GLOW became an advocate of gay people’s political demands, and its

⁶⁵² The Botha defence 3–16.

⁶⁵³ Croucher 2003 *JSASud* 319.

⁶⁵⁴ Croucher 2003 *JSASud* 319.

predominantly black membership not only attested to the fact that homosexuality was not simply a white issue, but also linked the gay struggle to the broader anti-apartheid struggle.⁶⁵⁵

Nkoli's work began to legitimise gay rights in the African community and among future African policymakers. Nkoli was found guilty in the Delmas Treason trial of 1986, and he was imprisoned for four years with future African National Congress (ANC) leaders. His detention as an anti-apartheid activist who was homosexual was highly publicised and this influenced political leaders to begin to change social attitudes regarding the position of gays and lesbians in South African society. This also caused Nkoli to become well-known.⁶⁵⁶ In this regard, Edwin Cameron, judge of the Constitutional Court, described Nkoli as the first openly gay anti-apartheid activist. With a racial heritage shared by those who suffered most under apartheid, he successfully linked the gay and lesbian rights struggle with the struggle against racism in South Africa.⁶⁵⁷ At that period, many ANC members who had been exiled during the apartheid regime and educated in Western European nations with democratic constitutions and national gay rights movements, returned to South Africa from their exile and their opinions were converted toward viewing sexual orientation as an issue of equality. At the same time, another influential organisation, the Organization of Lesbian and Gay Activists (OLGA) came into existence in Cape Town. OLGA's members were predominantly middle-class white intellectuals, many of whom had unblemished anti-apartheid credentials. OLGA's membership was disappointed with the apolitical stance of GASA and committed itself to opposing state repression broadly and to a close alliance with the United Democratic Front (UDF), an umbrella opposition organisation aligned to the ANC.⁶⁵⁸

The year 1990 marked a turning point in South Africa's gay rights movement. The lifting of the ban on the ANC, the release of former president Nelson Mandela from prison, and the beginning of negotiations for a transfer of power from the National

⁶⁵⁵ Croucher 2003 *JSASud* 319 (quoting Gevisser "A different fight for freedom" 63–69.)

⁶⁵⁶ Croucher 2003 *JSASud* 319.

⁶⁵⁷ Cameron 1993 *SALJ* 462.

⁶⁵⁸ Massoud 2003 *PR* 302.

Party to a Government of National Unity are the important events that characterised that year. Gay activists began to lobby the ANC to recognise gay and lesbian rights in South Africa. However, there was opposition within the ANC, much of which took the form of characterising gays as a fringe group, or gay issues as marginal to the overall struggle for national liberation. Ruth Mompoti, an ANC executive committee member, for example, regarded homosexuality as abnormal, and gays as a wealthy and privileged group not in need of rights. This internal opposition was balanced by the return of many leaders from exile in Western Europe and North America with a greater awareness of and sensitivity to the issue of gay liberation; and was also countered by groups such as GLOW who opposed the argument that gay liberation should not be linked to the national liberation.⁶⁵⁹ In this regard Patrick Noome stated the following:

“In South Africa, gay liberation is charged with distracting from the struggle for a democratic non-racial future. The same charge used to be levelled at the women’s movement. Both have subsequently proved that our struggle against oppression can enhance, not divide the offensive. GLOW, like the women’s movement, believes that none will be free until all are free”.⁶⁶⁰

In 1992, the ANC formally recognised gay rights and agreed to include in its Bill of Rights a prohibition against discrimination on the basis of sexual orientation. The Democratic Party and the Inkatha Freedom Party (IFP) followed suit. The following year, multiparty negotiations began for the purpose of drafting an interim Constitution (Constitution of the Republic of South Africa 200 of 1993).⁶⁶¹

In summary, during the apartheid era, a few organisations were formed to fight for gay rights recognition in South Africa. Some of those organisations had an apolitical nature and others a racial nature. Because they had the view that the struggle had to be linked to the liberation of not only gay and lesbians, but the liberation of the entire

⁶⁵⁹ Massoud 2003 *PR* 302.

⁶⁶⁰ Noome “The gay left” *March/April 1990 EXIT* 3.

⁶⁶¹ Stychin “Constituting sexuality: The struggle for sexual orientation in the South African Bill of Rights” 1996 *JLSoc* 465.

nation from the discrimination and injustice of the apartheid regime, the existing organisations started fighting towards ending the apartheid regime. Although their struggle did not make significant changes towards the recognition of homosexual rights in South Africa, it nevertheless laid the foundation for what was materialised with the advent of the democracy in South Africa.

5.3.2 The homosexual liberation struggle under the new constitutional dispensation

There is a third indicator in the homosexual liberation struggle: the adoption of the new Constitution, the first in Africa to recognise homosexuals' rights. One of the victories of gay activists, it is argued, was the insertion of sexual orientation in the interim Constitution as protected ground for non-discrimination.⁶⁶² This victory urged forty three gay and lesbian organisations countrywide to come together and form the National Coalition for Gay and Lesbian Equality (NCGLE) in 1994. NCGLE was determined to lead a campaign against gay discrimination in South Africa. To this end, the coalition hired a full-time lobbyist to act on its behalf, and drew upon the legal experience and credentials of white attorneys and activists and upon the experience and anti-apartheid credentials of many black activists to formulate and implement an impressive lobbying campaign. Their campaign was ultimately successful, and South Africa's final Constitution, now considered one of the most progressive in the world, includes an equality clause that specifically prohibits unfair discrimination based on sexual orientation.⁶⁶³ The equality clause protects South Africans from unfair discrimination, and reads as follows:

“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”.⁶⁶⁴

⁶⁶² Buttler and Ausbury in Sears 815.

⁶⁶³ Croucher 2003 *JSASud* 319.

⁶⁶⁴ Sections 9(3) and (4) of the Constitution.

In short, the post-apartheid era is essentially characterised by the coming into force of the democratic Constitution and the coalition of all existing homosexual organisations with the sole purpose of fighting and ending the apartheid regime's discrimination. It can be argued that this process culminated in the insertion of the equality clause in the Constitution. Gay activists used the equality clause in the judicial process to have their rights (including their right to marry and build families) recognised in South Africa. The judicial process that led to the recognition of gay rights is discussed in the next section.

5.4 THE LEGAL RECOGNITION OF HOMOSEXUAL MARRIAGE AND FAMILIES IN SOUTH AFRICA

The institution of marriage holds particular importance for many societies, including South Africa. Pierre De Vos, describing marriage, points out that marriage is of the utmost importance to South African people. In his words:

“The institution of marriage remains of pivotal importance to most South Africans. This is because marriage remains the focal point for the legal protection and regulation of the interests of individuals who are engaged in intimate relations. Marriage is the only legal institution that comprehensively safeguards the rights of individuals involved in intimate relationships. It is also one of the most powerful symbols of societal acceptance and belonging in many parts of the world, including in multi-ethnic, culturally diverse South Africa.”⁶⁶⁵

The legal position of the government towards marriage was not the same under the apartheid regime and in the post-apartheid era.

5.4.1 The legal position during the apartheid era

The apartheid government protected only marriage between one man and one woman as it was discussed in the previous section. All other forms of intimate

⁶⁶⁵ De Vos “Same-sex sexual desire and the re-imagining of the South African family” 2004 *SAJHR* 180.

relationships, including homosexual relationships, were of no legal effect.⁶⁶⁶ Given the particular importance of marriage in South Africa, individuals in South Africa who experienced sexual desire for members of their own sex and who formed relationships based at least in part on such desire, increasingly requested the legal and social recognition of their relationships. Given that those individuals were also raising children, they also demanded the social and legal recognition of their parental roles.⁶⁶⁷

This would suggest that people engaged in homosexual relationships would like society to recognise and treat them like married people and families. However, this was far from being the intention of the apartheid regime. The apartheid social and legal system did not protect minority sexual inclinations, that is, sexual preferences of gays, lesbians and transsexuals.⁶⁶⁸ Although homosexuality was becoming more visible in the big cities of the country, it was severely repressed under the apartheid regime. In fact, as Santos points out, the apartheid regime viewed homosexuality as a danger and imposed an intensive repression of the practice. In the words of Santos:

“The emergence of a growing gay sub-culture in big South-African cities, associated with the increasing visibility of places frequented by homosexuals, blew the whistle and caught the attention of the National Party, whose high command saw homosexuality as a threat to South African civilisation. To make sure the country would not have the same destiny as Rome or Esparta, the falls of which were intimately associated with the dissemination of homosexuality, in 1968 the party imposed a major repression of homosexuality”.⁶⁶⁹

The major repression of homosexuality was done through a legislative and judicial process. With regard to the legislative process, several apartheid statutes

⁶⁶⁶ See para 5.2.1.1 above.

⁶⁶⁷ De Vos 2004 *SAJHR* 180.

⁶⁶⁸ Jivan “From individual protection to recognition of relationships: Same-sex couples and the South African experience of sexual orientation reform” 2007 *LDD* 21.

⁶⁶⁹ Santos “Decriminalising homosexuality in Africa: Lessons from the South African experience” in Lennox and Waites (eds) *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* 317.

criminalised homosexuality. Homosexual conduct formed the basis of a variety of criminal offences. The early Roman criminal law expressly prohibited “unnatural practices” between men and in the Roman-Dutch common law a large number of sexual acts between adults, whether between men or between a man and a woman, were criminal, if not directed towards procreation.⁶⁷⁰ A category of “unnatural offences” was created with the sole purpose of criminalising homosexuality and was often used to punish homosexual conduct which did not involve sodomy.⁶⁷¹ In its agenda to impose repression on homosexuality, the apartheid government proposed an act amending the Immorality Act in 1968. The Immorality Amendment Act 57 of 1969 increased the regulation of sex between men in several ways, while also adjusting sexual offences by men with girls, via amendments to the Immorality Act.⁶⁷² In an attempt to oppose medical developments permitting sex change operations, the legislature amended the Births, Marriages and Deaths Registration Act 81 of 1963 in 1974 by inserting section 7B into the Act. This section allowed the alteration, in the birth register, of the description of the sex of a person who had undergone a change of sex. This Act was replaced by the Births and Deaths Registration Act 51 of 1992. However, it is important to note that even while section 7B was still in force; it had no effect on the marriage of a person who had undergone sexual reassignment surgery.⁶⁷³ This would suggest that a person who had undergone sexual reassignment or sex change surgery was considered a man or a woman if he or she was a man or a woman respectively before surgery. Consequently, a man who had undergone the surgery and became a woman is regarded by law as a man and could in no circumstances marry another man. The repression against homosexuality continued with the amendment of the existent statutes. In 1988 Parliament extended the existing prohibition on “immoral or indecent” acts between men and boys under 19 to those between women and girls under 19.⁶⁷⁴ It is important to note that the most important amendment relating to sex

⁶⁷⁰ Jivan 2007 *LDD* 21.

⁶⁷¹ Jivan 2007 *LDD* 21.

⁶⁷² Santos in Lennox and Waites (eds) 317. The Act was later renamed by the Immorality Amendment Act 2 of 1988 to become known as the Sexual Offences Act 23 of 1957)

⁶⁷³ Jivan 2007 *LDD* 23.

⁶⁷⁴ Section 14(3) (b) of the Sexual Offences Act.

between men became section 20A of the Immorality Act.⁶⁷⁵ This section stated as follows:

- “1. A male person who commits with another male person at a party an act which is calculated to stimulate sexual passion or to give sexual gratification shall be guilty of an offence;
2. For the purposes of subsection (1) ‘a party’ means any occasion where more than two persons are present. [...]”

The sentence for individuals involved in same-sex relationships was made clear in the law. People found guilty of homosexual relationships could face punishment by being locked up for two years in prison.⁶⁷⁶

Another tool used in the repression imposed on homosexuality under the apartheid regime was the judicial process. It is clear from a number of court decisions that homosexuality during the apartheid regime was a criminal offence. In *S v V*,⁶⁷⁷ for example, the court held that mutual masturbation between two men is criminal as an “unnatural offence”. In another case, *W v W*,⁶⁷⁸ the court refused to entertain a divorce action where one of the parties to the marriage was a transsexual. With reference to the English case of *Corbett v Corbett*,⁶⁷⁹ the court held that a person who had undergone a sex change operation did not change her biological sex, and could not, therefore, marry someone of her original sex (irrespective of her physical appearance or gender role in society).⁶⁸⁰ Similarly, in *Simms v Simms*,⁶⁸¹ the court confirmed that a person who had undergone a sexual reassignment remains the same person irrespective of the sex change. In this case, the husband sought to

⁶⁷⁵ Santos in Lennox and Waites (eds) 317.

⁶⁷⁶ The amendment of s 22 of Act 23 of 1957, as substituted by s 4 of Act 68 of 1967 states that s 22 of the principal Act is hereby amended by the substitution by para (g) with the following parag: “(g) in the case of an offence referred to in section 18A, 19, 20 (1)(b) or (c), or 20A(1), to a fine not exceeding four hundred rand or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.” See also Santos *Homosexuality in Africa* 317.

⁶⁷⁷ 1967 (2) SA 17 (E) at 18C-D.

⁶⁷⁸ 1976 (2) SA 308 (W).

⁶⁷⁹ [1971] P 83, [1970]2 All ER 33.

⁶⁸⁰ 1976 (2) SA 308 (W) at 314.

⁶⁸¹ 1981 (4) SA 186(D).

have his marriage annulled on the ground that his wife, who had undergone sexual reassignment surgery prior to the marriage, was at all times male. The court declared the marriage null and void.

In summary, in terms of the recognition of homosexual relationships, the apartheid era was characterised by:

- The denial of protection for gays and lesbians;
- The non-recognition and disrespect of homosexual relationships;
- The criminalisation and severe punishment of homosexual conduct or behaviour or acts,⁶⁸² and
- The monogamous and heterosexual nature of marriage.⁶⁸³

In the late 1980s, a vibrant movement within and outside of South Africa that was opposing apartheid sexual regulations grew visible by targeting the leading organisations in the struggle, the ANC in exile and the United Democratic Front (UDF) inside the country. As a result amongst others of the participation of these parties in the constitution-writing process, sexual minorities were included in chapter two of the Constitution.⁶⁸⁴ This inclusion is the starting point for the legal recognition of homosexual rights in the post-apartheid era.

5.4.2 The recognition of homosexual relationships in the post-apartheid era

The post-apartheid era is mainly characterised by the adoption of the democratic Constitution of 1996, which is the starting point of the new constitutional dispensation in South Africa. The South African Constitution has received international praise for explicitly prohibiting any discrimination on the basis of sexual orientation and the provision related to this prohibition has formed the basis for strategic litigation by the

⁶⁸² Jivan 2007 *LDD* 44.

⁶⁸³ Jivan 2007 *LDD* 22.

⁶⁸⁴ Thoreson 2008 *JSASud* 680-681.

organised lesbian and gay movement.⁶⁸⁵ The legislative prohibitions and exclusions of homosexual relationships which were characterised by the criminalisation of sodomy; the exclusion of lesbian and gay partners from their partners' medical aid benefits; their exclusion from the immigration benefits extended to foreign spouses of South African citizens, from partners' pension and insurance benefits, and from receiving compensation from the Road Accident Fund for the death of their partners; and the inability of gay and lesbian couples jointly to adopt children or to be each other's intestate heirs, were gradually challenged before the court and found inconsistent with the Constitution. The judicial process culminated in a successful constitutional challenge to the common-law definition of marriage and the provisions of the Marriage Act 25 of 1961 which excluded homosexual couples from marrying.⁶⁸⁶

As already stated above, the South African Constitution was a starting point for these changes.⁶⁸⁷ According to Nielsen and Van Heerden, the advent of democracy in South Africa marked a new era. In their words:

“With the introduction of a constitutional democracy in 1994, South Africa entered a new era characterised by values, such as respect for the dignity and privacy of all its citizens, a principled commitment to equality, recognition of the diversity of different groups in our heterogeneous society and, last but not least, a particular emphasis on the most vulnerable groups in society within the ambit of constitutional protection; South Africa became the first country ever to include sexual orientation in its anti-discriminatory provisions”.⁶⁸⁸

This would suggest that the Constitution extended its protection to all South Africans by introducing provisions explicitly aimed at prohibiting any form of discrimination. In this regard, unfair discrimination based on marital status and sexual orientation was

⁶⁸⁵ Bonthuys “Race and gender in the Civil Union Act” 2007 *SAJHR* 528-529.

⁶⁸⁶ Bonthuys 2007 *SAJHR* 529.

⁶⁸⁷ The recognition of homosexual marriage and family is one of those changes.

⁶⁸⁸ Nielsen and Van Heerden “The constitutional family: Developments in South African family law jurisprudence under the 1996 Constitution” 2003 *IJLPF* 121.

also prohibited. These provisions have led to the legal rights of lesbians and gay men becoming the subject of considerable judicial, political and legislative activity.⁶⁸⁹

South Africa legalised homosexual marriages by way of the Civil Union Act 17 of 2006.⁶⁹⁰ When the Civil Union Act was adopted, it was received as a relatively clear victory for the lesbian and gay community as a whole. Same-sex relationships were incorporated into a structure which is marriage-like.⁶⁹¹ The incorporation of homosexual relationships in the Civil Union Act is the result of constitutional prohibition of any discrimination based on the ground of sexual orientation.

According to Jivan, legal issues relating to sexual orientation have arisen in two contexts: first the prohibition of discrimination, primarily to ensure that individual lesbians and gay men are not discriminated against; and second the recognition of homosexual relationships, and the extension to homosexual partners of the benefits and rights that are accorded to heterosexual partners.⁶⁹²

With regard to the prohibition of discrimination, several judicial decisions dealing with legal challenges against allegedly discriminatory laws have clarified the legal position of lesbians and gay men and have served as a focus for the political debate about homosexuality and, in some instances, have provided a framework for legislative reforms. These reforms have evidenced a move away from “condemnation” towards homosexuality to “compassion and recognition”.⁶⁹³

In a series of cases, the Constitutional Court of South Africa progressively dealt with unfair discrimination based on sexual orientation and recognised the rights of homosexual persons, including their right to marry. The first case in which the court dealt with the issue of discrimination based on sexual orientation was *National*

⁶⁸⁹ Jivan 2007 LDD 26.

⁶⁹⁰ Bonthuys “Possibility foreclosed: The Civil Union Act and lesbian and gay identity in Southern Africa” 2008 *Sexualities* 726-727.

⁶⁹¹ Bonthuys 2007 SAJHR 541.

⁶⁹² Jivan 2007 LDD 27.

⁶⁹³ Jivan 2007 LDD 27.

Coalition for Gay and Lesbian Equality v Minister of Justice.⁶⁹⁴ In this case, the court overturned the sodomy law in South Africa. The case dealt with the confirmation of an order made by the Witwatersrand Local Division, as it was then called. The Witwatersrand Local Division had granted an order declaring unconstitutional and invalid the common-law offence of sodomy and certain statutory provisions which prohibited and criminalised sexual conduct between consenting male adults.⁶⁹⁵

Commenting on equality, Ackermann J emphasised that it is the impact of the discrimination on the complainant or the members of the affected group that is the determining factor.⁶⁹⁶ He continued by saying that the desire for equality does not consist in the elimination of all differences but requires an understanding of “the other” in society. Discriminatory prohibitions on sexual relations between men reinforce existing societal prejudices and increase the negative effects of such prejudices.⁶⁹⁷ Ackermann J, commenting on the purpose of the sodomy offence, held the following:

“The sole purpose and existence of the offence of sodomy was to criminalise a particular form of gay expression which failed to conform to the moral or religious views of a section of society. The objective of the common-law offence of sodomy was not dictated by the punishing of ‘male rape’. The fact that the ambit of the offence was wide enough to include ‘male rape’ was mere coincidental. The core of the offence was to punish sexual expression between gay men.”⁶⁹⁸

Ackermann J further held that gay men were a permanent minority in society and had in the past suffered from patterns of disadvantage, and that the consequences of the disadvantage were severe, affecting the dignity, personhood and identity of gay men at a deep level.⁶⁹⁹

⁶⁹⁴ 1998 (12) BCLR 1517 (CC), 1999 (1) SA 6 (CC) (“the first *National Coalition* case”).

⁶⁹⁵ De Ru “Historical perspective on the recognition of same-sex unions in South Africa” 2013 *Fundamina* 234.

⁶⁹⁶ First *National Coalition* case para [19].

⁶⁹⁷ First *National Coalition* case paras [22] and [23].

⁶⁹⁸ First *National Coalition* case para [69].

⁶⁹⁹ First *National Coalition* case para [26].

Although the right to equality was the primary basis on which the case was argued, Ackermann J held that the criminalisation of sodomy also infringed the right to dignity enshrined in section 10 of the Constitution, and the right to privacy protected by section 14 of the Constitution. With regard to the right of dignity, he stated that the common-law prohibition on sodomy criminalised all sexual intercourse between men regardless of the circumstances surrounding the relationship, thus punishing a form of sexual conduct the broader society identified with homosexuality.⁷⁰⁰ He went on to explain as follows:

“The existence of a law which criminalises a form of sexual expression for gay men degraded and devalued gay men in our broader society and constituted an invasion of their dignity and thus infringed section 10 of the Constitution”.⁷⁰¹

With regard to the right to privacy, Ackermann J further held that the criminalisation of sodomy infringed the right to privacy enshrined in section 14 of the Constitution. He stated the following:

“Privacy recognises that we all have the right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If in expressing our sexuality, we act consensually and without harming one another, invasion of that will be a breach of our privacy”.⁷⁰²

By this statement, Ackermann is clearly showing the intention of homosexual people to have their sexuality equally respected even though it is different from heterosexuality.

The theme of equality as including respect for difference was also endorsed by Sachs J, who wrote a concurring judgment. Sachs J stressed that equality should not

⁷⁰⁰ First *National Coalition* case para para [28].

⁷⁰¹ First *National Coalition* case para para [28].

⁷⁰² First *National Coalition* case para [37].

be confused with uniformity. On the contrary, equality means equal concern and respect across difference.⁷⁰³ He added that the success of the constitutional endeavour will depend on how successfully South Africans are able to reconcile sameness and difference.⁷⁰⁴ Both Ackermann J and Sachs J affirmed that the laws governing sodomy violated not only the right to equality, but also the rights to privacy and dignity.⁷⁰⁵ Therefore, the court concluded that the common-law offence of sodomy was unconstitutional because it violated the rights to equality, dignity and privacy.⁷⁰⁶ The limitations on these rights were not justifiable in terms of section 36 of the Constitution. The court held that the enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose.⁷⁰⁷

Another step in the judicial process to end discrimination based on sexual orientation was the prohibition of discrimination in employment. Discrimination in employment was raised in *Langemaat v Minister of Safety and Security*.⁷⁰⁸ This case involved a lesbian police captain who sought to have her partner included in her medical aid scheme, which allowed only the legal spouse, widow or widower and the child of a member of the police force to be registered as the member's dependant. The court clarified the meaning of dependant and held that a dependant is someone who relies upon another for maintenance.⁷⁰⁹ On behalf of the court Roux J held that the knowledge and experience of many homosexual couples who have lived together for years should not be ignored. He pointed out that the scheme's rules and regulations excluded many *de facto* dependants of members of the police force from the benefit of their carer's medical Aid. This amounted to discrimination against the dependants, as well as members of the police force who would have to find alternative means to pay for the medical care of their dependants.⁷¹⁰ He then declared the position unconstitutional and ordered the chairperson of the police medical scheme to

⁷⁰³ First *National Coalition* case para para [132].

⁷⁰⁴ *Ibid.*

⁷⁰⁵ Jivan 2007 LDD 28.

⁷⁰⁶ First *National Coalition* case para [30].

⁷⁰⁷ First *National Coalition* case para [37].

⁷⁰⁸ 1998 (3) SA 312 (T) ("the *Langemaat* case").

⁷⁰⁹ *Langemaat* case 315F.

⁷¹⁰ *Langemaat* case 316A-B.

reconsider the application for registration of the applicant's lesbian partner as her dependant.⁷¹¹

Another aspect of discrimination on the basis of sexual orientation was raised in *Satchwell v President of the Republic of South Africa*.⁷¹² In this case Judge Kathleen Satchwell challenged provisions of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 and the corresponding regulations that prevented her homosexual partner from receiving the equivalent pension and other benefits regarding transport, travelling and subsistence provided to spouses of judges. Satchwell argued that the provisions constituted unfair discrimination on the basis of marital status and sexual orientation. The court, after applying the Harksen test to the facts in this case, found that the denial of benefits to same-sex partners while affording them to married judges is a differentiation on the ground of sexual orientation which is a listed ground in section 9 of the Constitution. That denial was held accordingly to amount to discrimination, which is presumed in terms of section 9(5) to be unfair unless the contrary is shown.⁷¹³

The court declared that the omission from regulations 9(2)(b) and 9(3)(a) of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 after the word "spouse" of the words "or partner in a permanent same-sex partnership in which the partners have undertaken reciprocal duties of support" is inconsistent with the Constitution.⁷¹⁴ The court further held that Regulations 9(2)(b) and 9(3)(a) of the Judges' Remuneration and Conditions of Employment Act are to be read as though the following words appear therein after the word "spouse": "or partner in a permanent same-sex partnership in which the partners have undertaken reciprocal duties of support".⁷¹⁵

⁷¹¹ *Langemaat* case 317H.

⁷¹² 2002 (6) SA 1 (CC).

⁷¹³ *Satchwell v President of the Republic of South Africa* (1) SA BCLR 39 (CC), 2000 (2) SA 1 (CC) para [21] (hereafter "the Satchwell case").

⁷¹⁴ *Satchwell* case para [37].

⁷¹⁵ *Satchwell* case para [37].

It is clear from the court's order in this case that the rights of heterosexual married partners were extended to homosexual partners. This was an important progress in the struggle for the recognition of homosexual individuals' rights.

In a number of cases, provisions of the Aliens Control Act 96 of 1991 were challenged with regard to the meaning of family. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,⁷¹⁶ the Constitutional Court overturned the provisions of the Aliens Control Act 96 of 1991, which restricted immigration benefits (including the right to accord residency to a foreign partner) to "spouses" while denying it to same-sex partners.⁷¹⁷ The court held:

"This denial reinforced harmful stereotypes of gays and lesbians, invading their constitutional right to dignity by conveying a message that same-sex relationships lacked the same validity as heterosexual ones. The denial also discriminated against gays and lesbians on the grounds of sexual orientation and marital status."⁷¹⁸

The relationship between family and marriage, and the extent to which gay and lesbian couples can be considered as constituting family, were also brought before the court because here also homosexual people felt discriminated against. In this regard, the court concluded that the values of family life that are protected by section 25(5) of Aliens Control Act are equally to be found in homosexual relationships. In short the court held that gays and lesbians are able to establish a *consortium omnis vitae* and are capable of establishing a family and benefiting from family life.⁷¹⁹ The focus by the court on this aspect of *consortium* was subjected to criticism. According to Jivan, it sends out a strong message that only those relationships that are sufficiently similar to marriage will qualify for recognition.⁷²⁰ In De Vos's opinion, the court seems to support a rather narrow conception of which intimate relations should

⁷¹⁶ 2000 (1) SA BCLR 39 (CC), 2000 (2) SA 1 (CC) ("the second *National Coalition* case").

⁷¹⁷ Section 25(5) of the Aliens Control Act 96 of 1991.

⁷¹⁸ Second *National Coalition* case para [40].

⁷¹⁹ Second *National Coalition* case para [53].

⁷²⁰ Jivan 2007 *LDD* 31.

qualify for protection, even while it professes to endorse a more open-ended view and claims that is broadening access to “the family”.⁷²¹

A further step along the road towards formal recognition of homosexual relationships was taken in *Du Toit v Minister of Welfare and Population Development*.⁷²² In this case, the Constitutional Court declared the unconstitutionality of certain provisions of the Child Care Act 74 of 1983,⁷²³ and the Guardianship Act 192 of 1993.⁷²⁴ This case involved a lesbian couple that jointly wanted to adopt two children. However, they were denied the right to adopt because in terms of the Child Care Act, only married couples could jointly adopt children. As a consequence of that law, only one lesbian could adopt a child. They subsequently challenged the constitutionality of the relevant provisions on the ground that the absence in the Child Care Act of a provision that grants homosexual life partners the right to jointly adopt violates homosexual life partners’ right to equality and their right to dignity, and does not give paramountcy to the best interests of the child.⁷²⁵ The court found that the impugned sections unjustifiably limited the right not to be unfairly discriminated against on the ground of sexual orientation, and the right to dignity. It further found that the situation in which only one partner to the homosexual union has a legal relationship with the adopted child was manifestly not in the best interests of those children whose rights their care-givers sought to enforce and protect.⁷²⁶ The court read words into the Act to bring homosexual life partners within the ambit of the sections. As a result of this decision, homosexual life partners may jointly adopt children. One homosexual life partner may furthermore adopt the other’s child without the legal rights and obligations between the parent and the child being terminated. In both instances, homosexual life partners are the child’s joint guardians after the adoption.⁷²⁷

It can be argued that in this case the court confirmed that not only the rights of adoption are secured for homosexual couples, but also their relationships are

⁷²¹ De Vos 2004 *SAJHR* 179.

⁷²² 2002 (10) BCLR 1006 (CC), 2003 (2) SA 198 (CC) (hereafter “the *Du Toit* case”).

⁷²³ Section 17(a), 17(c) and 20(1) of the Child Care Act 74 of 1983.

⁷²⁴ Section 1(2) of the Guardianship Act 192 of 1993.

⁷²⁵ *Du Toit* case para [7]. See also Jivan 2007 *LDD* 34.

⁷²⁶ *Du Toit* case para [17].

⁷²⁷ *Du Toit* case para [17].

recognised even though the judgment does not explicitly “legalise” these relationships.⁷²⁸

Discrimination against homosexual couples on the ground of their sexual orientation was also challenged in *Du Plessis v Road Accident Fund*.⁷²⁹ In this case, the Supreme Court of Appeal extended the common law dependant’s action to the surviving partner in a same-sex permanent life partnership, similar to a marriage, in circumstances where the deceased had contractually undertaken a duty of support towards the survivor. The case involves two homosexual partners, the appellant and the deceased, who had lived together for approximately eleven years until the deceased was killed in a motor vehicle accident. Their relationship was in all respects similar to a marriage. Five years into the relationship, the appellant was medically boarded. From then on, the deceased contributed towards the appellant’s financial support and undertook to continue doing so for as long as the appellant needed it. After the deceased’s death, which was largely attributable to the negligence of the driver of a vehicle insured by the Road Accident Fund, the appellant instituted a dependant’s claim for loss of support against the Fund. He also sought to recover the deceased’s burial expenses.

In a unanimous judgment, the Supreme Court of Appeal found that the appellant was entitled to compensation for the loss of the deceased’s financial support and the court concluded that the action in this case “would be an incremental step to ensure that the common law accords with the dynamic and evolving fabric of our society as reflected in the Constitution, recent legislation and judicial pronouncements”.⁷³⁰

This decision represents an important advance towards recognising and protecting persons involved in homosexual partnerships in that it developed the common law dependant’s action to accord with the realities of modern family life and social conditions.⁷³¹

⁷²⁸ Jivan 2007 LDD 34

⁷²⁹ 2003 (11) BCLR 1220 (SCA), 2004 (1) SA 359 (SCA) (hereafter “the *Du Toit* case”).

⁷³⁰ *Du Toit* case para [39].

⁷³¹ Jivan 2007 LDD 36.

The right to marry of homosexual people was addressed in two different cases decided on the same day, 1 December 2005: *Minister of Home Affairs v Fourie* and *Lesbian and Gay Equality Project v Minister of Home Affairs*.⁷³²

According to Goldblatt, 1 December 2005 was a proud day for South Africa as it joined the ranks of a handful of countries that provide full legal recognition to homosexual partnerships. On this date, the Constitutional Court was asked by a lesbian couple (Fourie and Bonthuys) to address their exclusion from the common law definition of marriage, which says that marriage is “a union of one man with one woman, to the exclusion, while it lasts, of all others”.⁷³³ On the same date, the court was asked, in a separate case brought by the Lesbian and Gay Equality Project, which is an organisation established to litigate and promote the rights of gays and lesbians in South Africa (together with a number of same sex couples), to remedy the problematic marriage formula in the Marriage Act that refers to a person taking another person as his or her “lawful wife” (or husband).⁷³⁴ In a majority judgement, the court found that the common law and the formula in the Marriage Act were inconsistent with the Constitution and invalid to the extent that they prevent homosexual couples from enjoying the status and benefits coupled with responsibilities accorded to heterosexual couples.⁷³⁵ The basis of the court’s decision was primarily the right to equality enshrined in South Africa’s Bill of Rights that affords “equal protection and benefit of the law” and includes a prohibition against unfair discrimination on the basis of a set of listed grounds including sexual orientation.⁷³⁶ The Constitution, in this regard, requires that the common law and legislation be developed in accordance with the spirit, purport and objects of the Bill of Rights.⁷³⁷

⁷³² *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae), Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 255 (CC) (hereafter “the *Fourie* case”).

⁷³³ *Fourie* case para [6]. See also Goldblatt “Case Note: Same-sex marriage in South Africa – The Constitutional Court’s judgement” 2006 *FLStud* 261-262.

⁷³⁴ Marriage Act s 30(1). *Fourie* case paras [1]-[3]. See also Goldblatt 2006 *FLStud* 261-262.

⁷³⁵ *Fourie* case para [19].

⁷³⁶ Section 9 of the Constitution.

⁷³⁷ Section 39(2) of the Constitution.

With regard to the right to marry, the Constitutional Court confirmed that the right to marry is an inalienable right that belongs to all who live in South Africa, black or white, gay or straight; and that gay men and lesbians can only be affirmed as full and equal members of our society if this right is also fully extended to them.⁷³⁸ The majority of the court held that it would be important first to afford Parliament the opportunity to cure the unconstitutionality of the existing law.⁷³⁹ In response to the aforementioned decision, the Cabinet approved the first draft of the Civil Union Bill.⁷⁴⁰

The cases discussed above paved the way for the Constitutional court's affirmation of the rights of gays and lesbians to the same benefits as married heterosexuals in the *Fourie* case. This means that South African family law, which still locates marriage at its centre, is now inclusive of same-sex partners for all purposes.⁷⁴¹

In summary, in the gradual process of legally recognising homosexual relations, it can be argued that the post-apartheid Constitution began with the legal protection of "sexual orientation" as a form of identity. In the great movement towards gay and lesbian equality, the early battles, be it decriminalisation or protection from discrimination, concerned matters that involved individual rights. Thereafter, a new generation of disputes emerged which concerned relationships rather than individuals and now, with the passing of the Civil Union Act, a new distinct status has been conferred upon gays and lesbians.⁷⁴²

According to De Vos and Barnard, the Constitutional Court has constantly highlighted the clear significance of the concepts of human dignity, equality and freedom for the court's equality jurisprudence on homosexual relationships. It has also developed a detailed set of assumptions that must guide any such enquiry. In the process of setting out these assumptions, it has rejected many of the

⁷³⁸ *Fourie* case para [32]
⁷³⁹ *Fourie* case para [32]
⁷⁴⁰ Bill 26 of 2006.
⁷⁴¹ Goldbalt 2006 *FLStud* 266.
⁷⁴² Jivan 2007 *LDD* 44.

standardised and hackneyed assumptions made about gay men and lesbians and their intimate relationships.⁷⁴³

The Constitutional Court thus concluded that the family life of gay men and lesbians is in all significant respects indistinguishable from that of heterosexual spouses and in human terms as important. Failure to recognise the relationships of homosexual couples amounts to sending the message that “gays and lesbians lack the inherent humanity to have their families and family lives in such homosexual relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity.”⁷⁴⁴

In addition to the judicial recognition of homosexual rights, there is also statutory recognition of homosexual relationships and family in South Africa. In fact, several statutes have included homosexual partners within many of their provisions. It is not possible to discuss all of them in this study; however, reference will be made to few of these statutes.

Certain statutes, including the Maintenance Act 99 of 1998, the Domestic Violence Act 116 of 1998 and the Rental Act 50 of 1999, grant to heterosexual and homosexual life partners the same protection that spouses enjoy. In addition, like their counterpart heterosexual life partners, homosexual life partners now have the same benefits as spouses in terms of the rules of medical schemes and job-related benefit schemes. In respect of medical schemes, the Medical Schemes Act 131 of 1998 states that a scheme may not be registered if its rules unfairly discriminate against anyone on the ground of, inter alia, sexual orientation.⁷⁴⁵

⁷⁴³ De Vos and Barnard “Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on ongoing saga” 2007 *SALJ* 800.

⁷⁴⁴ Second *National Coalition* case para [33].

⁷⁴⁵ Section 24(e) of the Medical Schemes Act 131 of 1998. See also Heaton *South African Family Law* 3 ed 249.

With the passing of the Taxation Laws Amendment Act 5 of 2001, the definition of spouse was extended to include homosexual partners in the Transfer Duty Act 45 of 1955 and the Income Tax Act 58 of 1962.⁷⁴⁶ In terms of the Employment Equity Act 55 of 1998, family responsibility is the responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care and support.⁷⁴⁷ According to the Basic Conditions of Employment Act 75 of 1997, an employee must be given three days paid leave in the event of the death of the employee's spouse or life partner.⁷⁴⁸

It can be argued that the major victory in the process of recognising homosexual marriage and family was obtained through the *Fourie* case, which resulted in the drafting and passing of the Civil Union Act. This victory is discussed in the next section.

5.5 MODELS OF RECOGNITION OF HOMOSEXUAL RELATIONSHIPS AND ISSUES RAISED BY THE LEGAL RECOGNITION OF HOMOSEXUAL RELATIONSHIPS

This section briefly discusses the status given to homosexual relationships in the Civil Union Act and the issues that this legal recognition has raised.

5.5.1 Models of recognition of homosexual relationships

In December 2005 South Africa became the fifth nation to legalise homosexual marriage. In a revolutionary decision, the Constitutional Court ruled that the law limiting marriage to heterosexual couples was unconstitutional and gave the parliament one year to amend the country's marriage laws accordingly.⁷⁴⁹ It was by means of the Civil Union Act that South Africa legalized the formalisation of

⁷⁴⁶ Heaton *South African Family Law* 3 ed 248.

⁷⁴⁷ Section 1 of the Employment Equity Act 55 of 1998.

⁷⁴⁸ Section 27 of the Basic Conditions of Employment Act 75.

⁷⁴⁹ Kukura "Finding family: Considering the recognition of same-sex families in international human rights law and the European Court of Human Rights" 2006 *HRB* 17.

homosexual relationships.⁷⁵⁰ The purpose of the Civil Union Act was to extend marriage rights to homosexual couples who were until then denied the right to marry.⁷⁵¹ The Act recognises two different models of homosexual relationships, civil unions and life partnerships.

5.5.1.1 *Civil unions*

Section 1 of the Civil Union Act provides a comprehensive definition of a civil union. According to this section, a civil union is:

“the voluntary union of two persons who are both 18 years or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others.”⁷⁵²

Heaton is of the view that the definition of the civil union applies to heterosexual and homosexual couples. In her words:

“However, in the light of the use of the word ‘persons’ without any qualification regarding the persons’ sex in the definition of ‘Civil Union’ in s 1 of the Act, it is clear that the legislator had persons of either sex in mind. If the legislator intended to limit civil unions to same-sex couples, the Act would have had to expressly include in this definition of ‘civil union’, like in the definition of ‘civil partnership’ as the voluntary union of two adult persons of the same-se sex that is solemnized and regarded in accordance with the procedures prescribed in the Act to the exclusion, while it lasts, of all others”.⁷⁵³

It is therefore clear that the fact that the Act refers to “two persons” without any further specification, would suggest that two persons, irrespective of their race,

⁷⁵⁰ Bonthuys 2008 *Sexualities* 726–727.

⁷⁵¹ De Vos “A judicial revolution? The court-led achievement of same-sex marriage in South Africa” 2008 *ULR* 162.

⁷⁵² Section 1 of the Civil Union Act.

⁷⁵³ Heaton *South African Family Law* 3 ed 195.

culture, or sexual orientation can be united in a civil union, provided that they are 18 years or older. Therefore, a homosexual couple in which partners are 18 years or older can enter into a civil union. This applies also to heterosexual couples.

Section 2 of the Civil Union Act gives the objectives of the Act. In terms of this section the objectives of the Civil Union Act are the following:

- (a) to regulate the solemnisation and registration of civil unions, by way of either a marriage or a civil partnership; and
- (b) to provide for the legal consequences of the solemnisation and registration of civil unions.⁷⁵⁴

The objectives of the Civil Union Act reveal two important characteristics of a civil union, which are the solemnisation and the registration of civil unions to which legal consequences are conferred. It is important to briefly comment on these characteristics.

With regard to the solemnisation of civil unions, it should be noted that the prospective civil partners must first enter into a contract or engagement to marry each other. The engagement is followed by a promise to enter into a civil union on a determinable date. In terms of section 4(1) and 4(2), it is the marriage officer who will solemnise the civil union in the light of the requirements set out in the Act. These requirements include that only religious organisations approved by the Minister of Home Affairs can solemnise civil unions.⁷⁵⁵ In this regard a person from a religious organisation will be designated as a marriage officer for the purposes of solemnising civil unions in accordance with the provisions of the Act and further in accordance with the rites of that specific religious institution only after his or her application was received and approved by the Minister of Home Affairs.⁷⁵⁶ Section 6 of the Civil Union Act reads as follows:

⁷⁵⁴ Section 2 of the Civil Union Act.

⁷⁵⁵ Section 5(1) of the Civil Union Act.

⁷⁵⁶ Section 5(4) of the Civil Union Act.

“A marriage officer, other than a marriage officer referred to in section 5, may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such civil union”.

According to this section, a marriage officer is not compelled to solemnise a same-sex civil union if he or she objects on the ground of conscience, religion or belief. There is no such provision for a heterosexual couple who would like to enter into civil union. This would suggest that the Act allows discrimination against homosexual persons on the ground of their sexual orientation.

The solemnisation of civil unions is somehow similar to the solemnisation of civil marriage in terms of the Marriage Act. No solemnisation of a civil union will take place before the prospective civil union partners are properly identified. In this regard, they must provide the marriage officer with their identity documents or identity affidavits.⁷⁵⁷ Where one of the partners does not have an identity document, it is suggested that he or she may alternatively submit an identity affidavit.⁷⁵⁸ It is recommended that the parties and at least two competent witnesses be personally present during the civil union ceremony.⁷⁵⁹ At the beginning of the ceremony, it is important for the marriage officer to know how the civil union he or she is solemnising is going to be known. In this regard, he or she must ask the parties whether their civil union is going to be known as a marriage or a civil partnership.⁷⁶⁰ The civil union partners have to answer to that question by choosing either marriage or civil partnership. Once they give their answer to the prescribed question, the marriage officer will declare them lawfully joined in a marriage or civil partnership.⁷⁶¹ It is important to note that it is when this declaration is made by the marriage officer that the civil union is legally recognised.

⁷⁵⁷ Section 7 of the Civil Union Act.

⁷⁵⁸ Section 7(c) of the Civil Union Act.

⁷⁵⁹ Section 10(2) of the Civil Union Act.

⁷⁶⁰ Section 11(1) of the Civil Union Act.

⁷⁶¹ Section 11(2) of the Civil Union Act.

It should be noted that civil unions are registered by way of the registration certificate issued by the marriage officer. The registration certificate will be the proof of the existence of the civil union between the civil union partners. In fact, prior to the solemnisation of the civil union, each prospective civil union partner must in writing declare his or her willingness to enter into a civil union with the other partner. They will then both sign the prescribed document in the presence of two witnesses.⁷⁶² The marriage officer and the two witnesses must sign the written declarations to certify that it was made in their presence. After the civil union is solemnised, the marriage officer will issue the civil union partners with a registration certificate stating that they have entered into either a marriage or a civil partnership depending on the decision they made as to the term they wish their union to be known by.⁷⁶³

It is noteworthy that the ceremony of solemnisation and registration of a civil union can take place on any day of the week. However, a marriage officer is not obliged to solemnise a civil union between 08h00 and 16h00.⁷⁶⁴ The solemnisation may take place in a public or private dwelling house with open doors or on any premises used for such purposes by the marriage officer. A civil union may also be solemnised elsewhere if one or either of the parties is incapable of being present at the abovementioned places due to serious, longstanding illness or serious bodily injury.⁷⁶⁵

Since a civil union has a beginning, it can also have an end. The circumstances that can end a civil union can be the death of one or both civil partners or their divorce. There is not much to say in the case of the end of a civil union by death. In this case, the surviving partner will be free from the civil union and can even enter another civil union like in the case of heterosexual marriage. However, in the case that the civil union ends in divorce, the Divorce Act 70 of 1979, which regulates divorce and its consequences, will apply *mutatis mutandis* to a civil union concluded under the Civil

⁷⁶² Section 12(1) of the Civil Union Act.

⁷⁶³ Section 12(2) & (3) of the Civil Union Act.

⁷⁶⁴ Section 10(1) of the Civil Union Act.

⁷⁶⁵ Section 10(2) of the Civil Union Act.

Union Act. In terms of section 3 of the Divorce Act read together with section 13 of the Civil Union Act, there are two major causes of divorce, namely:

- 1) The irretrievable breakdown of the civil union as contemplated in section 4 of the Divorce Act;
- 2) The mental illness or the continuous unconsciousness of a partner to a civil union, as contemplated in section 5 of the Divorce Act.

The content of these causes are beyond the scope of this study and will not be discussed. However, it is important to note that once the divorce has been declared, the patrimonial consequences of the civil union will be regulated by the matrimonial property regime the partners chose upon entering into the civil union.⁷⁶⁶

Another model of recognition of homosexual relationships is the life partnership. This model is reserved to cohabiting homosexual couples.

5.5.1.2 *Life partnerships*

The term “life partnership” can be used in a wide or a narrow sense. In a wide sense, a life partnership includes both of the following relationships:

- (a) The relationship between two people, regardless of their sex, who live together in a permanent union analogous to marriage without ever having gone through a marriage ceremony although they are not prevented by the law from validly marrying one another in terms of civil or customary law or entering into a civil union with one another; and
- (b) The relationship between two people who live together after having entered a marriage that is not regarded as valid by South African law or between two

⁷⁶⁶ For a general discussion of the patrimonial consequences of the dissolution of a civil marriage by divorce see Heaton *South African Family Law* 3 ed ch 12.

people who live together because they are prohibited from marrying one another.⁷⁶⁷

In the narrow sense, a life partnership means a permanent life relationship, analogous to marriage, comprising two persons who, even though they are legally competent to marry one another, live together without:

- (a) having ever attempted to marry one another in terms of the Marriage Act, the Recognition of Customary Marriages Act or the Civil Union Act;
- (b) having ever attempted to enter into a civil partnership with one another in terms of the Civil Union Act; or
- (c) having entered into a purely religious marriage with one another.⁷⁶⁸

For the purpose of this study, a life partnership is understood in its narrow sense as an arrangement where two people live together in a relationship similar to a marriage which produces a sense of responsibility and commitment and creates dependence between the parties.⁷⁶⁹ According to Heaton, various terms are used to describe these relationships, including *de facto* marriage, common-law marriage and domestic partnership.⁷⁷⁰ In general, the legal consequences of a legally recognised marriage will not apply to life partners. However, some Acts confer spousal benefits on life partners. Further, some courts have extended additional spousal benefits to life partners.⁷⁷¹ In the case of homosexual life partners, the extension of these benefits was the result of constitutional jurisprudence in family law, and the transformation of the concept “family law” and what it encompasses.⁷⁷²

⁷⁶⁷ Smith “The dissolution of a life or domestic partnership” in Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* 406.

⁷⁶⁸ Smith in Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* 407.

⁷⁶⁹ Goldblatt “Regulating domestic partnerships – a necessary step in the development of South African family law” 2003 *SALJ* 611.

⁷⁷⁰ Heaton *South African Family Law* 3 ed 243.

⁷⁷¹ *Ibid.*

⁷⁷² See the discussion under para 5.4.2 in this regard.

Life partnerships can be characterised by the absence of marriage engagement and the presence of dependence between the life partners. The absence of marriage engagement is significant in understanding the unwillingness of the courts to extend spousal benefits to heterosexual life partners. *Volks v Robinson*⁷⁷³ is an important decision in this regard. This case involves sixteen years of a heterosexual permanent life partnership between Mrs Ethel Robinson and Mr Richards Gordon Volks. During this period the cohabitant couple lived together on a continuous basis in a flat in Cape Town. They jointly occupied that flat until the death of Mr Volks in 2001. During his lifetime, Mr Volks was depositing into Mrs Robinson's account an amount of R5000 on a monthly basis for covering the household's necessities; he also provided petrol and paid for her car's maintenance. In his will, Mr Volks bequeathed certain assets to Mrs Robinson but she submitted a claim for maintenance against the estate with the executor of the estate appointed in terms of the will. The claim was lodged in terms of section 2(1) of the Maintenance of Surviving Spouses Act 27 of 1990. The executor of the estate refused Robinson's claim on the basis that she was not a "spouse" of the deceased for purposes of the Act. Mrs Robinson then sought an order declaring that the exclusion of the survivor of a domestic partnership from the provisions of the Act was unconstitutional and invalid in that it discriminated unfairly against her on the ground of marital status and infringed her right to dignity.

The court held that section 2(1) of the Act, read together with section 1, is unconstitutional in that it violates the right to equality in terms of section 9 of the 1996 Constitution and specifically discriminates unfairly on the basis of marital status. The court then ordered that section 1 of the Act be amended to include persons involved in domestic partnerships. In a majority judgment by Skweyiya J, the Constitutional Court found that section 2(1) of the Act was a mere extension of the reciprocal duty of support between living married persons to the estate of a deceased spouse.⁷⁷⁴ This extension should be viewed as a qualification of the right to freedom of testation. However, because no reciprocal duty exists between living unmarried persons, the court held that it would be unfair to impose such duty on the

⁷⁷³ *Volks v Robinson* 2005 (5) BCLR 446 (CC).

⁷⁷⁴ Paras [56]-[60].

estate of the deceased. The court explained that there is a fundamental difference between Mrs Robinson's relationship to the deceased and a marriage relationship in relation to maintenance. This difference is that people in marriage are obliged to maintain each other by operation of law and without further agreement or formalities. People in the class of relationships to which she belongs are not in that position.⁷⁷⁵

It is clear from this judgment that Mrs Robinson could not qualify as a surviving spouse in terms of the Maintenance of Surviving Spouses Act simply because she was never married to Mr Volks. She was engaged to Mr Volks in a relationship that was different to marriage.

The emphasis on the difference between marriage and domestic life partnership would suggest that marriage bestows on married people rights from which people who are not married cannot benefit. This would further suggest that marriage is a relationship that is legally protected and valued as it is mentioned in the majority judgment by Ngcobo J.

In his judgment, Ngcobo J argued that section 15(3)(a)(i) of the Constitution recognises the institution of marriage and that the recognition is consistent with the obligations imposed on our country by certain international and regional human rights instruments such as the African Charter on Human and People's Rights of 1981, the International Covenant on Civil and Political Rights of 1966 and the Universal Declaration of Human Rights of 1949.⁷⁷⁶ Ngcobo further argued that because of this recognition of the institution of marriage as well as other obligations on our country to protect this institution, the law may distinguish between married people and unmarried people and also afford protection to married people which it does not afford to unmarried people. He then held that the discrimination *in casu* was not unfair.⁷⁷⁷

⁷⁷⁵ Para [62].

⁷⁷⁶ Paras [80]-[85].

⁷⁷⁷ Paras [86]-[87].

Like Skweyiya J, Ngcobo J emphasised the difference that exists between marriage and life partnership and stressed that the law is expected to protect heterosexual couples who desire the consequences ascribed to this type of relationships. He further argued that those couples desiring to benefit from marriage rights should clearly signify their acceptance by entering into marriage.⁷⁷⁸ This would suggest that marriage is an option open to every mature couple that seeks the protection that the law offers to this institution. Consequently, those couples that chose not to enter into marriage cannot claim rights that marriage grants to married people.

Life partners may use contracts to regulate the legal consequences of their relationship and to create some financial security between the partners themselves and third parties.⁷⁷⁹ In this regard, life partners may, for example, purchase assets jointly, or jointly enter into lease agreements and credit agreements. The terms and conditions of each agreement will determine each partner's individual rights and obligations.⁷⁸⁰

Life partner contracts and contracts can be used by life partners in order to regulate their relationships. According to Heaton, homosexual (and opposite-sex) life partners may enter into a life partnership contract (also known as a cohabitation or domestic partnership contract) to determine the rights and duties of each partner during the subsistence of the life partnership and to regulate the financial and proprietary consequences upon termination of the life partnership.⁷⁸¹

A life partnership contract may contain any provision which is not impossible, against the law or immoral.⁷⁸² In that regard, the life partners may for example look after one other, agree on the occupation and ownership of the common home, the procedure for the division of household goods after the termination of the life partnership, deal with the ownership of assets owned before the inception of the life partnership and

⁷⁷⁸ Para [92].

⁷⁷⁹ Heaton *South African Family Law* 3 ed 246.

⁷⁸⁰ Heaton *South African Family Law* 3 ed 244.

⁷⁸¹ Heaton *South African Family Law* 3 ed 246.

⁷⁸² Heaton *South African Family Law* 3 ed 246. See also Heaton "An overview of the current legal position regarding heterosexual life partnerships" 2005 *THRHR* 666.

during its subsistence, agree on liability for households necessities during the subsistence of the life partnership and after its termination.⁷⁸³

Life partners may also expressly or tacitly enter into a universal partnership contract. The partners' conduct is determinant for the existence of a tacit agreement. This means that the factual situation and the objectives of the parties are considered, taking into account the circumstances and facts of each case.⁷⁸⁴ For example, to provide for the livelihood and comfort of the parties and their children, including the proper education of those children, has been regarded as compliance with the making-a-profit object and therefore as being sufficient for partnership purposes.⁷⁸⁵ For a universal life partnership to come into existence, the following requirements must be complied with:

- (a) Each party must contribute to the enterprise by bringing something (money, labour or skill) into the partnership or undertake to bring something into it in future;
- (b) The aim of the partnership must be to make a profit;
- (c) The partnership must operate for the parties' joint benefit; and
- (d) The contract between the parties must be legitimate.⁷⁸⁶

Their dependence is important when proving the existence of the tacit life partners' universal partnership contract.⁷⁸⁷ This view was further made clear in *V v De Wet*,⁷⁸⁸ where the court held that a universal partnership can be formed between people who live together as husband and wife. In this case, a woman who was not married and a married man cohabited for three weeks during which, in addition to her job in the man's painting and decorating business, she also performed all the household duties relating to the couple's two children. It is clear from the court's decision in this case

⁷⁸³ Heaton *South African Family Law* 3 ed 247.
⁷⁸⁴ Heaton *South African Family Law* 3 ed 245.
⁷⁸⁵ *Isaacs v Isaacs* 1949 (1) SA 952 (C) at 956.
⁷⁸⁶ Heaton *South African Family Law* 3 ed 245.
⁷⁸⁷ Heaton *South African Family Law* 3 ed 245.
⁷⁸⁸ 1953 (1) SA 613 (O).

that, for the establishment of a universal life partnership, the key factor is interdependence as opposed to the duration of the cohabitation.

Some essential criteria exist for life partnerships to come into existence and to confer entitlements to certain spousal benefits on the parties. These include the community of life and the intention of the parties to create a permanent homosexual life partnership.

With regard to the community of life, also referred to as the *consortium omnis vitae*, some judicial decisions have described what should be viewed as community of life. In *Dawood v Minister of Home Affairs*,⁷⁸⁹ for example, the court held that only a civil marriage (and now also a civil union) creates a physical, moral and spiritual community of life under South African common law, which includes reciprocal obligations of cohabitation, fidelity and sexual intercourse.⁷⁹⁰

In *Grobbelaar v Havenga*,⁷⁹¹ the court held that companionship, love, affection, comfort, mutual services, and sexual intercourse all belong to the married state. Taken together, they make up the *consortium*.⁷⁹² In *Peter v Minister of Law and Order*⁷⁹³ the court concluded that *consortium* is termed as an umbrella word for all the legal rights of one spouse to the company, affection, services and support of the other.⁷⁹⁴ The *consortium omnis vitae* can also be understood as

“an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage . . . These embrace intangibles, such as loyalty and sympathetic care and affection, concern, as well as the more material needs of life, such as physical care, financial support, the rendering of services in the running of the common household or in support-generating business”⁷⁹⁵

⁷⁸⁹ 2000 (3) SA 936 (CC).

⁷⁹⁰ *Dawood v Minister of Home Affairs* 2003 (3) SA 936 Para [33].

⁷⁹¹ 1964 (3) SA 522 (N).

⁷⁹² *Grobbelaar v Havenga* 1964 (3) SA 522 (N) at 911.

⁷⁹³ 1990 (4) SA 6 (E).

⁷⁹⁴ 1990 (4) SA 6 (E) at 9F.

⁷⁹⁵ 1990 (4) SA 6 (E) at 9G-H.

South Africa is a society with pluralism and diversity of family. Given that pluralism and diversity, the court held in the second *National Coalition* case that gay men and lesbian women have the ability to establish a *consortium omnis vitae*.⁷⁹⁶

It is worth noting that the court specified in the *Dawood* case that only civil marriage (and now civil union) can create a community of life.⁷⁹⁷ In the *Peter* case, the court used the word “spouse”, which refers to people engaged in marriage and in the second *National Coalition* case; the court recognised the ability of gay and lesbian persons to establish a community of life.⁷⁹⁸ This clearly shows that heterosexual as well as homosexual partners can form a community of life. Once it is proven that there is *consortium omnis vitae*, certain rights associated with marriage can be extended to homosexual couples.

The question that arises at this stage is whether the rights associated with marriage will be extended to all homosexual couples, including those in life partnerships. This question is unfortunately answered in the negative because, as argued above, the legal consequences that extend to civil union partners do not automatically apply to life partners.⁷⁹⁹ This constitutes an issue raised by the legal recognition of homosexual relationships under the Civil Union Act that will be discussed later in this chapter.

A permanent life partnership exists if the parties can prove that they had the intention to cohabit permanently at the beginning of the relationship.⁸⁰⁰ This intention must be opposed to the parties’ intention to cohabit only temporarily.⁸⁰¹ If homosexual partners in a permanent life partnership have undertaken reciprocal duties of support, rights associated with heterosexual life partnerships will also apply to them.

⁷⁹⁶ Second *National Coalition* case para [53].

⁷⁹⁷ 2000 (3) SA 936 (CC) para [33].

⁷⁹⁸ 1990 (4) SA 6 (E) at 9G-H.

⁷⁹⁹ Life partners have to use contracts in order to regulate the legal consequences of their relationships.

⁸⁰⁰ 2000 (2) SA 1 (CC) para [86].

⁸⁰¹ Bodley and Cameron “Establishing the existence of a same-sex life partnership for the purposes of intestate succession” 2008 *SALJ* 261.

This issue was made clear in *Gory v Kolver No (Stark and Others intervening)*.⁸⁰² This case concerns the constitutional validity of section 1(1) of the Intestate Succession Act 81 of 1987 to the extent that it confers rights of intestate succession on heterosexual spouses but not on permanent same-sex life partners, as well as the appropriate remedy in the event the Constitutional Court confirms the order of the constitutional invalidity made by the Pretoria High Court, as it was known then.

This case involves Mr Henry Harrison Books (the deceased), who was at the time of his death in a permanent same-sex life partnership with Mr Mark Gory. When Mr Books died intestate, his parents nominated Mr Daniel Kolver to be appointed by the Master of the High Court of Pretoria as the executor of Books' estate, and claimed to be entitled to Books' assets as his intestate heirs. This nomination resulted in a dispute with Mr Gory as to who the lawful intestate heir is. The dispute was brought to the Pretoria High Court.⁸⁰³

On behalf of the court, Hartzenberg J found that the omission after the word "spouse" wherever it appears in section 1(1) of the Intestate Succession Act 81 of 1987 of the words "or partner in a permanent same-sex life partnership in which partners have undertaken reciprocal duties of support" is inconsistent with the constitution. The judge ordered that this defect be cured through the reading in of the words "or partner in a permanent same-sex life partnership in which partners have undertaken reciprocal duties of support" after the word "spouse" wherever it appears in section 1(1) of the Intestate Succession Act.⁸⁰⁴ This decision was disputed in an appeal to the Constitutional Court.

Erilda Starke and her three sisters applied to intervene, arguing that reading in is not the appropriate remedy, and that any order by the court should apply only to the estates of people who die after the order is handed down. Their late brother's alleged same-sex partner Bobby Lee Bell (another of Books' same-sex permanent life

⁸⁰² *Gory v Kolver No (Stark and Others intervening)* 2007 (4) SA 97 (CC).

⁸⁰³ 2007 (4) SA 97 (CC) para [2]-[3].

⁸⁰⁴ 2007 (4) SA 97 (CC) para [4].

partners) also applied to intervene should the sisters' application be granted. He submitted that the High Court's order should be confirmed.⁸⁰⁵

These applications to intervene were granted on the ground that the intervening parties have direct and substantial interests in the confirmation application, and it is in the interests of justice to allow the intervention.⁸⁰⁶

On behalf of the court Van Heerden AJ upheld the High Court's finding regarding the constitutional invalidity of section 1(1) of the Intestate Succession Act and ordered that, with effect from 24 April 1994, section 1(1) of the Intestate Succession Act 81 of 1987 is to be read as through the words "or partner in a permanent same-sex life partnership in which partners have undertaken reciprocal duties of support" appeared after the word "spouse" wherever the latter word appears in section 1(1) of the Intestate Succession Act.⁸⁰⁷

It is clear from this case that denying same-sex life partners the right to inherit the estate of the other partner who died intestate is inconsistent with the constitution of the Republic of South Africa. The judgment in this case also displays the intention of the South African Constitutional Court to emphasise the legal recognition of homosexual relationships in South Africa,

Like the civil union, the life partnership can also be terminated. The partnership can be terminated by agreement between the partners, a court order, or the death of one of the partners.⁸⁰⁸ It is important to note that each life partner can terminate the life partnership on any ground and at any time.⁸⁰⁹ The consequences of the termination of a life partnership can be determined without court intervention. This can be done by means of the agreement. However, in case of necessity, issues relating to for instance the post-separation maintenance, the exercising of parental responsibilities

⁸⁰⁵ 2007 (4) SA 97 (CC) para [8].

⁸⁰⁶ 2007 (4) SA 97 (CC) para [16-18].

⁸⁰⁷ 2007 (4) SA 97 (CC) para [19-26].

⁸⁰⁸ Smith in Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* 469.

⁸⁰⁹ *Volks No v Robinson* 2005 (5) BCLR 466 (CC) para [55].

and rights, and which of the partners will continue to occupy the joint home can be referred to court. It should be noted that partnership debts still outstanding after the breakdown of the partnership can be claimed from the former partners individually.⁸¹⁰

The legal recognition of homosexual relationships raised a number of issues that need to be discussed for the purposes of this study.

5.5.2 Issues raised by the legal recognition of homosexual relationships

The adoption of the Civil Union Act by South Africa's parliament in 2006 was a way of extending marriage rights to homosexual relationships. The adoption of the Act was viewed as the victory of a long legal and political struggle for the emancipation of gay men and lesbians in South Africa.⁸¹¹ However, the legal recognition of homosexual relationships through the Civil Union Act seems to have failed to emancipate homosexual relationships. It raises a number of issues, including the issue related to the emancipation of homosexual rights, and the issue related to the solemnisation of marriage.

5.5.2.1 The issue related to the emancipation of homosexual rights

This issue is inspired by the reflections of De Vos on the effect of the legalisation of homosexual relationships by means of the Civil Union Act. De Vos is of the view that although the legalisation of homosexual relationships through the Civil Union Act was intended to extend marriage rights to all gay and lesbian couples in South Africa, the adoption of the Act through which homosexual relationships were legally recognised did not emancipate the rights of gays and lesbians in South Africa. De Vos pointed out as follows:

⁸¹⁰ Smith in Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* 428. See also *Herbst v Solo Boumateriaal* 1993 (1) SA 397 (T) at 399.

⁸¹¹ De Vos "The inevitability of same-sex marriage in South Africa's apartheid state" 2007 *SAJHR* 432.

“It might be tempting to assume that the inclusion of ‘sexual orientation’ in the non-discrimination clauses of the 1993 and 1996 Constitutions created the conditions that logically and inevitably led to the Constitutional Court’s same-sex marriage judgment in *Fourie* and the adoption of the legislation that extended full marriage rights to same-sex couples. This achievement, in turn, could then also be viewed as confirming the final and triumphant emancipation of those individuals who experience same-sex sexual desire and are emotionally attracted to members of the same sex. However, a more critical look at the political and legal struggles that led to the adoption of this Act suggests that the process was far from inevitable. It is also not clear whether these struggles have led or will lead to the full emancipation of individuals whose sexual orientation does not conform to the existing heterosexual norm”.⁸¹²

In other words, the adoption of the Civil Union Act should not be regarded as the culmination of a struggle that restored full citizenship to all gay men and lesbians in South Africa. In this regard De Vos maintains the following:

“The legal recognition of same-sex marriage might well provide legal protection and social affirmation to same-sex couples whose relationships mirror those of the idealised heterosexual marriage, but it ignores the lived reality of many individuals who are not in a position to ‘choose’ to legalise their relationships through marriage. A mere extension of marriage rights to some same-sex couples will also not lead to a necessary and fundamental re-imagining of the nature of the legal regulation of intimate relations in our society. Moreover, I argue that such a development will leave unaffected many other aspects of the concept of marriage that are highly problematic, not only for individuals who experience same-sex sexual desire, but also for society as a whole”.⁸¹³

I agree with De Vos that many different kinds of intimate relationships are not sufficiently protected or regulated by the law, because they do not conform sufficiently to the idealised heterosexual norm. Examples include where a male or female same-sex couple decide to beget and raise children together as a family; or

⁸¹² De Vos 2007 *SAJHR* 433.

⁸¹³ De Vos 2004 *SAJHR* 182.

where more than two individuals in an intimate relationship with the others decide to beget and raise children; or where a man has a rural wife but cohabits with a woman in an urban area in a long term relationship; or where a mother and a grandmother jointly raise the mother's children.⁸¹⁴

This would suggest that the Civil Union Act protects only homosexual relations that reflect heterosexual marriage. Reference is made here to homosexual civil unions. The partners in homosexual civil unions can have their relationships solemnised and registered in terms of the Civil Union Act. Rights granted to heterosexual married couples are extended to civil union partners, with the exception of the right to marry under the Marriage Act. However, the civil union is just one of the models for the recognition of homosexual relationships under the Civil Union Act. The other model is the life partnership which, as discussed above, is neither solemnised nor registered. For the life partners to regulate the legal consequences of their relationships, they must enter into a contract. Life partnerships are one kind of homosexual intimate relationship that is not adequately protected by the law because they do not conform to the idealised norm. Although life partners are engaged in homosexual relationships like civil partners, they are not afforded the same rights extended to civil partners under the Civil Union Act. They therefore constitute a category of gay men and lesbians who have not been fully emancipated by the adoption of the Civil Union Act in South Africa.

After analysing different forms of marriages existing in South Africa, Bonthuys points out that there is inequality between marriages in South African. She further confirms that racial, religious and cultural dimensions contribute to the differential status afforded to the various legal forms of marriage, and to the spouses who marry in terms of these laws.⁸¹⁵ Bonthuys argues that only civil marriages have full recognition; customary marriages which can be polygamous, although now fully recognised, have a lower legal and social status than civil marriages. Muslim and Hindu marriages are not recognised at all, but spouses often also marry each other

⁸¹⁴ De Vos 2004 *SAJHR* 182.

⁸¹⁵ Bonthuys 2008 *Sexualities* 728.

in terms of the civil law in order to ensure legal consequences for their relationships.⁸¹⁶ This undoubtedly shows that not all South African marriages have the same legal protection.

According to Bonthuys, by merely broadening the categories of people who can get married, the Civil Union Act has failed to question or address the inequitable features of the institution of marriage, but in fact strengthens its position as the template and ideal towards which all other relationships should aspire. In addition, because of the various forms of marriage in South Africa, it retains and reinforces a particular legal and cultural version of marriage at the expense of others.⁸¹⁷ Bonthuys goes on arguing as follows:

“The value given to civil marriage reaffirms the paramount status of civil marriage, by implying that this form of marriage is the template to which all hitherto excluded relationships must conform in order to receive social and legal recognition. It also implies that only civil marriage – and not other forms of marriage – can expand to incorporate same-sex couples. This, in turn, implies that customary and Muslim family norms are static, inflexible and incapable of accommodating change. This point is practically illustrated by the fact that neither the Law Reform Commission, nor the Department of Home Affairs’ hearings preceding the Act, even considered whether to change the Recognition of Customary Marriage Act to accommodate same-sex couples”.⁸¹⁸

It can be argued from the opinion of Bonthuys that the Civil Union Act has reinforced the primacy of marriage, excluded other forms of marriage from the benefits of marriage and had made marriage exclusive to heterosexual couples. This amounts first to the categorisation of relationships that can be viewed as marriage and second, the categorisation of forms of marriages that can benefit from the rights of marriage. In support of these views, Bonthuys has confirmed the following:

⁸¹⁶ Bonthuys 2008 *Sexualities* 728.

⁸¹⁷ Bonthuys 2008 *Sexualities* 728.

⁸¹⁸ Bonthuys 2008 *Sexualities* 729.

“The particular way in which the Civil Union Act has permitted lesbian and gay couples to conclude civil partnerships not only reinforces the primacy of civil marriage, but also has consequences for other forms of marriage. I argue that, by simply equating same-sex relationships with civil marriage, the Civil Union Act has foreclosed several more radical possibilities which have existed, and still exist, in African communities. Furthermore, the Act is premised on a particular form of global gay identity which does not accord with the identities of many African people who have same-sex relations”.⁸¹⁹

In short, the Civil Union Act has allowed only certain homosexual couples access to the marriage-like institution of civil unions. By doing so the legislation has inevitably excluded other same-sex and opposite-sex couples from the benefits it bestows.⁸²⁰ This categorisation cannot fulfil the objective of extending marriage rights to all homosexual relationships and that amounts to a failure to emancipate all gay men and lesbians through the Civil Union Act.

5.5.2.2 *The issue related to the solemnisation of marriage*

De Vos comments at length on the solemnisation of marriages in South Africa and has pointed out that the civil union marriage regime remains problematic in at least one important technical sense relating to the solemnisation of marriages in terms of the Act.⁸²¹ De Vos compares the solemnisation of marriages under Marriage Act and under the Civil Union Act and noted that in terms of the Marriage Act and the Civil Union Act, several people can be appointed in order to solemnise marriage. These include religious officials, public servants designated to fulfil this task, certain civil servants like magistrates and commissioners who are by reason of their office automatically deemed to be marriage officers, state officials and diplomatic officers who may be appointed as marriage officers by the relevant Minister.⁸²²

⁸¹⁹ Bonthuys 2007 *SAJHR* 527.

⁸²⁰ Bonthuys 2007 *SAJHR* 534.

⁸²¹ De Vos 2008 *ULR* 171.

⁸²² De Vos 2008 *ULR* 171.

However, De Vos identifies what he calls anomalies in the Civil Union Act, which are actually the issues being discussed in this section. First, he points out that becoming a marriage officer to conduct marriages in terms of the Civil Union Act is more cumbersome than becoming a marriage officer in terms of the Marriage Act.⁸²³ De Vos compares the way marriage officers are appointed under Marriage Act and Civil Union Act and notes that it is easier under Marriage Act to be appointed a marriage officer than under Civil Union Act. In this regard De Vos argues as follows:

“The Civil Union Act distinguishes between religious marriage officers and nonreligious marriage officers in the same way that the Marriage Act does. However, in respect of religious marriage officers the Act requires first, that a religious denomination or organisation must apply for approval to conduct civil unions. Once the religious organisation has been approved, an official from the organisation may apply to be appointed as a marriage officer. Individuals who belong to a specific religious order cannot apply individually to become religious marriage officers... In the case of civil union marriages, both the institution and the individual religious official must apply, while in the case of marriage in terms of the traditional Marriage Act, one application suffices”.⁸²⁴

This makes it difficult for religious officials who are willing to solemnise homosexual civil partnerships to be appointed in order to fulfil this task.

The second anomaly is that the Civil Union Act allows the marriage officers representing the state to refuse to conclude a civil union marriage “on the ground of conscience, religion and belief”.⁸²⁵ In fact, under the Civil Union Act civil servants can be designated marriage officers to conduct civil union marriages in their capacity as civil servants. In terms of the Civil Union Act any marriage officer designated as such in terms of the original Marriage Act would also automatically become a marriage officer for the purposes of the Civil Union Act.⁸²⁶ However, in terms of section 6 of the Civil Union Act, these marriage officers can refuse to conclude a civil union

⁸²³ De Vos 2008 *ULR* 172.

⁸²⁴ De Vos 2008 *ULR* 171-2.

⁸²⁵ De Vos 2008 *ULR* 172.

⁸²⁶ De Vos 2008 *ULR* 172.

marriage on the ground of conscience, religion and belief. According to De Vos this right to refuse to solemnise a marriage is not provided for in the Marriage Act dealing with traditional heterosexual marriages. This means, for example, that a devoutly Christian civil servant may not object to marry a heterosexual couple in terms of the Marriage Act who are atheist or Muslim and a racist marriage officer may not object to marrying an interracial couple when a heterosexual couple chooses to marry in terms of the traditional Marriage Act. Civil servants may therefore only object to conduct marriages under the Civil Union Act and, moreover, only to same-sex marriages under this Act.⁸²⁷ With regard to the real ground upon which these officers object to conduct homosexual marriages, De Vos argues as follows:

“The only ground upon which they can object is therefore the sexual orientation of the couple. This provision thus clearly endorses sexual orientation discrimination by state officials and will most probably be struck down by the Constitutional Court if challenged. But apart from the legal problem with this provision, it also represents a potential practical problem for same-sex couples who wish to tie the knot. This is because it may make it more difficult for especially less wealthy and less educated same-sex couples who live in small towns in South Africa to get married. Such a couple would typically go to the local magistrate’s court where the local magistrate would act as the state’s designated marriage officer. When such a magistrate then refuses to marry a couple, they might not pursue the matter out of ignorance or a lack of resources”.⁸²⁸

In summary, by making it difficult for religious officials to be appointed as marriage officers and by allowing civil servants to object to conducting homosexual marriages, the Civil Union Act once more discriminates against homosexual couples on the ground of their sexual orientation. It is important to note that these issues can have some impact on children who grow up in homosexual families. Children in homosexual life partnerships for example can lose their rights to inheritance or maintenance upon the life partnership breakdown.

⁸²⁷ De Vos 2008 *ULR* 172.

⁸²⁸ De Vos 2008 *ULR* 172-3.

5.6 THE LEGAL STATUS OF A CHILD BORN TO HOMOSEXUAL PERSONS AS A RESULT OF ARTS IN SOUTH AFRICA

In South Africa, many homosexual people, single, cohabiting, and married, have used ARTs to have children and build families of their own. It is important to analyse the status of the child resulting from ARTs, the acquisition of parental responsibilities and rights in the families formed of ARTs, and the best interests of such children.

As previously indicated, in South Africa homosexual relationships are recognised as either as civil unions or life partnerships.⁸²⁹ Under the Children's Act, the legal status of a child depends on the question whether the child was born to married or unmarried parents. The legal status of children born from civil unions and life partnerships respectively will be discussed in this section

5.6.1 The legal status of children born of assisted reproductive technologies to civil union partners

From the discussion of the civil union above,⁸³⁰ it can be concluded that homosexual couples can marry under Civil Union Act and therefore a child born by means of ARTs to homosexual civil union partners is regarded as a child born to married parents.

5.6.2 The legal status of a child born of assisted reproductive technologies to life partners

According to Heaton, homosexual couples who engage themselves in life partnerships are not married. They have decided to live in a marriage-like relationship. Simply put, they have decided to cohabit.⁸³¹ Consequently, if a child is born to them as a result of ARTs, the child will be regarded as a child born to unmarried parents.

⁸²⁹ See para 5.5.1 above.

⁸³⁰ See para 5.3.1.1 above.

⁸³¹ Heaton *South African Family Law* 3 ed 243.

In summary, a child born to a homosexual couple engaged in a civil union is regarded as born to married parents while a child born to a homosexual couple engaged in life partnerships will be regarded as a child born to unmarried parents. Consequently, it is clear that the law treats a child born to civil union partners and a child born to life partners differently, even though the circumstance of the birth is the same. How parentage is established in these families and how parental responsibilities and rights are acquired will be discussed in the next section.

5.7 PARENTAL RESPONSIBILITIES AND RIGHTS IN HOMOSEXUAL FAMILIES

Parental responsibilities and rights consist of the responsibility and the right to care for the child, to maintain contact with the child, to act as the guardian of the child; and to contribute to the maintenance of the child.⁸³²

Children arrive in homosexual families through adoption and ARTs. In addition, some of them are from previous heterosexual relationships. Parental responsibilities and rights under this section will not be discussed for all these children. The section focuses only on the acquisition of parental responsibilities and rights for children born to lesbians and gay men as a result of ARTs in the context of South African law. Since homosexual families were categorised into civil unions and life partnerships, the discussion will be done in the context of these two models.

5.7.1 Parental responsibilities and rights in civil unions

5.7.1.1 The acquisition of parental responsibilities and rights by gay men in civil unions

As already said above,⁸³³ children may arrive in gay men's families by means of surrogate motherhood, which is described as a situation in which the surrogate mother undertakes to be artificially fertilised for the purposes of bearing a child for

⁸³² Section 18(2) of Children's Act.

⁸³³ See para 5.6.2.1 above.

the commissioning parents and handing over that child to the commissioning parents upon the birth or within a reasonable time thereafter so that the child will become the commissioning parents' child as if he or she were born from the commissioning parents.

Both the terms "surrogate mother" and "commissioning parents" are defined in the Children's Act. In terms of section 1(1) a surrogate mother is an adult woman who enters into a surrogate motherhood agreement with the commissioning parent; and a commissioning parent is a person who enters into a surrogate mother agreement with a surrogate mother. The scenario for gay civil union partners to have a child through surrogacy can be described as follows: The gay civil union partners must consent to have a child together. After all the legal requirements discussed above⁸³⁴ are met, a surrogate mother will be chosen. One of the civil union partners will give his gametes that will be used to fertilise either the egg of the surrogate mother, in which case she will be the birth and biological mother of the child, or a donated egg. In this latter case she will be just the birth mother. Section 297(1) of the Children's Act establishes parentage in the case of surrogate motherhood agreements and confers the parental responsibilities and rights to the commissioning parent or parents.

In terms of this section:

"The effect of a valid surrogate motherhood agreement is that-

- (a) any child born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of the birth of the child concerned;
- (b) the surrogate mother is obliged to hand the child over to the commissioning parent or parents as soon as is reasonably possible after birth;
- (c) the surrogate mother or her husband, partner or relatives has no rights of parenthood or care of the child;

⁸³⁴ See paras 5.6.4.1 above.

- (d) the surrogate mother or her husband, partner or relatives have no right of contact with the child unless provided for in the agreement between parties...”

It is clear from the provisions of this section that gay civil union partners are the parents of the child born by the surrogate mother, though she may be the biological mother of the child.

5.7.1.2 *Acquisition of parental responsibilities and rights by lesbians in civil unions*

In the case of lesbian civil union partners, the following scenarios are possible: One lesbian can give an egg that will be fertilised with a male gamete from a donor and the embryos will be put in the womb of her partner; or a male gamete from a donor is used to fertilise one of the lesbians' civil union partners. In the former case, both lesbians are the biological parents of the resulting child and in the latter, only the birth mother is the biological mother of the resulting child.

It is important to note that in one of the scenarios, a gamete from a donor can directly be used to fertilise one of the lesbians, who will by that fact become pregnant and give birth to a child. She is the biological mother of the child and has full parental responsibilities and rights in respect of the child. This may raise the question whether her partner automatically has the same responsibilities and rights in respect of the child. The answer is yes if the two civil union partners had consented to the artificial fertilisation.

It is important to note that section 13(2) of the Civil Union Act equates civil unions to marriages. This would suggest that civil union partners are regarded as married to each other for the purposes of the Civil Union Act. In addition, section 40(1) (a) of the Children's Act provides as follows:

“Whenever the gametes or gametes of any person other than a married person or her spouse have been used with the consent of both spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation

must for all purposes be regarded to be the child of the spouses as if the gamete or gametes of those spouses had been used for such artificial fertilisation”.

Artificial fertilisation in this context is the introduction, by means other than natural means, of a male gamete into the internal reproductive organs of a female person for the purpose of human reproduction. Artificial fertilisation includes the bringing together of a male and female gamete outside the human body with the view of placing the product of a union of such gametes in the womb of the female person as well as the actual placing of such product in the woman’s womb (in vitro fertilisation). A gamete is either of the two generative cells essential for human reproduction.⁸³⁵

In our above scenario, the spouse who did not provide the egg consented to the fertilisation of her partner. Logically, in line with provisions of section 40(1)(a) read together with section 13(2) of the Civil Union 17 of 2006, the resulting child will have both lesbian civil partners as parents and consequently both partners will have parental rights and responsibilities in respect of the child.

5.7.2 Parental responsibilities and rights in life partnerships

The case of gay life partners does not raise any problem. If a gay life partner has entered into a valid surrogate motherhood contract and has given his gamete for the fertilisation of a surrogate mother, the gay life partner who gave the gamete and his partner will have full parental responsibilities and rights in respect of the resulting child because the child will be handed over to them according to the provisions of the surrogate motherhood contract.

In the case of lesbian life partnerships, if a lesbian life partner is fertilised with a gamete from a male donor, even if the egg used is from her life partner, the resulting child will be regarded as the child of the birth mother. In fact, section 40(2) of the Children’s Act provides as follows:

⁸³⁵ Section 1(1) of the Children’s Act.

“Subject to section 296, whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.”

This provision has the effect of excluding the gamete donor, male or female, from the parentage of the child born with his or her donated genetic material. It is therefore clear from the provisions of this section that a homosexual life partner who gives birth to the child is regarded as the child’s parent and only she acquires full parental responsibilities and rights in respect of the child in terms of section 19(1) of the Children’s Act. According to section 19(1), the biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child. Section 40(3) makes the parentage of the birth mother even clearer. In terms of this section no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and the gamete donor unless the donor is the child’s birth mother. This would suggest that it is only the birth mother who has to be regarded as the parent of the resulting child in this context and she *inter alia* has an obligation to maintain the child. In addition the child has a claim against her for maintenance.

It is important to note that in line with section 40(3), if the woman who gives birth to the child merely offered her gestational function, in other words the egg from her life partner was fertilised with the male gamete from a male donor, the life partner of that woman may qualify as the biological mother, but she does not qualify as the child’s parent. The definition of parent in the Children’s Act excludes any person who is biologically related to a child by reason only of being a gamete donor for the purposes of artificial fertilisation.⁸³⁶

In summary, in the context of this study, parental rights and responsibilities in homosexual families are acquired through artificial fertilisation and surrogate motherhood agreements. The Children’s Act makes a distinction between children

⁸³⁶ Section 1(1) of the Children’s Act.

born in homosexual civil unions and life partnerships. In homosexual civil unions, the child is deemed born to married parents and consequently both parents have parental responsibilities and rights in respect of the child provided that they consented to the artificial fertilisation. However, in homosexual life partnerships, the child is regarded as born to unmarried parents, and consequently only the birth mother has parental rights and responsibilities on the child. This distinction raises an issue related to the best interests of the child that will be discussed in the next section.

5.8 THE BEST INTERESTS OF THE ASSISTED REPRODUCTIVE TECHNOLOGIES-BORN CHILD IN THE HOMOSEXUAL FAMILY

Assisted reproductive technologies have made possible a variety of families and have enabled infertile couples and individuals as well as gay men and lesbians to have children. Children resulting from the use of ARTs are referred to in this section as ART-born children. The discussion of the best interests of ART-born children consists in the application of the best interests criterion to their situations. In other words, it is important to ask whether children born through ARTs and growing up in homosexual families in South Africa have their best interests adequately protected.

5.8.1 The application of the best interests of the child criterion to ARTs-born children

As already stated above the application of the best interests of the child criterion will consist in the balancing of all the interests in presence rather than the triumph of the child's interests over the interests of other individuals involve.⁸³⁷

In the application of the best interests of the child criterion the process of balancing different interests in presence will take into consideration the harm that ARTs impose on children. As mentioned in chapter three,⁸³⁸ the harm can be either physical or psychological.

⁸³⁷ See para 4.3.2.2.2 above.

⁸³⁸ See para 3.5 above.

5.8.1.1 *Considering physical harm*

In South Africa, the best interests of the child criterion can be applied to ARTs-born children in order to establish if the best interests of those children are adequately protected. In fact as already stated above,⁸³⁹ in South Africa, every child has the right that his or her best interests are of paramount importance in every matter concerning him or her.⁸⁴⁰ If the child's best interests is to be a criterion in ARTs, it is important to identify the relevant factors that need to be taken into consideration when applying this criterion. The Children's Act provides a list of factors to be taken into consideration when applying the best interests of the child criterion. These include the need to protect the child from any physical or psychological harm that may be caused by subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or other harmful behaviour;⁸⁴¹ or exposing the child to maltreatment, abuse, degradation, ill-treatment, violence, or harmful behaviour towards another person.⁸⁴² These factors are relevant for the application of the best interests of the child criterion to ARTs-born children.

Assisted reproductive technologies procedures have been proven to be harmful to children resulting from these techniques.⁸⁴³ It was proven that many embryo manipulations lead to the child being born with a number of health problems, including low birth weight which is in turn a cause of many other health problems. In most of ART births, it is common that twins, triplets or quadruplets are born with a very low weight and require extra care after birth.⁸⁴⁴ The question that arises is whether the protection of the child under section 7 of the Children's Act could be extended to embryos.

⁸³⁹ See para 4.3.2.2.1 above.

⁸⁴⁰ Section 28(2) of the Constitution.

⁸⁴¹ Section 7(l) (i) of the Children's Act.

⁸⁴² Section 7(l) (ii) of the Children's Act.

⁸⁴³ See para 3.5.1 above.

⁸⁴⁴ McNair 2004 *VLRC* 38.

The answer to this question can be controversial. In light of the South African Constitution, the life of every person, including the child, is protected.⁸⁴⁵ Although in *Christian Lawyers Association of South Africa v The Minister of Health*,⁸⁴⁶ the Transvaal Provincial Division (as it was then known) of the South African High Court held that there is no constitutional right to life before birth, it can be argued that there is judicial, legislative and even doctrinal protection of the unborn child's life. Since the protection of life before birth is critical for the purpose of this thesis, it appears important to discuss briefly this protection.

(a) The doctrinal protection of the unborn child

Two major theories exist with regard to the inception of life. These are the theory of the beginning of life at conception and the theory of the beginning of life at live birth. The former theory is referred to as the "life begins at conception theory", and the latter is referred to as the "live birth" theory.⁸⁴⁷ According to the life begins at birth theory, an embryo is viewed as an actual life rather than a potential life. For this reason, the theory forbids any non-therapeutic experimentation on a human embryo. However, this does not suggest that the advocates of this theory classify an embryo as a person; rather they deem it to be a human being.⁸⁴⁸ The live birth theory in contrast maintains that there is no life until the child is born alive.⁸⁴⁹ In line with the theory, Feldman points out that a living person should be for his or her life independent from another human person, and in the view of the fact that the foetus is part of its mother and not an independent entity; it should not be deemed a living person.⁸⁵⁰

⁸⁴⁵ Section 11 of the Constitution.

⁸⁴⁶ 1998 (11) BCLR 1434 (T) at 24-25.

⁸⁴⁷ Lupton "The legal status of the embryo" 1998 *LM* 204.

⁸⁴⁸ Lupton 1998 *LM* 204.

⁸⁴⁹ *Ibid.*

⁸⁵⁰ Feldman *Marital Relations, Birth Control and Abortion in Jewish Law* 253 (as quoted by Lupton 1998 *AJ* 204).

These two theories are extreme as to the moment of the beginning of the life as Lupton clearly points out.⁸⁵¹ There is therefore a necessity for a theory that can draw from the two theories and constitute a theory of mediation. That theory is the *nasciturus* theory or fiction. This theory or fiction takes into account the fact that the unborn child is not a legal person and therefore does not have rights, duties and capacities; and the fact that the unborn child may eventually become a legal subject in situations that may arise before its birth provided that the child was already conceived at the time the situation arises and will subsequently be born alive.⁸⁵² According to Heaton, in such a situation the law provides protection of the interests of the unborn child by employing the fiction or theory that the child is regarded as being born at the time of his or her conception whenever this happens to be to his or her advantage. It is this fiction that is referred to as the *nasciturus* fiction.⁸⁵³ There are many situations that may cause the application of the *nasciturus* fiction or theory, however only two situations will be discussed as this stage while others will be discussed below.

The *nasciturus* fiction can be used for the purpose of protecting the interests of the unborn child in case of intestate succession. According to the rules of intestate succession a person can inherit from another person if he or she is alive at the time that the estate falls open and generally speaking this is at the time of the death of the deceased. However, although a child was not born at the moment the testator dies, he or she can inherit when the *nasciturus* fiction is applied. This would suggest that the *nasciturus* fiction will postpone the distribution of the estate until it can be determined with certainty whether a live child was born or not. In this case, if the child is born alive, he or she will inherit as if his or her birth took place before the death of the deceased.⁸⁵⁴ It is important to note that in this case, a person has died without leaving a valid will and the person's estate devolves in terms of the law of intestate succession. But if a person dies and leaves a valid will, this will lead us to the second application of the *nasciturus* fiction for the purpose of the protection of the unborn interests.

⁸⁵¹ Lupton 1998 *LM* 2014.

⁸⁵² Heaton *The South African Law of Persons* 4 ed 12.

⁸⁵³ *Ibid.*

⁸⁵⁴ Heaton *The South African Law of Persons* 4 ed 13.

The other situation in which the *nasciturus* fiction can be applied to protect the interests of the unborn child is in the case of testate succession. It should be noted that different scenarios are possible here. It can happen that in his or her will, a person leaves a company to his son or grandson, who is to be born; the beneficiaries will inherit regardless of whether or not they had been conceived at the time the testator died. The intention must in this case be carried out and the unborn child will inherit provided that he or she is born alive.⁸⁵⁵ The other scenario is in the case a person did not specify the name of the beneficiaries in his will; rather he or she appointed the beneficiaries as a group. If in the group there is a child who was already conceived at the moment the testator died but was born after the testator's death, such a child can inherit by the aid of the *nasciturus* fiction. It can similarly happen that a person leaves a farm property to persons who will be born decades after his death. This is for example the case of a person who leaves a company of cars manufacturing to his son, Enoch subject to the proviso that the company will devolve on Enoch's son Ariel and that after Enoch and Ariel death, on Ariel's son, Winner. This institution is commonly known as a fiduciaries or fiduciary and Ariel and Winner are the fideicommissarii or fideicommissaries.⁸⁵⁶

It is clear from the above discussion that under certain circumstances, the interests of the unborn child are protected when the *nasciturus* fiction or theory is applied. It is important to note that through judicial activities, the application of the *nasciturus* fiction has also played an important role in the protection of the unborn child's interests.

(b) The judicial protection of the unborn child

South African courts have in a number of cases held that the life of an unborn child is worthy of protection. The first case in which the South African court applied the *nasciturus* fiction in the field of the law of delict is *Chisholm v East Rand Property Mines Ltd.*⁸⁵⁷ In this case, the court reached a very important decision in line with the

⁸⁵⁵ Heaton *The South African Law of Persons* 4 ed 13.

⁸⁵⁶ Heaton *The South African Law of Persons* 4 ed 14.

⁸⁵⁷ 1909 TH 297. See also Heaton *The South African Law of Persons* 4 ed 16.

protection of the unborn child. The court held that if a man or a woman is killed as a result of a third person's delict prior to the birth of the child his wife or the woman who is expecting, such a child has a dependent's action for damages for loss of support against the perpetrator of the delict. It must be noted in these cases that the child must be born alive.⁸⁵⁸ Such an action is known as the dependent's action for loss of support and protects the unborn child's interests of growing up in acceptable conditions with adequate financial, material and psychological support.

In another case, *Pinchin v Santam Insurance Co Ltd*,⁸⁵⁹ the court had to determine whether a person has an action for injury that was inflicted on him or her while he or she was still an unborn child in the womb of his or her mother. The case involved a pregnant woman who was injured as a result of motor accident which resulted in the expected child being born with brain damage. The child's father argued that the brain damage was caused by the negligent behavior of the driver of the other motor vehicle and claimed damages in respect of medical expenses regarding the child and satisfaction for the infringement of the child's personality rights.⁸⁶⁰ On the behalf of the court, Hiemstra J admitted that the only starting point in South African common law sources for the protection of the interests of the foetus can be found in the *nasciturus* fiction. The court added that there were no good reasons for an unborn child to be regarded as a bearer of legal rights for the purposes of property but not for life and limb.

In *Pinchin* the court was of the view that the *nasciturus* fiction could be applied in the law of delict, a view that proved to be controversial. Most authors hold the view that the issue which arose in *Pinchin* could have been solved by using the ordinary principles of the law of delict, which would have given the child an action for pre-natal injuries anyway. They argue that it was not necessary to use the *nasciturus* fiction to give a child an action for pre-natal injuries.⁸⁶¹

⁸⁵⁸ *Chisholm v East Rand Property Mines Ltd* 1909 TH 297.

⁸⁵⁹ *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (W).

⁸⁶⁰ *Ibid.*

⁸⁶¹ 1963 (2) SA 254 (W) 259. See also Heaton *The South African Law of Persons* 4 ed 17-18.

In *Road Accident Fund v Mtati*⁸⁶² the Supreme Court of Appeal settled the issue, deciding that it is unnecessary to use the *nasciturus* fiction to award a child an action for pre-natal injuries. The case involved a pregnant woman who was, as in the *Pinchin* case, injured as a result of a motor vehicle accident, allegedly causing her expected child to be born with brain damage and mental disability. The child's father instituted a claim against the Road Fund Accident on behalf of his child because in his view the brain damage was a result of the accident. In opposition to this claim, the Road Accident Fund contended that the unborn child is not a person and as such has no right to compensation. The Road Accident Fund further contended that in view of the fact that an unborn child is not a person, the alleged negligent driver does not owe a duty of care to him or her. The court dismissed the plea of the Road Accident Fund, whereupon it appealed to the Supreme Court of Appeal, which in turn rejected the appeal.

Even though the court did not apply the *nasciturus* fiction in the *Mtati* case, the case is significant for this discussion as the court was prepared to protect the interests of an unborn child by awarding him or her an action for pre-natal injuries. The cases discussed here are evidence of how South African courts have worked towards the protection of the unborn child. However, this did not end the efforts of protecting the unborn child. Legislative activities also have played a role in this regard.

(c) The legislative protection of the unborn child

In South Africa, a number of statutes seem to protect the rights of an unborn child. These include the the Prisons Act 8 of 1959, the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965, the General Law Amendment Act 62 of 1955, and the Administration of Estates Act 66 of 1965. In terms of the Prisons Act 2 of 1975, female convicted who are in advanced stage of pregnancy are released unconditionally.⁸⁶³ Section 33(1) of the General Amendment Act 62 of 1955 and

⁸⁶² *Road Accident Fund v Mtati* 2005 (6) 215 (SCA).

⁸⁶³ Section 7 of the Prisons Act 2 of 1975.

sections 44 and 94 of the Administration of Estates Act 66 of 1965 protect the interests of fideicommissaries and other hereditary interests of an unborn heir.

It should be noted that from a medical perspective, life starts in the womb and any harm done to the child in the womb of his or her mother will certainly manifest when the child is born. It is important to note that some countries in the world, including Italy, are now expressly protecting the rights of the embryo. In Italy, Chapter IV of Law 40 is entitled “Measures for the protection of the embryo”. Article 13 of Law 40 sets limits for scientific research on human embryos. The law prohibits experimentation on human embryos. Research is allowed only for therapeutic and diagnostic purposes for the embryo’s benefit. The production of human embryos for research or experimentation is prohibited, as well as any form of eugenic selection of embryos and gametes. Cloning and fertilisation of human gametes with gametes of a different species is also prohibited. Article 14 limits the use of the existing techniques for medically assisted procreation. The law prohibits cryopreservation, the production of a “number of embryos exceeding those necessary for a single, simultaneous transfer and in any case not more than three”. It permits short-term cryopreservation only when the transfer is impossible due to major health reasons. Lastly, it prohibits embryo reduction in twin pregnancies.⁸⁶⁴ This is a good starting point in the protection of life and a good inspiration for South Africa.

This being said, it can be argued that ART procedures are not in the best interests of the child to the extent that they harm the child and violate his or her right to be protected from any physical harm as protected under section 7 of the Children’s Act. However, it is important to remember that it is only through these procedures that children are born to homosexuals. The situation of children born as a result of ARTs is complex. The child could be exposed to harmful behaviours while in the womb of his or her mother, which harmful behaviours cause the defects that may manifest at birth.

⁸⁶⁴ Mattalucci “Between the law and bioethics: Placing the unborn in contemporary Italy” 2013 *AJIS* 285.

In summary, the above discussion has provided a controversial answer to the question whether ARTs can serve the best interests of the child. While some scholars argue that the procreative right extends to the use of ARTs irrespective of the harm it causes to the resulting children, others who have applied the best interests of the child criterion to ARTs have concluded that ARTs solely serve the interests of the prospective parents and not the interests of the child born through these procedures.

Some children born as a result of ARTs are growing up in homosexual families. It appears therefore important to analyse whether being born of ARTs and growing up in homosexual families can serve the best interest of the child.

5.8.1.2 *Considering psychological harm*

The answer to the question whether being born of ARTs and growing up in homosexual families can serve the best interests of the child requires a close examination of the experience of the child born of ARTs to homosexual parent(s).

Generally speaking, a child born of ARTs as already said in the second chapter of this study,⁸⁶⁵ is characterised by the absence of a genetic link with at least one of the parents. In some cases there is no genetic link at all between the couple parenting the child and the child who is legally their child. In addition, some prospective parents opting to use ARTs prefer to use gametes from unknown donors. The reasons behind this option include the stability of the couple and the avoidance of a third party in the child-rearing process.⁸⁶⁶ However, these situations might have some implications for the child's right to preserve his or her identity and the right to know his or her genetic origins.⁸⁶⁷

⁸⁶⁵ See para 2.4.3 above.

⁸⁶⁶ Meazan and Rouch "Gay marriage, same-sex parenting, and America's children" 2005 *The Future of Children* 99.

⁸⁶⁷ For the discussion of those rights, see paras 4.2.2.2.3 and 4.2.2.2.4 above.

In short, some authors are of the view that the identity of the donors should not be disclosed to ARTs-born children, others view the disclosure as advantageous for ARTs-born children while some others suggest that children should reach the age of majority before accessing to their genetic parents information.

5.8.1.3 *Considering laws regulating assisted reproductive technologies*

A close examination of the surrogacy agreements or contracts in South Africa reveals that, these contracts are concluded solely in the interests of the prospective parents to the detriment of resulting children. Furthermore, a close look at the validity of the surrogate motherhood agreement reveals no reference to the best interests of the child. The Act requires the drafting of a valid contract for the surrogate motherhood arrangement. The High Court must confirm the agreement if it meets certain requirements as set out in the Act.⁸⁶⁸ The contract reduces the risk of a breach of the surrogate motherhood arrangement and consequent litigation. An ordinary surrogate motherhood contract involves an agreement between the commissioning couple and the surrogate mother who undertakes to bear a child for them, handing it over after birth, thus terminating any parental responsibilities and rights she may have over the child.⁸⁶⁹

Artificial fertilisation is regulated in South Africa under the National Health Act. A closer analysis of the provisions of this Act reveals that the South African approach to artificial fertilisation does not take into consideration the best interests of the child. One of the critical steps in the artificial fertilisation procedure is the transfer of the embryo from the test tube to the woman's body. The number of children to be born and most importantly the quality of those children depend on the number of embryos transferred. As indicated in chapter 3,⁸⁷⁰ the larger the number of embryos transferred, the larger the number of children to be born who could potentially have health problems. However, at odds with this scientific reality, the National Health Act allows the transfer of not less than two embryos. In fact, in terms of the Act, no more

⁸⁶⁸ Mahlobogwane 2013 *SJ* 50.

⁸⁶⁹ Mahlobogwane 2013 *SJ* 50.

⁸⁷⁰ See para 3.5.1.1.1 above.

than three zygotes or embryos may be transferred to the recipient during an embryos transfer procedure, unless there is a specific medical indication to the contrary.⁸⁷¹ This would suggest that in every embryo transfer procedure, the maximum number of embryos to be transferred should be three embryos.

It is important to note that when three embryos are transferred, there is a high probability for all three children to develop to maturity in the womb of the recipient, resulting in the birth of triplets. In other words, South African regulation of artificial fertilisation is likely to condemn children who are born as a result of ARTs to be born with several birth defects and health problems as discussed in chapter 3 of this study.⁸⁷²

The impact of the non-disclosure of the identity of gamete donors has been discussed at length in this chapter.⁸⁷³ However, despite the psychological troubles associated with the anonymity of the donor, the National Health Act requires the identity of the donor to be kept secret. Section 18 of the Act reads as follows:

“No person shall disclose the identity of any person who donated a gamete or received a gamete, or any mater related to artificial fertilisation of such gametes, or reproduction resulting from such artificial fertilisation except where a law provides otherwise or a court so orders.”⁸⁷⁴

This would suggest that the South African regulation of artificial fertilisation does not take into consideration the rights of the child to know his or her origins.

5.9 INTERIM CONCLUSION

The overview of the recognition of homosexual families in South African law has revealed that although homosexuality was prohibited and severely punished under

⁸⁷¹ Section 12 of the National Health Act.

⁸⁷² See para 3.5.1.1.3 above.

⁸⁷³ See para 5.8.4.2.2 above.

⁸⁷⁴ Section 19 of the National Health Act.

the apartheid regime, it was a reality for many South Africans irrespective of their race and culture. The ban on homosexuality during the apartheid period led to a long struggle for the recognition of gay and lesbian rights, which in turn resulted in the recognition of homosexual relationships under the democratic constitutional dispensation. The legal recognition of homosexual relationships is one of the steps in the recognition of homosexual families in South Africa.

Like in the USA and Australia, homosexual relationships are legally recognised in South Africa as civil unions or life partnerships. Different rights are conferred on homosexual people in terms of each of these models of recognition. The models of recognition of homosexual relationships as civil unions and life partnerships raised a number of issues, some of which were related to the emancipation of homosexuals' rights and others to the solemnisation of marriages. The analysis of civil unions and life partnerships reveals that the law offers two different levels of protection respectively to homosexual couples who decided to marry and those who have chosen to cohabit. To the former, the law grants almost all the rights that heterosexual marriage bestows and in the case of the latter, there seems to be no protection either for the partners or for their children.

The analysis of the process of building families through ARTs in South Africa reveals that although ARTs have been a solution to infertile couples by enabling them to have children, it has also created some problems related to the health of the resulting children. Children born as a result of ARTs are exposed to different harmful treatments resulting from different manipulations on the embryo. These treatments seem to be in the sole interests of the parents and could result in the child being born with several health challenges that will keep him or her from developing to the fullest of his potential like all other children. I am not arguing that all ART procedures result in a sick or disabled child; however, there seems to be no guarantee that the resulting child will not face such challenges.

It can therefore be concluded that the family in South Africa has undergone changes to include homosexual families. The legal recognition of homosexual relationships in South Africa raised some questions related to the best interests of the child. The

establishment of parentage in life partnerships, for instance, is one of the examples of the differential treatment of children born to homosexual couples in South Africa. This leads to the conclusion that it is not always in the child's best interests to grow up in a homosexual family. The application of the best interests of the child criterion to ARTs in South Africa and later in the USA and Australia reveals that for several reasons, including the harm that ARTs cause to children, the adult-centric focus of these procedures, the violation of the child's right to preserve his or her identity and the child's loss of her or his genetic origins; these procedures can be regarded as contrary to the best interests of the ARTs-born child.

There thus appears to be a conflict between the right of parents to reproduce and the right of the child to have his or her best interests considered as paramount in every matter concerning him or her. The question that arises is how this conflict will be solved? The next chapter will provide a proposal of solution to this question.

CHAPTER SIX

HOMOSEXUAL FAMILIES IN THE UNITED STATES OF AMERICA

6.1 INTRODUCTION

As indicated earlier in this thesis, homosexual families are a result of the relationship or union between two men or two women.⁸⁷⁵ For many years, the unions between two men and two women were illegal throughout the world. In fact, before the dawn of the twenty-first century, no nation or state had ever legalised the union between man and man or woman and woman. But nowadays, these unions are a legal reality and the movement to legalise these unions is riding a wave of popularity that seems to be growing, especially among cultural elites in many affluent western nations. By 1989, only a few north western European nations had created a separated, marriage-like legal status for homosexual people. By 2007 the union between two women or two men had been fully legalised in five nations in Europe, the USA and Africa. These include the Netherlands (2000), Belgium (2003), Spain (2005), South Africa (2005) and in the American state of Massachusetts.⁸⁷⁶ It is interesting to note that the list of countries that have legalised homosexual unions in the world has been recently expanded. Twenty one countries in the world, including the USA have now legalised homosexual marriage nationwide.⁸⁷⁷

Efforts towards the legalisation of homosexual relations in the USA were aimed at seeking to obtain a change of the laws regulating marriage. Advocates of the legalisation of homosexual unions sought to achieve this mission by through litigation and legislation.⁸⁷⁸ The impact of the efforts of advocates of the legalisation of homosexual relationships was significant. Similar efforts were undertaken in other countries worldwide. Several other nations, especially in Europe and former European colonies, followed the path of the countries mentioned above and enacted

⁸⁷⁵ See paras 1.1 and 2.2 above.

⁸⁷⁶ Wardle "A response to the 'conservative case' for same-sex marriage and the tragedy of the commons' 2007 *BYUJPL* 443.

⁸⁷⁷ CNN "Map: Same-sex marriage in the Unites States" (26 June 2015), available at <http://edition.cnn.com/interactive/us/map-same-sex-marriage> (date of use 21 July 2015).

⁸⁷⁸ Wardle "A critical analysis of constitutional claims for same-sex marriages" 1996 *BYULR* 8.

laws granting to homosexual couples limited economic protection similar to that given to heterosexual non-married couples.⁸⁷⁹

In the USA, efforts of advocates of the legalisation of homosexual unions resulted in the creation of new legal domestic relations for homosexual couples, conferring on them the same or nearly equivalent legal status, rights and benefits as married couples. The evolution of the legalisation of homosexual relationships in the USA can be divided into two important periods. The first period is the period prior to the decision in *Obergefell v Hodges*.⁸⁸⁰ This period is essentially characterised by the wave of the legalisation of homosexual relationships only in few states. With the decision in *Obergefell v Hodges*, homosexual relationships were recognised in all the states in America. This wave of legalisation of homosexual relationships conferred to homosexual married couples the same rights and benefits that heterosexual married couples enjoy, including the right to be recognised on official documents such as birth and death certificates.⁸⁸¹

This chapter will analyse the legalisation of homosexual unions in the USA. It begins with a brief historical background of the legalisation of homosexual unions; it then discusses the legal position in the USA during the two periods of the evolution of the legalisation process before discussing the reasons for and against the legalisation of homosexual unions that were asserted by the proponents of the legalisation on one side and the opponents on the other side.

The chapter will then discuss the legal status of homosexual unions, and the issues raised by the legalisation of homosexual unions. The chapter will further examine the establishment of parentage in the families created by gay men and lesbian women through ARTs in the USA. It will then analyse the implications of the legalisation of homosexual unions before ending with the discussion of the best interests of the child

⁸⁷⁹ Wardle 2007 *BYUJPL* 444.

⁸⁸⁰ 135 S CT 2584 (2015).

⁸⁸¹ CNN http://edition.cnn.com/interactive/us/map_Same-sex marriage (date of use 21 July 2015).

6.2 THE LEGALISATION OF HOMOSEXUAL UNIONS IN THE UNITED STATES OF AMERICA

Before discussing the legalisation of homosexual unions in the United States of America it appears important to give a brief overview of the US legal system.

The United States of America was founded as a union of thirteen colonies that claimed each its independence from the British Crown.⁸⁸² However, it is now a federation made of fifty States.⁸⁸³ Like in Australia, the US system of government is divided into two levels, namely the federal and the state level.

At the federal level, the US Constitution (the supreme law) establishes the federal system of government. It gives the powers to the federal government, establishes the judicial branch and specifies the authority of the federal courts.⁸⁸⁴ The Congress (federal parliament) has a limited legislative power. Section 9, article 1 of the Constitution for example forbids the Congress to pass ex post facto law (a law that applies retroactively) or law on levy tax on exports. Article I of section 8 of the Constitution lists areas where Congress may legislate. A proposal considered by the Congress is called “a Bill”. The Bill will become a law when it is voted by a two third majority of the Congress. The federal law is contained in a code which is a codification of the federal statutory law.⁸⁸⁵

The federal judicial branch comprises the Supreme Court (the highest court), established by the US Constitution and the US district courts as well as the US circuit courts of appeals established by the Congress. The US district courts are courts of first instance in the federal system. There are 94 of them in the USA with at least one

⁸⁸² Bureau of International Information Programs, United States Department of State “Outline of the US legal system” (2004), available at <http://usinfo.state.gov> (date of use 24 August 2016) 6.

⁸⁸³ *Ibid.*

⁸⁸⁴ Federal Judicial Center “The US legal system: A short description” available at www.fjc.gov/Public/pdf.nsf/...Legal-System.../US-legal-System-English07.pdf 1.

⁸⁸⁵ Bureau of International Information Programs, United States Department of State (2004), available at <http://usinfo.state.gov> (date of use 24 August 2016) 6.

in each state. The US circuit courts of appeals are regional courts on the next levels. Twelve of these courts are located in every region of the country.⁸⁸⁶

Federal courts have exclusive jurisdiction only on certain types of cases, such as cases involving federal laws, controversies between states, and cases involving foreign governments. In other areas federal courts share jurisdiction with state courts.⁸⁸⁷

At state level, each state has its own state Constitution, which establishes the state government. Each state has also its own governmental structure, judiciary and legal code. The structure of the judicial branch varies from state to state. There is a highest court in each state (the State Supreme Court) that serves as an appeal court. In many states there are also intermediate appellate courts that hear appeals from the trial courts.⁸⁸⁸

Each state has the power to legislate where the federal Constitution has not delegated the power to the Congress. However, the law adopted at the state level should not be inconsistent with the federal Constitution.⁸⁸⁹

In addition to the Constitution, the other sources of law are the statutes passed by the congress, common law, a collection of judicial decisions, customs and general principles. It is important to note that all these sources of law can be used at federal and state level, and that the US Supreme Court's precedents apply to all lower federal courts.⁸⁹⁰

⁸⁸⁶ Federal Judicial Center, available at www.fjc.gov/Public/pdf.nsf/...Legal-System.../US-legal-System-English07pdf 1 (date of use 24 August 2016).

⁸⁸⁷ *Ibid.*

⁸⁸⁸ *Ibid.*

⁸⁸⁹ Bureau of International Information Programs, United States Department of State (2004), available at <http://usinfo.state.gov> (date of use 24 August 2016) 16.

⁸⁹⁰ Bureau of International Information Programs, United States Department of State (2004), available at <http://usinfo.state.gov> (date of use 24 August 2016) 13.

Two important periods characterise the process of the legalisation of homosexual relationships in the USA as it was indicated in the introduction above. The discussion of the legalisation of homosexual relationships will therefore revolve around these two periods.

6.2.1 The legalisation of homosexual unions prior to the decision in *Obergefell v Hodges*

The USA is a federation made up of 50 states. Prior to the decision in *Obergefell v Hodges*, homosexual marriage was recognised only in few states. The movement for the legalisation of homosexual unions focused on the extension of the definition of marriage for the purpose of including homosexual couples and the recognition of marriage benefits to homosexual couples. Advocates of the legalisation sought the recognition of the rights of homosexual couples through judicial and legislative activities.⁸⁹¹ Their efforts were crowned by several judicial decisions and pieces of legislation that favoured their claims in many states. These efforts include at least eight major cases reported since 1980 involving claims for full or partial marital status or incidents for homosexual couples.⁸⁹² Most of these cases were successful in that some courts had demonstrated increased sensitivity toward the claims made in favour of homosexual marriage. For example, in two cases respectively in 1989 and 1991, homosexual partners successfully obtained some family status or benefits not specially limited to married couples but indicative of a domestic status similar to marriage.⁸⁹³ In 1993 the Hawaii Supreme Court in *Behr v Lewin* rendered a decision that contained sympathetic opinions in significant cases attacking heterosexual requirements for marriage.

In this case, the Hawaii Court ruled that it is possible that heterosexuality requirements for marriage might violate the equal protection clause and the equal

⁸⁹¹ Wardle 1996 *BYULR* 8.

⁸⁹² Wardle 2007 *BYUJPL* 445.

⁸⁹³ *Brasch v Stahl Assocs. Co* 543 NE 2d 49 (New York 1989). See also *In re Guardianship of Kowalski* 478 NW 2d 790 (Min CT 1991).

rights amendment of the state's Constitution and remanded the case for trial on those issues.⁸⁹⁴

This decision led to serious legislative consideration of partnerships in Hawaii. As a result of this judicial activity, the California legislature passed a Domestic Bill in 1994. The Bill provided official state registration of homosexual couples and limited marital rights and privileges relating to hospital visitation, wills and estates, and powers of attorney.⁸⁹⁵ Late in 1995, a Federal Appeal Court held that the right to participate in a religious homosexual marriage ceremony was entitled to special Constitutional protection as an "intimate association".⁸⁹⁶

It is important to note that these decisions were the precursor of some changes in the legislation of many states and counties in the USA. For example, the Lambda Legal Defense and Education Fund reported that by mid-1995, thirty-six municipalities, eight counties, three states, five state agencies, and two federal agencies extended some marital benefits to homosexual registered partnerships.⁸⁹⁷ Following the decision of the Hawaii Court, the state of Hawaii legislature considered and introduced the Domestic Partnership Bill in 1996.⁸⁹⁸ A few years later, the courts of other states followed suit in granting the right to marry to homosexual couples. The decision of the Supreme Court in Vermont to grant homosexual couples the right to enter into civil unions in 2001, the decision to allow gay marriage in Massachusetts in 2004, and the performance of nearly 6000 homosexual marriages in San Francisco and in Multnomah County, Oregon, in 2004, are a few examples of that process.⁸⁹⁹ In other jurisdictions countrywide, local government officials briefly issued marriage certificates to homosexual partners until they were stopped by state courts or officials.

⁸⁹⁴ *Baehr v Lewin* 852 P2d 44.

⁸⁹⁵ Wardle 1996 *BYULR* 9.

⁸⁹⁶ *Shahar v Bowers* 70 F 3d 1218 (11th Cir 1995).

⁸⁹⁷ Memorandum from the Lambda Legal Defense and Education Fund Inc (22 May 1995).

⁸⁹⁸ Hawaii SB 2419, SB 3208 and SB 3131. 18th Leg. 1996.

⁸⁹⁹ Soule "Going to the chapel? Same-sex marriage bans in the United States, 1973-2000" 2004 *SP* 453.

In 2004, that process resulted in the issuing of marriage certificates to 4037 couples in San Francisco, 3022 couples in Multnomah County, Oregon, 68 couples in Sandoval County, New Mexico, New York and New Jersey.⁹⁰⁰

It is worth noting that efforts for the legalisation of homosexual unions were challenged in many other states and at the federal level. Counter-efforts were remarkably successful in several states and opponents of the legalisation of homosexual marriage succeeded to stop for a short period the running of the movement for the legalisation of gay and lesbian marriage in the USA. For example, in 1996 the United States' Congress passed the Federal Defense of Marriage Act of 1996 ("DOMA").

DOMA defines marriage as the union of one man and one woman, and exempts states from recognising marriages between two people of the same sex performed in another state.⁹⁰¹ As a result of this federal legislation, several states enacted laws banning homosexual marriage within their jurisdictions.⁹⁰² Despite the effect of these counter-efforts of the legalisation of homosexual unions, the success of the advocates of the legalisation of homosexual unions is somehow remarkable. In fact, as Herek points out, by early 2006 homosexual couples were first allowed to marry in Massachusetts. A few years later, six other states had enacted legislation granting various degrees of limited legal protections and benefits under the rubrics of civil unions (Vermont, Connecticut), domestic partnerships (California, New Jersey, Maine), and reciprocal beneficiary relationships (Hawaii).⁹⁰³ In addition, some states and local governmental entities offered limited benefits for the homosexual partners of their employees (eg access to group health insurance plans), as did many private

⁹⁰⁰ Herek "Legal recognition of same-sex marriage in the United States. A social science perspective" 2006 *AP* 608.

⁹⁰¹ Herek 2006 *AP* 608.

⁹⁰² For example, in 2004 the Georgia Constitution was amended. The amendment denied homosexual couples and their children the basic rights and benefits enjoyed by heterosexual married couples. Also, the proposed Federal Marriage Amendment ("FMA"), supported by the former USA president George Bush would amend the United States Constitution to stipulate that marriage is between one man and one woman; this federal amendment would apply to all state Constitutions as well. Furthermore, by the end of 2003, 37 states had passed laws banning homosexual marriage. See Soule 2004 *SP* 453.

⁹⁰³ Herek 2006 *AP* 608

employers. Homosexual couples' parental rights had statutory protection through second parent adoptions,⁹⁰⁴ in a handful of states, including California, Connecticut, Massachusetts, New Jersey, New York and Vermont, as well as the District of Columbia.⁹⁰⁵

In 2013, the evolution of the legalisation of homosexual relationships in the USA took a significant turn when the court struck down section 3 of DOMA in *US v Windsor*.⁹⁰⁶ According to section 3 of DOMA, marriage is a union between a man and a woman for the purpose of federal laws.⁹⁰⁷ This decision marks a new era in the history of the legalisation of homosexual relationships in America, and was followed by legislative and judicial activities which ended up in the recognition of homosexual marriage in 47 states.⁹⁰⁸ Although the decision in *US v Windsor* was a great victory in the process of legalising homosexual relationships in America, some homosexual couples were still suffering from the non-recognition of their relationships in some states. However, it can be argued that in spite of challenges that advocates of the legalisation of homosexual unions faced in some states, homosexual couples or families have been granted legal status. In fact, varying degrees of limited protection and benefits were granted to homosexual couples under different rubrics, including civil unions, domestic partnerships and to a certain extent marriage. The analysis of these rubrics is significant for the purpose of this thesis. Indeed, the legal status granted to homosexual relationships raises some issues that will be discussed further down in this section.

⁹⁰⁴ In second parent adoptions, a parent consents to a partner adopting her or his child while retaining parental rights. See Herek 2006 *AP* 608.

⁹⁰⁵ Herek 2006 *AP* 608.

⁹⁰⁶ *US v Windsor* [2013] 570 US.

⁹⁰⁷ Section 3 of the Defense of Marriage Act.

⁹⁰⁸ The states that legalised homosexual marriage after *US v Windsor* decision include: Alabama, Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Virginia, Vermont, Washington, West Virginia, Wisconsin, Wyoming. See Salam and Lowery "Taxation of same-gender spousal benefits in the wake of US Supreme Court ruling" 2015 *EY* 2.

6.2.1.1 *The legal status of homosexual unions*

Homosexual unions have been legally recognised in the USA as discussed above.⁹⁰⁹ All states have enacted laws that give a legal status to homosexual unions within their jurisdictions. It is important to note that the legal status given to homosexual unions might differ from one state to another. Sometimes, a few states give the same legal status to homosexual unions within their jurisdictions. It is also important to note that rights conferred to homosexual couples by one jurisdiction might be different from those conferred by another jurisdiction. An analysis of some studies on the legalisation of homosexual unions reveals that homosexual unions in the USA have been recognised as civil unions, registered domestic partnerships and marriages.⁹¹⁰ Each homosexual relationship status deserves to be analysed.

6.2.1.1.1 Civil unions

The first state in the USA to enact civil union laws was Vermont. The Civil Union Act passed by Vermont was all-encompassing in nature and offered comprehensive rights and benefits to same-sex couples.⁹¹¹ According to the Act, parties to a civil union shall have the same benefits, protections and responsibilities under the law, whether they derive from statute, administrative or court rule, policy, common law or any other sources of civil law, as granted to spouses in marriage.⁹¹² These rights and benefits include the ability to utilise the law of domestic relations in full, including annulment, separation, divorce, child support, child custody, division of property, and maintenance;⁹¹³ the ability take advantage of the laws relating to title, ownership,

⁹⁰⁹ See para 3.2 above.

⁹¹⁰ Wardle "Who decides? The federal Architecture of DOMA and comparative marriage recognition" 2010 *CWJ* 160-161; Sadler "Re-thinking civil unions and same-sex unions" 2008 *The Monist* 578; Aloni "Incrementalism, civil unions, and the possibility of predicting legal recognition of same-sex marriage" 2010 *DJGLP* 110.

⁹¹¹ Bossin "Same-sex unions: The new civil rights struggle or assault on traditional marriage" 2004 *TLR* 418.

⁹¹² *Baehr v Miike* 910 P.2d 112 (Haw. 1996).

⁹¹³ American Bar Association Section of Family Law Working Group on Same-Sex Marriages and Non-Marital Unions *An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships* (a White Paper) 30-33, 59 fn 207-208 (2004), available at <http://www.americanbar.org/content/dam/aba/migrated/family/reports/WhitePaper.authcheckd.am.pdf> (date of use 26 March 2015) (hereinafter "the White Paper"). The White Paper discusses the federal Defense of Marriage Act.

inheritance, decent, and distribution with respect to the ownership of real estate;⁹¹⁴ and the ability to utilise prohibitions against discrimination based on marital status.⁹¹⁵ The Act also states that the rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of married couples.⁹¹⁶

Homosexual unions were legalised as civil unions in almost all states. States have created same-sex civil unions with all or most of the incidents and benefits of marriage.⁹¹⁷ Although it can be argued that parties to civil unions have been offered all the rights offered to those entering marriage, some scholars argue that civil unions are different from marriage. Bossin, for example, argues that civil union is a legal status that is only available to homosexual people,⁹¹⁸ and Isaac contends that even if civil unions provide full economic benefits, they fail to provide marriage's intangible benefits, such as self-esteem, self-definition, and the stabilising influence of social expectations. Although these benefits may be less concrete than tax exemptions, they are no less constitutionally significant.⁹¹⁹

6.2.1.1.2 Registered domestic partnerships

A registered domestic partnership is conceived of as a legal institution more or less analogous to marriage, essentially an intermediate level of recognition, sometimes referred to as "marriage lite". A registered domestic partnership, like marriage, results in a number of legal rights and obligations between the couple and others, including the state, and contains actions that must be taken in order to terminate it.⁹²⁰

⁹¹⁴ Pub. L. No. 104-199, 110 Stat. 2419 (1996).

⁹¹⁵ Vt.Stat.Ann.Tit 15 § 1204(e)(7).

⁹¹⁶ Bossin 2004 *TLR* 418.

⁹¹⁷ Vt. Stat. Ann. tit. 15, §§ 1201-1207 (2002).

⁹¹⁸ Vt.Stat.Ann.Tit 15 § 1202. See also Bossin 2004 *TLR* 418

⁹¹⁹ Isaac "What's in a name?' Civil unions and the constitutional significance of marriage" 2008 *JCL* 612.

⁹²⁰ Isaac 2008 *JCL* 612.

A registered domestic partnership takes different forms in different countries and states. For example, registered partnerships in Great Britain provide same-sex couples all the rights and benefits that are offered to opposite-sex couples. Conversely, in France, Finland, Ireland, and Austria, gay couples cannot jointly adopt even if their domestic partnerships are registered. In addition, couples in civil unions are often required to demonstrate more committed behaviour, such as living together for a number of years, while married couples are not required to behave similarly in order to register.⁹²¹

In the USA, some states have recognised homosexual unions as registered domestic partnerships. A number of American states enacted laws recognising homosexual unions as registered domestic partnerships. For example, early in 2005, the State of California passed a Domestic Partnership Registration Act.⁹²² This Act became almost the equivalent of Vermont's civil union laws in terms of the rights and benefits bestowed upon partners of civil unions.⁹²³ The California Domestic Partnership Registration Act provides as follows:

“The rights of parties to a civil union, with respect to a child of whom either spouse becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage”.⁹²⁴

On 16 January 2004, New Jersey passed a Domestic Partners Act. While it grants many rights to domestic partners that are available to married couples, it is not as sweeping or all-encompassing as the laws in Vermont and California and does not purport to make domestic partners the equivalent of spouses.⁹²⁵

⁹²¹ Waaldijk “Overview of forms of joint legal parenting available to same-sex couples in European countries” 2009 *Droit et Société* 384; Case “What feminists have to lose in same-sex marriage litigation” 2010 *UCLALR* 1203-04.

⁹²² Cal. Fam. Code Ann. §§ 297-299.6 (2004).

⁹²³ *Ibid*.

⁹²⁴ Vermont. Stat. Ann. tit. 15, at § 1204(f).

⁹²⁵ Bossin 2004 *TLR* 420.

The situation in Massachusetts is a bit different. Massachusetts is the first American state to legalise homosexual marriage.⁹²⁶ In this process, Massachusetts started by decriminalising sodomy laws and adopted anti-discrimination laws protecting lesbian, gay and bisexual people in 1998, but only offered an extremely limited domestic partnership registry.⁹²⁷

Usually, domestic partnership schemes provide substantial rights, including rights such as the right to remain in a rent-controlled apartment after the domestic partner and leaseholder dies, to visit the domestic partner in a city hospital, and (in the case of the partners of the city employees) to access subsidised health insurance.⁹²⁸

However, several cities and towns in Massachusetts have offered a more expansive recognition of domestic partnership, including medical benefits. The Supreme Judicial Court of Massachusetts ruled in 1999 that the city of Boston did not have the power to expand the reach of the state insurance laws by including domestic partners in the group health system.⁹²⁹ This would suggest that there was only minimal legal recognition of homosexual unions, and Massachusetts did not offer the option of civil union or domestic partnership registration when the court decision was handed down.⁹³⁰

It must be noted that the rights granted by civil unions and domestic partnerships are limited compared to those granted by marital status. In this regard, Bossin points out as follows:

⁹²⁶ “We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.” (*Goodridge v Dep’t of Pub Health*, 798 N.E.2d 941, 969 (2003)).

⁹²⁷ Aloni 2010 *DJGLP* 130.

⁹²⁸ N.Y. Executive Order No. 33, Establishing a State Policy Against Discrimination on the Basis of Sexual Orientation and Reviving a Task Force to Address Individuals’ Rights to Benefit of Government Services and Opportunity for Government Service Regardless of Sexual Orientation, 9 NYCRR 5.33 (1996).

⁹²⁹ *Connors v City of Boston* 714 N.E.2d 335, 342 (Mass. 1999) (revoking an executive order issued by Boston’s mayor which granted health insurance benefits to registered domestic partners of city employees).

⁹³⁰ Aloni 2010 *DJGLP* 130.

“Several other states have enacted legislation offering certain specific benefits to same-sex partners, such as health insurance for state employees, but these laws are extremely limited in scope. Many municipalities also offer limited benefits, such as health insurance for their employees.”⁹³¹

This would suggest that marital status is the only legal status that offers a full range of rights to parties, and this status was historically reserved to the union of a man and a woman. However, as of 2013, with the decision in *US v Windsor* as indicated above, some American states enacted laws allowing homosexual people to marry.

6.2.1.1.3 Marriage

Like in many other countries, marriage in the United States is registered as civil marriage. Civil marriage is a registered partnership between two persons that results in a number of legal rights and obligations between partners and others including the state. Family law regulates the numerous aspects of civil marriage, including its termination.⁹³² Merin points out that marriage is and continues to be the privileged and preferred legal status in Europe and the USA and provides the most expansive recognition of rights by the state.⁹³³

Although at the federal level marriage is allowed only between two persons of opposite sex, the position is different at state level, as some states have allowed homosexual couples to enter into marriage. In fact, according to the Defense of Marriage Act (DOMA) enacted by the United States Congress in 1996, marriage is a legal union between one man and one woman as husband and wife.⁹³⁴ This would suggest that for purposes of interpreting federal laws, federal regulations, and rulings

⁹³¹ Bossin 2004 TLR 420.

⁹³² Waaldijk *More or Less Together: Levels of Legal Consequences of Marriage, Cohabitation, and Registered Partnership for Different-sex and Same-Sex Partners. A Comparative Study of Nine European Countries* 77-78.

⁹³³ Merin *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* 55-56.

⁹³⁴ DOMA Section 3 USC § 7.

made by federal agencies, the term marriage and spouse do not include homosexual unions.⁹³⁵

However, in the USA, the approach to applicable law issues in the entire family area has been almost left completely to the individual states and there is no federal conflicts rule on the issues of marriage or divorce. As to the validity of marriage in the United States, it is state law that determines the applicable law, just as the direct regulation of substantive domestic relations has been left entirely to the individual state.⁹³⁶ In other words, in the USA, family law is the law of the individual states; marriage and its dissolution, support and inheritance rights, legitimation, adoption and custody are all matters of state law.⁹³⁷ As a result, all states in the United States legalised homosexual marriage.⁹³⁸ In these states, all benefits (except the federal benefits which are substantial) provided to heterosexual married couples by states are conferred upon homosexual couples.⁹³⁹

This would suggest that the federal state and its agencies treated heterosexual married couples differently from homosexual couples. In fact, prior to the decision in *US v Windsor* and *Obergefell v Hodges*, at the federal level as argued above,⁹⁴⁰ homosexual couples were not allowed to get married in terms of section 3 of DOMA, and according to DOMA no state within the USA is compelled to recognise homosexual marriage registered in another state. This raises issues that will be discussed in the following section.

6.2.1.2 *Issues raised by the legalisation of homosexual unions*

By legalising homosexual unions within its territory, the United States major problems related to the consequences of that legalisation arose. These include the

⁹³⁵ Wardle 2010 *CWILJ* 172.

⁹³⁶ Wardle 2010 *CWILJ* 161.

⁹³⁷ Hay "Recognition of same-sex legal relationships in the United States" 2006 *AJCL* 258.

⁹³⁸ CNN <http://edition.cnn.com/interactive/us/map-same-sex-marriage> (date of use 21 July 2015).

⁹³⁹ Aloni 2010 *DJGLP* 149.

⁹⁴⁰ See para 6.2.1.1.3 above.

second class status or marital-like status given to homosexual unions, and the interstate recognition of homosexual unions within the USA.

6.2.1.2.1 Second class status or marital-like status

Scholars and commentators believe that by legalising homosexual unions under different statutes, as domestic partnerships, civil unions and marriage, and by awarding homosexual couples registered under domestic partnerships and civil unions less benefits than those who enter the marriage regime, civil unions and domestic partnerships are given a second class status.

In fact, some scholars, including Badgett, share the belief that individuals have an incentive to marry because it is an efficient institution that provides economic benefits and that is a public good.⁹⁴¹ The more marriage is associated with such benefits, the more individuals seeking to improve their economic situation will desire marriage. Therefore, individuals in homosexual relationships, especially those with property or children, would have the same economic incentive as individuals in heterosexual couples to desire access to the legal framework created by marriage, in addition to any other customary benefits of being married.⁹⁴²

This would suggest that civil unions, domestic partnership and marriage as discussed above are the result of the efforts of homosexual peoples who seek all the benefits that marriage offers. It can therefore be argued that if civil unions and partnerships provided all the benefits associated with marriage, the homosexual community would not fight for marital status. However, the economic benefits accrued by marriage have consistently been one of the main engines of the battle for the legalisation of homosexual marriage. This means, as argued above, that civil unions and domestic partnerships grant only limited rights to homosexual couples who enter into these forms of legal relationships.

⁹⁴¹ Badgett "Predicting partnership rights: Applying the European experience in the United States" 2005 *YJLF* 76.

⁹⁴² Badgett 2005 *YJLF* 76.

In fact, it has been proven that there is a difference between civil unions, domestic partnerships and marriage.⁹⁴³ According to Eskridge, civil unions are actually a kind of “equality practice”, *inter alia* because they are a necessary temporary stage on the way to homosexual marriage. The theory of small change that was used by the courts and legislature in the process of legalising homosexual unions in the USA informs that civil unions and domestic partnerships are a necessary stage before homosexual marriage, because without it, the public is unprepared for homosexual marriage. The theory of small change thus situates marriage as the final stage.⁹⁴⁴

Civil unions and domestic partnerships are different from marriage not only because of the limited rights conferred on parties but also because of their adverse effects on the parties. In this regard, it has been reported that civil unions and domestic partnerships have negative effects on the physical and mental health of homosexual couples and their children due to the stigma of living in a separate but equal regime. Some employers do not extend to couples in civil unions the rights and benefits that they grant to married couples.⁹⁴⁵

However, other scholars and commentators reject this view and argue that civil unions and domestic partnerships are not the second class and that marriage is not the final stage in the process of legalisation of homosexual unions. They argue that it is the value that societies give to the institution of marriage that matters. According to Budgett, for example, in countries where the value of marriage has declined, the chances of achieving legal recognition of homosexual relationships are higher. Thus, civil unions usually take place in countries where marriage is less meaningful on a societal level. A large number of cohabiting unmarried opposite-sex couples has

⁹⁴³ Bossin 2004 *TuILR* 418, Isaac 2008 *UPAJCL* 612.

⁹⁴⁴ Eskridge *Equality Practice: Civil Unions and the Future of Gay Rights* 128.

⁹⁴⁵ New Jersey Civil Union Review Common “The legal, medical, economic and social consequences of New Jersey’s Civil Union Law” (2008), available at <http://www.nj.gov/lps/dcr/downloads/CURCFinal-Report.pdf> (date of use 23 March 2015). Some employers in New Jersey (one of the US states) denied employees’ civil union partners the same benefits that are granted to employees’ opposite-sex spouses. Given that these employers are governed by the Employee Retirement Insurance Security Act (“ERISA”), and that DOMA limits benefits to the opposite-sex partners of employees, and ERISA is a federal law, these employers are not required to recognise same-sex partnerships.

proved to demonstrate the declining material importance of marriage in particular states or countries.⁹⁴⁶

McCaffrey additionally confirms that in such countries and states, homosexuals who achieve all the benefits offered by marriage are probably less passionate about the fight for homosexual marriage.⁹⁴⁷ It is likely that in such circumstances, homosexuals feel less discriminated against and have less motivation to fight for homosexual marital status.⁹⁴⁸

Some authors argue that the homosexual community is fighting for the recognition of marital status because to them, marriage is the final stage or the final goal of their struggle. Based on the experience of some European countries, Waaldijk argues that the fact that registered partnership laws were enacted in the Netherlands did not silence the call for opening up of marriage; rather it increased the social and political pressure on the issue. This would suggest that homosexual communities were fighting for nothing less than marriage. Waaldijk goes on to argue that the whole legislative process leading to the introduction of registered partnerships and joint custody served to highlight the remaining discrimination caused by the exclusion of homosexual couples from marriage.⁹⁴⁹ He adds that many homosexual couples choose not to register partnerships because of their commitment to homosexual marriage.⁹⁵⁰

⁹⁴⁶ Badgett 2005 *YJLF* 77.

⁹⁴⁷ In 2002, fourteen per cent of people living as couples in France were cohabiting – the highest percentage of thirty countries studied. See McCaffrey *The Gay Republic: Sexuality, Citizenship and Subversion in France* 20.

⁹⁴⁸ Aloni 2010 *DJGLP* 152.

⁹⁴⁹ Waaldijk *More or Less Together: Levels of Legal Consequences of Marriage, Cohabitation, and Registered Partnership for Different-sex and Same-Sex Partners. A Comparative Study of Nine European Countries* 447.

⁹⁵⁰ Waaldijk *More or Less Together: Levels of Legal Consequences of Marriage, Cohabitation, and Registered Partnership for Different-sex and Same-Sex Partners. A Comparative Study of Nine European Countries* 449.

Merin shares this view, contending that civil unions are still a necessary step on the way to homosexual marriage, because only then will the state be ready in terms of its socio-political and legal climate to move to the next stage.⁹⁵¹

Shipman and Smart reject the idea that marriage is the final goal of the homosexual community's activism. They argue that the vision that marriage is the final goal of the efforts of the homosexual movement is not representative of the goals of the homosexual community in Europe. They go on to argue that the evidence demonstrated that many Europeans are most interested in securing partnership rights and not marriage. For example, Great Britain's largest and most influential Lesbian Gay and Bisexual ("LGB") organisation, Stonewall, does not advocate the goal of homosexual marriage. Rather, the organisation advances the idea that civil partnership is preferable to marriage because it should be seen a twenty-first century means of recognising modern relationships and that it is preferable to attempting to radicalise the traditional notion of marriage.⁹⁵²

Similarly, the Lesbian and Gay Federation in Germany ("LSVD"), one of Germany's largest LGB organisations, is proud of the achievement of lifetime partnership laws and regularly works for the improvement of the benefits accompanying it. The website of this organisation states as follows:

"Only ten years after our foundation we were successful in obtaining a registered partnership law in Germany. This means that we convinced the German Parliament and society that equal rights for gay and lesbian couples are necessary for modern, democratic society. Nevertheless, we still have to struggle for equal rights in areas like taxation and pension laws, adoption and child custody."⁹⁵³

⁹⁵¹ Merin *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and The United States* 130.

⁹⁵² Shipman and Smart "It's made a huge difference': Recognition, rights and the personal significance of civil partnership (2007), available at <http://www.socresonline.org.uk/12/1/shipman.html> (date of use 23 March 2015).

⁹⁵³ "LSVD" <https://www.lsvd.de/ziele/buengerrechte/lsvd-the-lesbian-and-gay-federation-in-germany.html> (date of use 7 July 2015).

In short, the issue of second class status of civil unions and domestic partnerships is controversial. Some scholars view civil union and domestic partnerships as having second class status because these unions and partnerships grant some of the rights granted to married couples. Other scholars in contrast view these statuses as equal to marriage as long as those who enter into these forms of homosexual unions are granted all the rights of married couples.

Similarly, while some scholars view civil unions and domestic partnerships as a necessary step toward the legalisation of homosexual unions and thus consider marriage as the final goal of the LGB movement, some other scholars argue that the final goal of the LGB movement is rather the legal recognition of civil partnerships.

In the USA, this discussion takes a different turn. Some American homosexual organisations, including the Lambda Legal Defense and Educational Fund, the largest LGB organisation in the country, are fighting for both civil union and marital status. For example, the New Jersey Civil Union Watch, one of the movements within the Lambda, is working toward the goal of marriage equality.⁹⁵⁴ Halley reported in justification of the Lambda position that there are good reasons for working on securing partnership rights rather than focusing solely on homosexual marriage as the final goal of the LGB movement. Marriage does not offer relief from discrimination against LGB individuals who do not seek life in marriage-like relationships. Moreover, LGB people who do not live in marriage-like relationships will be subjected to additional discrimination if married versus unmarried distinction gains cultural value.⁹⁵⁵ Similarly, some feminists view marriage as a harmful institution and thus urge the LGB community not to pursue it. Chambers, for example, based on a review of numerous feminist accounts of marriage, contends that marriage's practical effects on women make them worse off because marriage reinforces the gendered division of labour and thus women earn less than men and

⁹⁵⁴ Lambda Legal "Marriage, relationships, and family law", available at <http://www.lambdalegal.org/ourwork/issues/marriage-relationships-family> (date of use 23 March 2015).

⁹⁵⁵ Halley "Recognition, rights, regulation, normalisation: Rethorics of justification in the same-sex marriage debate" in Wintemute and Andenaes M *Legal Recognition of Same-Sex Partnerships: A Study of National, European, and International law* 97.

are less independent. Marriage also reinforces the notion that housework is primarily the domain of women, even if they work outside the home.⁹⁵⁶

Another issue raised by the legalisation of homosexual unions is the recognition of a marriage registered in a state by another state within the territory of the USA.

6.2.1.2.2 Interstate recognition of homosexual unions

A survey of the legal position in the USA reveals confusion in respect of the legal status of homosexual unions. As discussed above, homosexual unions have been legally recognised as civil unions, registered domestic partnerships and civil marriages. While the US federal government did not recognise homosexual marriage, each state in the United States has enacted laws that regulate homosexual unions within its jurisdiction. However, not all the states recognise same rights to all homosexual individuals and couples. This would suggest that homosexual unions may receive different treatment in different states within the USA and at the federal level.

At the federal level, The United States Congress passed the Defense of Marriage Act (“DOMA”) in 1996. This Act had two major implications on the institution of marriage in the USA. The Act contains two operative sections. Section two, the horizontal section, was designed to create federal protection against the growing threat that the legalisation of homosexual marriage in one state would open the door for, and encourage, judges to interpret federal law (particularly full faith and credit doctrine) in a manner that would force other states to recognise homosexual marriage over objections from the people and lawmakers in those states.⁹⁵⁷ Section 2 of DOMA states as follows:

⁹⁵⁶ Chambers “Feminism, liberalism and marriage” (unpublished manuscript), available at <http://www.brown.edu/Research/ppw/files/Feminism,%20Liberalism%20and%20Marriage.doc> (date of use 26 March 2015).

⁹⁵⁷ Wardle 2010 *CWILJ* 146.

“No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.”⁹⁵⁸

Section 3 of DOMA was intended to prevent judges and agency officials from using federal choice of law and interpretative principles to recognise homosexual marriages in federal laws, regulations and programs before congress decided such recognition was appropriate.⁹⁵⁹ In other words, this section creates the definition of marriage in determining the meaning of any act of the congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States. According to this section the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to the persons of the opposite sex who is a husband or a wife.⁹⁶⁰

In summary, DOMA accomplished two purposes. First, the Act determined that no state would be required to give full faith and credit to a homosexual marriage performed in another state. Second, it defined marriage as a legal union between one man and one woman.

Following DOMA, many states passed their own forms of DOMA with purposes similar to the federal one, each defining marriage as a union of a man and a woman and also providing that the state would not recognise a homosexual marriage concluded in another state. As of 2004 38 of the 50 states in the United States had passed such laws.⁹⁶¹

⁹⁵⁸ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2000)).

⁹⁵⁹ Wardle 2010 *CWest/LJ* 146.

⁹⁶⁰ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000)).

⁹⁶¹ Bossin 2004 *TLR* 392.

Despite these laws in many states, the pressure of the LGB movement led the courts to take a different position. In 1998, an Alaska court held that denying homosexual couples the right to marry violated both the state constitutional right to privacy and the state constitutional right to be free from discrimination.⁹⁶² In 1999, the Vermont Supreme Court also held that denying homosexual couples the same benefits and privileges granted to married couples, violated the common benefits clause of the Vermont Constitution.⁹⁶³

The LGB movement also influenced the Supreme Court of the USA. The court in *Lawrence v Texas*⁹⁶⁴ ruled that the Texas statute that made it a crime for people of the same sex to engage in certain sexual conduct violated the due process clause of the Constitution, finding that the liberty protected by the Constitution allows homosexual adults to “choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons”.⁹⁶⁵

Similarly, in 2003, the Massachusetts Supreme Court in *Goodridge v Department of Public Health*,⁹⁶⁶ distinguished the federal Constitution from the Massachusetts Constitution and noted the following:

“The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected sphere of private life.”

The court recognised the substantial benefits enjoyed by those in marriage and pointed out as follows:

⁹⁶² *Brause v Bureau of Vital Statistics* 1998 WL 88743 (Alaska Super. Feb. 27, 1998).

⁹⁶³ *Baker v State* 744 A.2d at 867 (Vt 1999).

⁹⁶⁴ 539 U.S. 558.

⁹⁶⁵ Bossin 2004 TLR 403.

⁹⁶⁶ *Goodridge v Dept of Public Health* 798 N.E.2d at 948 (Mass 2003).

“Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution and the decision whether and who to marry is among life’s momentous acts of self-definition”⁹⁶⁷

The court then found that the marriage ban could not meet the rational basis test under either due process or equal protection analysis.⁹⁶⁸ As a result of this intensive judicial activity, many states reviewed their legislation and started enacting laws allowing homosexual couples to have a legal status in the USA. As discussed above, several states legalised homosexual relationships as civil unions, registered partnership and civil marriages. There are even states that did not pass any Act allowing or denying homosexual couples any of these legal statuses.⁹⁶⁹

The issue is now that where in some states homosexual couples have a number of rights associated with their civil unions status, in others the rights are associated with the registered partnership status or marital status of other states. The question arises how a state that recognises only some of the rights associated with civil union status will treat a couple that moves to that state from a state where the couple concluded a registered domestic partnership or a marriage. It is important to note that, given the limited scope of this study, the intention is not to discuss this issue or to venture to answer the aforementioned question. Nevertheless, it seems reasonable to give the position of Wardle on this issue.

Wardle believes the states that created the civil union status will likely recognise the civil union concluded in another state. This applies to registered domestic partnerships and marriage.⁹⁷⁰

Homosexual couples in the USA are raising children that they had from their heterosexual unions or that they have through ARTs. This would suggest that homosexual couples are parenting their children. This is also the result of the

⁹⁶⁷ *Goodridge v Dept of Public Health* 798 N.E.2d at 955 (Mass 2003).

⁹⁶⁸ *Goodridge v Dept of Public Health* 798 N.E.2d at 958 (Mass 2003).

⁹⁶⁹ Wardle 2010 *CWILJ* 161-2.

⁹⁷⁰ Wardle 2010 *CWILJ* 161.

legalisation of homosexual unions. What then are the rights of homosexual couples as parents and how are these rights determined? The next section will try to answer these questions.

6.2.2 Obergefell v Hodges and the legalisation of homosexual unions in America

The decision in *Obergefell v Hodges*⁹⁷¹ marks the second important period in the process of legalising homosexual unions in the USA. This decision is viewed as a remedy to the problem of marriage equality that was prevailing in the USA. It makes it possible for all homosexual married couples to be treated the same under federal and states laws. It also grants a wide range of rights, responsibilities and obligations to homosexual couples.⁹⁷²

6.2.2.1 The decision in Obergefell v Hodges

6.2.2.1.1 Summary of the facts

The *Obergefell v Hodges* case involves two homosexual individuals, Mr James Obergefell and Mr John Arthur James, residents of the state of Ohio in the USA. These two individuals were engaged in a homosexual marriage that was legally recognised in the state of Maryland in the USA. In the Ohio state, their home state, homosexual marriage is not legally recognised. Mr John Arthur James was diagnosed with a deadly disease and passed away few months before court proceedings began.

Mr Obergefell and Mr James wanted Mr James to be recognised as married on his death certificate and by the same fact they wanted Mr Obergefell to be recognised as Mr James' surviving spouse. They argued that the state of Ohio's refusal to legally recognise marriages performed in other states and banning homosexual

⁹⁷¹ 1355 CT. 2584 (2015)

⁹⁷² Burda "Obergefell v Hodges: The effects of the decision and Estate planning for LGBT couples" 2015 *NYSBAJ* 11.

marriage in Ohio violated the equal protection and due process clauses of the Fourteenth Amendment. To this end they filed the case in 2013 in the US District Court for the Southern District of Ohio.

On 22 July 2013, US District Judge Timothy Black granted a temporary restraining order that required the state to recognise the marriage of Mr Obergefell and Mr John Arthur James on Mr Arthur's death certificate.

On 16 January 2014, the Attorney General of the state of Ohio filed an appeal to reverse the decision of Black J and ordered the state of Ohio to recognise the marriage of homosexual individuals in terms of the issuing of death certificates. The matter was then transferred to the U.S. Supreme Court for decision.

6.2.2.1.2 The decision

In a majority judgement, the court rested its decision upon the fundamental right to marry. Referring to the decision in *Washington v Glucksberg*,⁹⁷³ where it was stated that in determining whether a right is fundamental, the Supreme Court looked into whether the right was historically and traditionally recognised, and whether failing to recognise the right would contravene liberty and justice. The court observed that the right to marry has long been found to be constitutionally protected. However, the court acknowledged that the precedents describing the right presumed a heterosexual union.⁹⁷⁴ The court further found that rights come not from ancient sources alone. They rise too from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.⁹⁷⁵ The court therefore held that the fundamental right to marry includes homosexual couples' right to marry.⁹⁷⁶

⁹⁷³ 521 U.S. 702 at 720.

⁹⁷⁴ *Obergefell v Hodges*, 135 ST. CT at 2598.

⁹⁷⁵ *Obergefell v Hodges*, 135 ST. CT at 2602.

⁹⁷⁶ 521 US at 720.

In a minority judgement, the court held that the majority should not have resolved the hotly contested issue of homosexual marriage for the entire country; such resolution should come from the people.⁹⁷⁷ They also held that the majority was looking beyond history and tradition to establish a fundamental right contrary to Supreme Court's precedents.⁹⁷⁸

In short, on 26 June 2015 the Supreme Court issued a decision in *Obergefell v Hodges* legalising homosexual marriage throughout the USA by requiring all the states to issue marriage licences to homosexual couples and recognise homosexual marriages that were legally formed in other states.⁹⁷⁹

As indicated above, the decision in *Obergefell v Hodges* was viewed as a remedy to the issue of marriage equality in the USA.⁹⁸⁰ With this decision, all homosexual married couples are entitled to the benefits of state and federal laws that apply to heterosexual couples, including state inheritance and intestacy statutes.⁹⁸¹ However, this decision has left unresolved many other issues, including the issue related to the pre-existing legal relationships that were never dissolved, the issue related to the reverse evasion statutes, the issue related to parental rights and inheritance rights, and the issue related to the intestate succession.

6.2.2.1.3 Unresolved issues

a The issue related to legal relationships that were never dissolved

Homosexual couples in all the USA now have the option to marry, but before marriage become an option, a number of states allowed homosexual couples to enter into civil unions, domestic partnerships and some were even in committed relationships without paperwork. States providing that option to homosexual couples

⁹⁷⁷ *Obergefell v Hodges* 135 ST. CT at 2612, 2615 (Roberts J).

⁹⁷⁸ *Obergefell v Hodges* 135 ST. CT at 2617.

⁹⁷⁹ *Obergefell v Hodges* 135 ST. CT at 2602.

⁹⁸⁰ See para 6.2.2 above.

⁹⁸¹ Burda 2015 *NYSBAJ* 11.

granted to them specific legal rights under state laws. The question that arises is what will happen to those relationships that were not marriages and that were not dissolved before marriage become an option in all the USA.⁹⁸²

In this regard, Salam and Lawery argue that the decision in *Obergefell v Hodges* does not change laws affecting domestic partnerships, civil unions or other formal relations that are not marriages under state law. Those relationships are not recognised as marriages and individuals (whether of the same sex or opposite sex) who have entered into these relationships are not treated as married under federal law.⁹⁸³ It can be argued that some states will automatically upgrade civil unions and domestic partnerships to marriage. This is the case of the state of Washington that automatically upgraded all existing state registered partnerships in 2014. However, there is no evidence that all other states will follow suit, and some couples choose to retain their civil union and registered domestic partnership status rather than getting married. As a consequence they face many legal challenges in family, estate planning, tax and property matters when relationships end.

b The issue related to the reverse evasion statutes

Reverse evasion laws are those state laws that prohibit non-residents from entering into a valid marriage if the couple's home state will not recognise that marriage.⁹⁸⁴ Before the decision in *Obergefell*, only a few states legally recognised homosexual marriage and states were not required to recognise such marriages concluded in other states. As a result, a marriage was valid only in the state where it was concluded and in states that recognised that marriage. In view of this situation, states had laws that did not allow non-residents to marry if their marriage is not valid in their state of origin. This would suggest that in terms of the reverse evasion laws, residents from state A, where homosexual marriage is not valid, could not engage in a valid marriage in another state B, where homosexual marriage is legally recognised.

⁹⁸² *Ibid.*

⁹⁸³ Salam and Lawery 2015 *EY* 2.

⁹⁸⁴ Burda 2015 *NYSBAJ* 11-2.

Now, with the decision in *Obergefell*, homosexual marriage is legalised in all the states in the USA, and all the states are required to recognise marriages concluded in other states. In order to comply with this decision some states, including Massachusetts, have repealed their reverse evasion statutes to apply retroactively to the date when marriage equality became law.⁹⁸⁵ However, the state of Illinois has not yet repealed its reverse evasion law and does not seem to have planned to do so.⁹⁸⁶ The question that arises is the following: In the view of the fact that homosexual marriage was invalid in the state of Illinois since the beginning, what shall be the status of marriages legally concluded in other states by the couples that have decided to settle in the state of Illinois after homosexual marriage was made legal in all the states?

It is possible to argue that as long as the state of Illinois has not repealed its reverse evasion laws, homosexual couples legally married in other states might not be treated as married in the state of Illinois, and this situation might result in many challenges in terms of spousal benefits and the will.⁹⁸⁷

c The issue related to the parentage of the assisted reproductive technologies-born child

Before the decision in the *Obergefell* case, in some states the marital presumption was guiding parentage for children born during marriage. In those states the marital presumption is rebuttable, while in other states this presumption is not even recognised.⁹⁸⁸ This would suggest that when a child is born to a married couple while they are married, and where the marital presumption is recognised, both parents will have parental rights and responsibilities. In the states where this presumption is not recognised, only the birth mother will have parental rights and responsibilities. Now, with the legalisation of homosexual marriages in all states through the decision in the

⁹⁸⁵ Burda 2015 *NYSBAJ* 12.

⁹⁸⁶ Burda 2015 *NYSBAJ* 12.

⁹⁸⁷ Burda 2015 *NYSBAJ* 12.

⁹⁸⁸ Burda 2015 *NYSBAJ* 12.

Obergefell case, the question that arises is whether all the states will apply the marital presumption to homosexual couples.

It can be argued that if the presumption is applied to homosexual couples, different scenarios are possible. In the states where the principle is recognised and applied to homosexual couples, both parents will have parental rights and responsibilities, provided that both parents were married at the time of the birth of the child. However, in the states where the marital presumption is not recognised, only the birth mother will have parental rights and responsibilities.

It is interesting to note that this situation raises other issues for the child born as a result of ARTs, including relating to intestate succession.

d Intestate succession

The marital status of the parents raises a problem for the eligibility of children born of ARTs to homosexual couples in the USA. Three scenarios can be envisaged: the first is, if a child is born in a state where the marital presumption is not recognised, he or she will have only one legal parent. As a consequence, he or she will inherit only from that parent.⁹⁸⁹ The second scenario is, if a child is born after the death of the legally recognised parent, that child might not be eligible for Social Security Administration Survivor Benefits as he or she is not included in the instate succession statute. This scenario is referred to as the posthumous heir. The court dealt with this scenario in *Astrue v Capito*.⁹⁹⁰ At issue in this case was the question whether a posthumously conceived child would qualify for the Social Security Administration Survivor Benefit. In an attempt to answer this question the court relied on the interpretation of the Social Security Administration Survivor Benefit, according to which a person would only qualify for those benefits if he or she were entitled to inherit from his or her father under the state's intestacy statutes. The court also referred to the Social Security Act, which defines a legal dependent child who is

⁹⁸⁹ Burda 2015 *NYSBAJ* 13.

⁹⁹⁰ Burda 2015 *NYSBAJ* 16.

entitled to benefits after the death of his or her parent. The Act defines that child as a child who was under 18 years of age and who was dependent on a legally recognised parent, who was fully insured at the time of his or her death.⁹⁹¹ The court then held that in view of the fact that the posthumously conceived child must demonstrate eligibility to inherit under state law or satisfy statutory alternatives to those requirements; the right of a posthumously conceived child to receive Social Security Administrative Survivor Benefits will be solely dependent on that child's right to inherit under the state intestacy's laws.⁹⁹²

To conclude, the decision in *Obergefell* is an important step in the legalisation of homosexual unions in the USA. With this decision, marriage equality is now possible within all the states in America. Consequently, married homosexual couples will now benefit from federal and state laws that protect the spouse's right to inherit.⁹⁹³ It can be argued that this decision has the merit to have put heterosexual and homosexual couples on the same level of protection. However, the decision in *Obergefell* seems to serve the interests of individuals who decide to get married better than it serves the interests of those who choose not to marry and children who will result from those marriages, including those born to homosexual couples using ARTs.

The legalisation of homosexual unions was the subject of extensive debate in the USA. Proponents and opponents of homosexual unions asserted various reasons for and against the legalisation of these unions. For the purpose of this research, it is important to discuss some of those reasons.

The legalisation of homosexual unions is a social issue, a revolutionary law decision that will impact society as a whole. The family, the most important institution and the fundamental unit of society will be seriously affected with many consequences on men and women as well as on children. The decision of legally recognising homosexual unions will also affect the state's institutions; law makers must adjust the law to accommodate new families resulting from the legalization of homosexual

⁹⁹¹ Burda 2015 *NYSBAJ* 16.

⁹⁹² Burda 2015 *NYSBAJ* 16.

⁹⁹³ Burda 2015 *NYSBAJ* 17.

unions, courts of law must prepare themselves to hear new cases from gays and lesbians, and political and administrative authorities must make themselves ready to ensure adequate protection to members of these new families. Parenting styles will be affected and the social environment in which children will develop will not be spared by the revolutionary decision of legalising homosexual unions. In view of all these implications of the legalization of homosexual unions, it is therefore necessary to discuss the reasons asserted for and against the legalisation of homosexual unions for a better understanding of the consequences that legalisation can have on the community, the family in general and on children in particular.

6.3 THE DEBATE OVER THE LEGALISATION OF HOMOSEXUAL UNIONS

6.3.1 Arguments for the legalisation of homosexual unions

The legalisation of homosexual unions is one of the most significant issues in contemporary American family law. The proposal of this revolutionary decision generated a debate about its numerous positive or negative potential consequences on parents, children, public health, homosexual couples, families and the status of women.⁹⁹⁴

Advocates of the legalisation of homosexual unions asserted a number of arguments or reasons in support of their claims. Discussing all those arguments is a huge task that cannot be fulfilled in this research. Nevertheless, the major arguments for the legalisation of homosexual unions will be discussed. The discussion of these arguments is important for this study as it highlights the potential implications of the legalisation of homosexual unions for the parents and the children. For instance, if homosexual unions were legalised based on the assimilation argument, homosexual partners would benefit from a public higher acceptance which would to a certain extent reduce the homophobic behaviours perpetrated on homosexual parents and their children. This in turn would increase the self-esteem and feeling of

⁹⁹⁴ Wardle 1996 *BYULR* 3.

equality among lesbians and gays within the heterosexual majoritarian population. Those arguments include the following.

6.3.1.1 *Constitutional arguments*

The constitutional arguments assert that the Constitution of the United States mandates or should be interpreted to mandate legalising homosexual unions. In other words, proponents of the legalisation of homosexual unions claim that homosexual unions are protected by a fundamental constitutional right which entitles them to special protection. This claim is referred to as “the constitutional right claim or the constitutional right argument”.⁹⁹⁵ Proponents of the legalisation of homosexual unions also claim that the equal protection doctrine dictates legalising homosexual unions to avoid discrimination against a class entitled to special protection. This claim is called “the equality claim”.⁹⁹⁶

It can hence be argued that the constitutional arguments can be divided into two variants, namely the constitutional right argument and the equality claim. For the purpose of this research each of these variants deserves to be discussed.

6.3.1.1.1 The constitutional right argument

The constitutional right argument for the legalisation of homosexual unions asserts that there is a fundamental constitutional right to marry, or a broader right of privacy or intimate association; that the core of this right is the private, intimate association of consenting adults who want to share their lives and commitment with each other; that homosexual couples have just as much intimacy and need for marital privacy as heterosexual couples; and that laws allowing heterosexual, but not homosexual couples to marry infringe upon and discriminate against this, or any related fundamental right.⁹⁹⁷

⁹⁹⁵ Wardle 1996 *BYULR* 4.

⁹⁹⁶ Wardle 1996 *BYULR* 4.

⁹⁹⁷ Wardle 1996 *BYULR* 26.

Advocates of the legalisation of homosexual unions relied on the family privacy cases,⁹⁹⁸ particularly *Loving v Virginia*,⁹⁹⁹ to support their claim. They argue that courts should compel states to allow homosexual marriage, just as the Supreme Court compelled states to allow interracial marriage, by recognising the claimed right as part of the fundamental constitutional right to marry, or to privacy or intimate association.

The constitutional right argument can therefore be summarised as follows: homosexual couples should be legally allowed to marry because by doing so, states would recognise their rights as part of the right to marry, or to privacy, or to intimate association that are protected by the Constitution of the United States.

6.3.1.1.2 The equality argument

The equality argument for the legalisation of homosexual unions is based on the principle of equality. This argument asserts that legal discrimination on the basis of homosexuality is essentially indistinguishable from legal discrimination on the basis of race or gender, and it is as indefensible for government to prohibit homosexual couples from marrying as it is to prohibit interracial couples from marrying, raising the *Loving* analogy.¹⁰⁰⁰ In other words, the government of the United States should not deny homosexual couples the right to marry; doing so would discriminate against them based on their sexual orientation; and this would be in contrast with the principle of equality. The United States government allows people of different races to marry; similarly it should also allow homosexual couples to marry and thus avoid discriminating against them based on their sexual orientation.

Other arguments were asserted in support of the legalisation of homosexual unions. These include the assimilation argument, conservative arguments, the equal protection argument and the public policy argument.

⁹⁹⁸ *Caban v Mohammed* 441 US 380 (1979), *Moore v City of East Cleveland* 431 US 494 (1977), *Pierce v Society of Sisters* 268 US 510 (1925).

⁹⁹⁹ 388 US 12 (1967).

¹⁰⁰⁰ Koppelman "Why discrimination against lesbians and gay men is sex discrimination" 1994 *NYULR* 197.

6.3.1.2 *The assimilation argument*

This argument is based on the assimilation theory, which implies that the outsider is brought into the mainstream. The purpose of the theory is to recognise homosexual people and couples as “normal” and allow them to enjoy the substantive and symbolic benefits that convey marriage. According to the assimilation argument, marriage is a social and public recognition of a private commitment, the highest public recognition of personal integrity. Denying it to homosexuals is the most public insult possible to their equality.¹⁰⁰¹

For proponents of the assimilation argument, legalising homosexual marriage is about civil rights, equality, and public recognition. The assimilation argument appeals the state to extend marriage rights to homosexual couples. The tenants of the assimilation argument maintain that the institution of marriage is not only the symbol of equality for homosexual people, but also a substantive necessity for them to participate, and be benefited equally in society.¹⁰⁰² Being married brings homosexual partners the right to health care benefits, pensions, and other benefits that are available to heterosexual couples.¹⁰⁰³

In short, the assimilation argument asserts that homosexual couples should be allowed to marry because by doing so they will have access to the benefits granted to heterosexual married couples. Being married is the only means for them to access those benefits and to proudly feel themselves as part of the society.

6.3.1.3 *Conservative arguments*

The tenants of the conservative arguments for the legalisation of homosexual unions asserted five claims that can be summarised as (1) We exist, (2) Stabilisation, (3) Sexual taming, (4) Society gain and (5) No harm.¹⁰⁰⁴

¹⁰⁰¹ Sullivan *Virtually Normal: An Argument about Homosexuality* 126.

¹⁰⁰² Sullivan *Virtually Normal: An Argument about Homosexuality* 126.

¹⁰⁰³ Hsu “Why the politics of marriage matter: Evaluating legal and strategic approaches on both sides of the debates on same-sex marriage” 2005 *BYUJPL* 281.

¹⁰⁰⁴ Wardle 2007 *BYUJPL* 452.

6.3.1.3.1 The “we exist” argument

The “we exist” argument asserts that homosexual couples should be allowed to marry because they exist in large numbers in society; they love each other, and need the benefits of marriage for themselves, and for their children.¹⁰⁰⁵

6.3.1.3.2 The stabilisation argument

According to the stabilisation argument, homosexual couples should be allowed to marry because their marriage will bring them stability and will alleviate much of the suffering and disadvantages of the children they are raising.¹⁰⁰⁶

6.3.1.3.3 The sexual taming argument

Supporters of legalising homosexual unions argue that legalising homosexual unions will tame and civilise the irresponsible behaviours of homosexual couples (especially gay men).¹⁰⁰⁷

6.3.1.3.4 The society gain argument

Proponents of the legalisation of homosexual unions make a social benefit claim that society as a whole will benefit from homosexual couples entering homosexual marriages.¹⁰⁰⁸

6.3.1.3.5 The no harm argument

Advocates of the legalisation of homosexual unions claim that no harm to the institution of marriage or to conjugal marriage will result from the legalisation of homosexual marriage.¹⁰⁰⁹

¹⁰⁰⁵ Carpenter “A traditionalist case for gay marriage” 2009 *STLR* 96.

¹⁰⁰⁶ Carpenter 2009 *STLR* 97.

¹⁰⁰⁷ Carpenter 2009 *STLR* 98.

¹⁰⁰⁸ Carpenter 2009 *STLR* 98.

6.3.1.4 *The equal protection argument*

The equal protection argument is based on the equal protection theory. The argument asserts that the law shall be applied equally to persons in similar situations regardless of one's race, sexual orientation or gender.¹⁰¹⁰ The equal protection argument was used in different cases, including the *Goodridge* case,¹⁰¹¹ as well as in *Romer v Evans*,¹⁰¹² to abolish unlawful treatments and classifications based on sexual orientation.

The other major arguments for the legalisation of homosexual unions include the public policy arguments, the marriage equality argument, and the basic civil rights arguments.

6.3.1.5 *The public policy arguments*

The public policy arguments assert inter alia, that (1) the state should not enforce prejudicial social stigma against parents who engage in homosexual behaviour, (2) same-sex parents can and do provide parenting that is just as good and valuable for children as that provided by heterosexual married couples and individuals, (3) public policy should encourage the formation of families, even non-traditional homosexual parenting families, because two parents (even of the same gender) are better than one, and (4) homosexual couples should be allowed to marry because parenting by an adult who is engaged in homosexual relationship may be the best option for a particular child.¹⁰¹³

6.3.1.6 *The marriage equality argument*

This argument briefly asserts that homosexual parents are as capable as their heterosexual counterparts and that the well-being of children is not contingent on the

¹⁰⁰⁹ Polk "Montana's marriage amendment: Unconstitutionally denying a fundamental right" 2005 *Mont LR* 405.

¹⁰¹⁰ Hsu 2005 *BYUJPL* 288.

¹⁰¹¹ *Goodridge v Dept of Public Health* 798 NE 2d 941 (Mass 2003).

¹⁰¹² 517 US 620 (1996).

¹⁰¹³ Wardle "Potential impact of homosexual parenting on children" 1997 *UJILR* 835.

parents' sexual orientation.¹⁰¹⁴ Therefore laws allowing heterosexual couples and not homosexual couples to marry are at odds with the principle of equality.

6.3.1.7 *The basic civil right argument*

The basic civil right argument is the result of the Hawaii Supreme Court decision in the *Baehr v Lewin* case.¹⁰¹⁵ In this case the Hawaii Supreme Court vacated the circuit court dismissal and remanded the case to trial, finding the denial of marriage to same-sex couples a potential violation of the Hawaiian Constitution. The High Court then ruled that the marriage ban might deny members of homosexual couples a basic civil right because of their gender and thus might represent state sanctioned sex discrimination, violating the equal rights amendment of the Hawaiian Constitution. The immediate impact of this decision was that, within a year, the Hawaiian legislature passed a law to assert that Hawaii's law of marriage applied only to homosexual couples.¹⁰¹⁶

It is important to note that the above list of arguments for the legalisation of homosexual unions is not exhaustive; there are many other arguments that were asserted in support of the claim for the legalisation of homosexual unions or marriage. The above enumerated arguments were deemed major and more relevant for the purpose of the research undertaken. Most of these arguments were criticised and challenged by the opponents of the legalisation of homosexual unions.

6.3.2 **Arguments against the legalisation of homosexual unions**

As stated above, in the debate about the legalisation of homosexual unions, the proponents of homosexual marriage sought the extension of the definition of marriage to include homosexual couples' unions. This would have as a consequence the extension to homosexual couples of the rights of heterosexual married couples.

¹⁰¹⁴ Herek 2006 AP 612.

¹⁰¹⁵ 852 P2d 44.

¹⁰¹⁶ Hull "The political limits of the rights frame: The case of same-sex marriage in Hawaii" 2001 S Per 213.

In support of their claim, they asserted many arguments, including the arguments enumerated above. However, in opposition to their claim, opponents of homosexual marriage sought to maintain the *status quo*, by claiming that marriage should be exclusive to heterosexual couples. In support of this claim, they asserted many arguments, some of which directly or indirectly challenge or criticise the arguments asserted in support of the legalisation claim.

It is worth noting that Wardle has asserted many arguments against the legalisation of homosexual unions. This research will refer to the most relevant of his arguments.

6.3.2.1 *The argument against the constitutional rights claim argument*

According to Wardle, all constitutional rights claimed for homosexual marriage are substantive due process claims that fail to pass the test for their legitimacy. Wardle argues that homosexual marriage constitutional rights claims were asserted based on the constitutional right to marry, the right to privacy, and the right to intimate association. However, none of these rights encompasses homosexual marriage.¹⁰¹⁷

In several cases the US Supreme Court has recognised and protected the right to marry as a fundamental liberty interest.¹⁰¹⁸ Although the Constitution does not mention the word marriage, Wardle argues that marriage is undeniably deeply embedded in the traditions of our nation and essential to the ordered liberty of nations. Marriage status is the ultimate example of long-established, highly preferred public status. It is official, formal, publicly endorsed, and powerfully protected. In Wardle's view, the right to marry is a fundamental right protected by the Constitution, but this right does not encompass homosexual marriage.¹⁰¹⁹ According to Wardle, the assertion of advocates of homosexual marriage that marriage includes

¹⁰¹⁷ Wardle 1996 *BYULR* 28.

¹⁰¹⁸ *Zablock v Redhail* 434 US 374 (1987), *Loving v Virginia* 388 US 1 (1967) and *Turner v Safely* 482 US 78 (1987).

¹⁰¹⁹ Wardle 1996 *BYULR* 28.

homosexual marriage just as it includes heterosexual marriage disregards history, precedents and the very nature of marriage.¹⁰²⁰

With regard to history, precedents and the nature of marriage, the court in *Bowers v Hardwick*,¹⁰²¹ concluded that whether homosexual marriage is a fundamental right or protected by some other strand of fundamental rights depends largely upon whether the practice is deeply rooted in the traditions of the nation that are essential to the preservation of our system of ordered liberty. Based on this conclusion, Wardle argues that American history has never allowed homosexual marriage; likewise, none of the established criteria for identifying special constitutional rights is satisfied by homosexual marriage claims.¹⁰²²

Wardle goes on to argue that precedents deny the constitutional right and all the rights arguments for homosexual marriage.¹⁰²³ He relied on a number of cases, including *Poe v William*.¹⁰²⁴ In this case Justice Harlan explicitly linked the confinement of sexual activity to marriage to the prohibition of homosexual activity, and concluded that both confinements of sexual activity behaviour were so deeply embedded in the values and consciousness of the nation that both were integral to any constitutional doctrine in the era. In another case, the Supreme Court suggested that restrictions on marriage, such as a prohibition on homosexual marriage, do not violate fundamental constitutional rights.¹⁰²⁵ In *Bowers v Hardwick*, the court rejected any claim that homosexual behaviour is constitutionally protected as part of a general category of constitutional privacy, as part of intimate sexual conduct among consenting adults, or as part of a right to be free from governmental intrusion within a certain zone, namely the home.¹⁰²⁶ In another case, the court explicitly concluded that no connection between family, marriage or procreation on the one hand and homosexual activity on the other has been demonstrated.¹⁰²⁷ In many other cases,

¹⁰²⁰ Wardle 1996 *BYULR* 31-32.

¹⁰²¹ Powell Plurality opinion quoted in *Bowers v Hardwick* 478 US 186, 192 (1986).

¹⁰²² Wardle 1996 *BYULR* 33.

¹⁰²³ Wardle 1996 *BYULR* 33.

¹⁰²⁴ 367 367 US 479, 546 (1961).

¹⁰²⁵ *Zablocki v Redhail* 434 US 374, 386 (1978).

¹⁰²⁶ *Bowers v Hardwicks* 478 US 189 (1986).

¹⁰²⁷ *Thornburgh v American College of Obstetrics & Genecology* 476 US 747, 772 (1986).

state and federal courts have consistently held that marriage does not encompass homosexual relations.¹⁰²⁸

In short, all these cases showed that none of the precedents ever allowed homosexual marriage; likewise American history and the very nature of marriage never included homosexual marriage.

With regard to the right to privacy, Wardle argues that the constitutional zone of privacy does not extend to homosexual marriage. He goes on arguing that American laws go to great lengths to protect against governmental intrusion into areas where there is a legitimate expectation of privacy.¹⁰²⁹

In fact, certain testimony of private spousal conversations may not be compelled in court. Likewise, most ordinary domestic decisions in on-going functioning families are private matters beyond the jurisdiction of a court to decide. However, this does not include homosexual marriage.¹⁰³⁰

Many constitutional rights arguments to legalise homosexual marriage assert zonal privacy claims. According to Wardle these arguments fail to distinguish non-regulation from public approval of private sexual behaviour. This means that proponents of homosexual marriage fail to recognise the difference between public non-interference with private homosexual behaviour and public approval or endorsement of homosexual behaviour. In fact, the notion of a right to homosexual marriage, or public approval recognition of homosexual marriage, is unsupported by the principles of a zone of family or sexual privacy. Thus the zone of privacy doctrine does not justify legalisation of homosexual marriage. It is important to note that for the same historical and structural reasons identified and discussed above, the homosexual structural privacy claim fails.¹⁰³¹

¹⁰²⁸ *Adams v Howerton* 468 F sup 1119, 1122, 1124 (CD Cal 1980), *Dean v DC*, 653 A 2d 307, 313-17 (DC 1995)

¹⁰²⁹ Wardle 1996 *BYULR* 40.

¹⁰³⁰ Wardle 1996 *BYULR* 40.

¹⁰³¹ Wardle 1996 *BYULR* 41.

Concerning the constitutional right to intimate association, Wardle argues that the right to homosexual marriage, if any, is not part of any constitutional right of intimate association. Proponents of homosexual marriage claim that homosexual marriage is a right to intimate association. The basic argument underlying this claim is that the Constitution shelters an unwritten right of persons to form and maintain intimate human relationships, that the relationship between homosexuals who are committed to each other is among the intimate human relationships so protected, and that the laws denying homosexual couples the right to marry unconstitutionally infringes upon this fundamental right. According to Wardle, this claim falls short as a matter of constitutional theory, doctrine and precedents. Wardle argues that, first, the notion that what a particular individual or couple subjectively believes to be equivalent to a constitutionally protected relationship is not a sound basis for creating a new constitutional right. Social order, as well as constitutional integrity, requires a more objective test. Second, cases in which the Supreme Court has mentioned a possible right of intimate association reveals the narrowness of the associations that this right might protect. For example, the court has emphasised that the associations that might be protected involve traditional personal bonds, a description that does not, from any historical approach, apply to homosexual marriage. Third, the underpinnings of the claim that homosexual marriage is part of a fundamental constitutional right of intimate association were completely undercut in the *Bowers* case.¹⁰³² In this case, the 11th circuit ruled that the Georgia sodomy statute violated the respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation.¹⁰³³

In short, if the basic interactions that define a relationship fail to gain protection as an intimate association, the relationship itself certainly cannot claim preferred constitutional status as a marriage under already repudiated theory. Moreover the court in *Bowers* concluded as follows:

¹⁰³² Wardle 1996 *BYULR* 45.

¹⁰³³ *Bowers v Hardwicks* 478 US at 191-192, 195.

“No connection between family, marriage or procreation on the one hand and homosexual activity on the other has been demonstrated”.¹⁰³⁴

If there is no such connection between the constitutionally protected relationships that are the model for those protected by the right of intimate association on the one hand and the defining characteristic of some homosexual relations on the other, the claim that the right of intimate association includes same-sex marriage is meritless.¹⁰³⁵

6.3.2.2 *The arguments against the conservative arguments*

The conservative arguments have been exposed above and summarised in five points.¹⁰³⁶ The critique of these arguments will follow suit. First, there is no doubt that homosexual couples and families exist in the world and in America. However, it is argued that the sole existence of lesbians and gays around the world in general and in the USA in particular does not necessarily support the claim for radically redefining the institution of marriage to include homosexual marriage.¹⁰³⁷

Second, there is no convincing evidence to support the claim that the legalisation of homosexual marriage will bring stability to gay and lesbian couples and will alleviate much of the suffering and disadvantage of the children they are raising.¹⁰³⁸ In fact, many studies in contrast show that in many countries where homosexual couples were allowed to marry or to enter into marriage-equivalent civil unions, this had little effect upon the stability of those relationships. For example, the 2003 report on a Dutch study of gay men in Amsterdam found that the average duration of gay-steady partner relations was only 1.5 years in the most gay-affirming, gay-supportive nation on earth, when marriage-equivalent same-sex domestic partnerships were legal, and

¹⁰³⁴ *Bowers v Hardwicks* 478 US at 191.

¹⁰³⁵ Wardle 1996 *BYULR* 48.

¹⁰³⁶ See para 3.3.1.3 above.

¹⁰³⁷ Wardle 2007 *BYUJPL* 453.

¹⁰³⁸ Wardle 2007 *BYUJPL* 453.

the full status of same-sex marriage was being implemented.¹⁰³⁹ In 2006, a Scandinavian study of the demographics of marriage-equivalent same-sex registered partnerships in Norway and Sweden noted significant problems with the stability of such relationships, and showed significantly higher rates of breakup.¹⁰⁴⁰ Despite the fact that same-sex couples were considerably older than male-female couples (a factor that generally correlates with greater stability in marriage), and the ratio of partners from higher socio-economic status was up to 50% higher for gay and lesbian couples (another factor that may be associated with greater stability), the divorce-risk levels for registered gay men partnerships were about 50% higher for comparable heterosexual couples. Controlling for variables, the risk of divorce was twice as high for lesbian couples as it was for gay men couples.¹⁰⁴¹

Another study of Swedish registered partnerships found that gay male couples were 50% more likely to divorce than married heterosexual couples, while lesbian couples were over 150% more likely to divorce than heterosexual couples.¹⁰⁴² Controlling for variables, gay couples were 35% and lesbian couples 200% more likely to divorce than heterosexual couples in that very gay-supportive nation.¹⁰⁴³

These studies are from countries where same-sex formal unions have been legalised, destigmatised, dignified, encouraged, socially supported, and given full legal equality for a decade longer than anywhere in the USA. These studies raise serious challenges to the claim that legalising same-sex marriage will produce significant stability for same-sex couples.¹⁰⁴⁴

¹⁰³⁹ Xiridou *et al* "The contribution of steady and casual partnerships to incidence of HIV infection among homosexual men in Amsterdam" 2003 *LWW* 1029. The study purported to assess whether the provision of certain AIDS drugs had resulted in an increase of unsafe sexual practices in the gay community in the Netherlands. See also Anderson *et al* "The demographics of same-sex marriages in Norway and Sweden" 2006 *Dem* 79. The study gives an overview of the demographic characteristics of the spouses in registered partnerships, examines patterns of their divorce risks, and compares the dynamics of same sex couples with those of heterosexual marriages.

¹⁰⁴⁰ Anderson *et al* 2006 *Dem* 79.

¹⁰⁴¹ Anderson *et al* 2006 *Dem* 85-88.

¹⁰⁴² Anderson *et al* 2006 *Dem* 87-88.

¹⁰⁴³ Anderson *et al* 2006 *Dem* 89-90.

¹⁰⁴⁴ Xiridou *et al* 2003 *LWW* 1029.

Third, there is no evidence that legalising homosexual marriage will tame and civilise the irresponsible sexual behaviours of homosexual couples, especially gay male couples. The claim that legalising homosexual marriage will tame the behaviours of homosexual couples is counter-factual. It does not appear that giving marital or marriage-like status to homosexual couples significantly alters their troubling behaviour.¹⁰⁴⁵ For example, a Vermont study published in 2005 compared the characteristics, including sexual practices, of homosexual couples in civil unions with those not in civil unions and with heterosexual married couples.¹⁰⁴⁶ The difference in infidelity rates between gay men in civil unions and those not in civil unions was 2.8% and the authors concluded that homosexual couples registered were similar to each other on demographic and relationship factors when compared with married heterosexual couples.¹⁰⁴⁷ In other words, the legalisation of homosexual marriage has no impact on the high rate of troubling sexual behaviour or the high rate of infidelity of gay men.

Fourth, although conservative advocates of homosexual marriage argue that there is a social benefit in allowing homosexual couples to enter into marriages, there is no supporting evidence for this social benefit claim. Wardle argues that, to the contrary, it has been proved that the sexual relations of gay men and, to a lesser degree, lesbians, are disproportionately unsafe in terms of social responsibility and public health. In the USA, gay male homosexual sex activity remains the primary means of transmission of AIDS. 55% of cumulative AIDS cases reported in 2004 involve the single mode of exposure of men who have sex with men and the number continues to rise. From 2001 to 2005, the estimated number of persons in the 50 states and District of Columbia living with AIDS increased from 331 482 to 421 873 – an increase of 27%. Furthermore, the number of persons with AIDS diagnoses in the USA in 2005 was 40 608; the number of such diagnoses from 1981 – 2005 was 952 629, of whom 530 756 have died.¹⁰⁴⁸

¹⁰⁴⁵ Wardle 2007 *BYUJPL* 456.

¹⁰⁴⁶ Solomon *et al* "Money, housework, sex, and conflicts: Same-sex couples in civil unions, those not in civil unions, and heterosexual married siblings" 2005 *SR* 561.

¹⁰⁴⁷ Solomon *et al* 2005 *SR* 561.

¹⁰⁴⁸ The injection of drugs, which accounted for 21% of the AIDS cases, was another method of disease transmission. See Centers For Disease Control and Prevention, US Department of Health and Human Services 16 *HIV/AIDS Surveillance Report* 32 tbl 17 (2005). See also

It is important to note that AIDS is not the only disease risked by homosexual couples. The list of diseases found frequently among homosexual practitioners as a result of anal sex is long and alarming: Cryptosporidium, giardia lamblia, anal cancer, chlamydia trachomatis, herpes simplex virus, human immunodeficiency virus, human papilloma virus, isospora belli, microsporidia, gonorrhoea, viral hepatitis types B and C and syphilis.¹⁰⁴⁹ Lesbian sex practitioners are also exposed to a higher risk of transmission of sexual infections than in heterosexual couples. These include bacterial vaginosis, hepatitis B, and Hepatitis C. Lesbians also have high levels of cigarette smoking, alcohol abuse, intravenous drug use, and prostitution.¹⁰⁵⁰ Cases of mental health problems, including psychiatric illness such as depression, drug abuse and suicide attempts were also abundantly reported.¹⁰⁵¹

It is important to note that the high rate of AIDS and some other diseases among homosexual couples is not due to the lack of legal marriage or marriage-like status.¹⁰⁵²

Fifth, conservative advocates of homosexual marriage argue that legalising homosexual marriage will bring no harm to the institution of marriage.¹⁰⁵³ Wardle has identified many detrimental consequences of legalising homosexual marriage, including consequences relating to the institution of marriage. For instance, Wardle argues as follows:

“Including same-sex couples within the institution of marriage will transform the institution of marriage to the detriment of all. The characteristics of same-sex

Centers for Disease Control and Prevention, US Department of Health and Human Services “A glance at the HIV/AIDS epidemic 2” (2007) available at <http://www.cdc.gov/hiv/resources/factsheets/At-A-Glance.htm> (date of use 26 March 2015).

¹⁰⁴⁹ Diggs “The health risks of gay sex” (2002), available at http://www.corporateresourcecouncil.org/whitepapers/Health_Risks.pdf (date of use 26 March 2015) 3.

¹⁰⁵⁰ Diggs “The health risks of gay sex” (2002), available at http://www.corporateresourcecouncil.org/white_papers/Health_Risks.pdf (date of use 26 March 2015) 6.

¹⁰⁵¹ McReynolds “Comment, what international experience can tell US courts about same-sex marriage” 2006 *UCLR* 1096.

¹⁰⁵² Wardle 2007 *BYUJPL* 459.

¹⁰⁵³ Polk 2005 *MLR* 442.

relationships will set a new and devastating minimum standard for marital relations. The moral and behavioral norms of marriage will be distorted by the inclusion of the behavioral and moral norms of gay and lesbian lifestyles within the institution of marriage.”¹⁰⁵⁴

Opponents of the legalisation of homosexual marriage have asserted many other arguments in support of their claim. Among those arguments some are supporting the *status quo* (marriage should be exclusive to heterosexual couples). This means that all those arguments point in one direction - the institution of marriage should be exclusive to heterosexual couples. Marriage should not be redefined to include homosexual couples. These include the following arguments.

6.3.2.3 *Homosexual marriage is not justified in terms of the compelling social interests*

It has been argued that the interests of the society in marriage and the family justify some substantial regulation of intimate interpersonal relations.¹⁰⁵⁵ According to Aristotle, the first duty of legislators was to establish rules regulating entrance into marriage.¹⁰⁵⁶ Historically, societies have given unique and special preference to heterosexual marriage because of the benefits the institution provides for society in general and for individual women, men and children in particular.¹⁰⁵⁷

The social interests that societies throughout history have sought to protect through the regulation of marriage have been commented on through the ages by philosophers and legal analysts. These interests include, among other interests, procreation, and the health of the future generation, child-rearing, channelling sexual behaviour and economic stability.¹⁰⁵⁸ For the purpose of this research, the first two interests will be discussed in length in the next sections. However, it is important to note for now that proponents of the maintenance of the *status quo* argue that from

¹⁰⁵⁴ Wardle 2007 *BYUJPL* 465.

¹⁰⁵⁵ Wardle “Multiply and replenish: Considering same-sex marriage in light of state interests in marital procreation” 2000 *HJLPP* 777.

¹⁰⁵⁶ Aristotle *Policia* 1334-1335.

¹⁰⁵⁷ Wardle 2000 *HJLPP* 777.

¹⁰⁵⁸ Wardle 2000 *HJLPP* 777.

the perspective of the social interests and public purposes that underlie the legal status of marriage, the claim that homosexual unions are equivalent to heterosexual marriages fails. They go on to argue that marriage laws are enacted to secure public, not private interests.¹⁰⁵⁹ In this context, legal marriage can be understood as a public institution, created by law to promote public policy and to further societal interests. Thus marriage law is not or should not be enacted simply to promote private or personal interests; rather, marriage law should protect and promote only those individual interests that are shared in common with society as a whole.¹⁰⁶⁰

In short, in terms of this argument, there is no evidence of any benefits that homosexual unions can provide to society. Therefore, there is no need to include homosexual unions to the institution of marriage or to extend any marital rights to homosexual couples.

6.3.2.3.1 Homosexual marriage is not justified in terms of responsible procreation

According to Wardle, responsible procreation is one of society's interests in marriage and is conceived as having four elements, namely (1) perpetuation and survival of the species, (2) public health and child welfare, (3) linking procreation with child-rearing and connecting parents to offspring, and (4) protecting the social order and social institution that best fosters responsible procreation.¹⁰⁶¹

It has been asserted that a committed union between a man and a woman provides the most advantageous environment in which children can be born and reared, providing profound benefits of dual gender parenting to model intergender relations and show children how to relate to persons of their own and the opposite gender. Heterosexual marriage is believed to provide the strongest and most stable companionate unit of society and the most secure setting for the intergenerational transmission of social knowledge and skills, and reflects the understanding of

¹⁰⁵⁹ Pound "Individual interests in domestic relations" 1916 *Mich LR* 178.

¹⁰⁶⁰ Wardle 2000 *HJLPP* 778.

¹⁰⁶¹ Wardle 2000 *HJLPP* 782.

marriage that has been constant across cultures.¹⁰⁶² Many opponents of homosexual marriage believe that homosexual marriage is not and cannot provide all the above mentioned advantages. For example, they argue that allowing homosexual couples to marry will result in irresponsible procreative behaviour by persons afflicted with some serious diseases or genetic conditions. This will also result in the birth of children afflicted with severe health problems, including diseases that can cause death and blindness. As a result they argue that the future of the entire society will be put at risk.¹⁰⁶³

6.3.2.3.2 Homosexual marriage is not justified in terms of the health of the future generation

According to American history, American lawmakers have long regulated marriage in the interest of the health of the future generation. In this regard marriage regulation has been the principal tool to prevent dysgenic reproduction. For example, marriage laws have forbidden marriages of persons who are closely related (because, inter alia, the risk of hereditary birth defects is deemed unacceptable).¹⁰⁶⁴ Medical testing for “loathsome diseases” has often been required for marriage licenses, in order to protect the health of the future generation as well as of spouses.¹⁰⁶⁵ This would suggest that the health of the future generation was a concern for the lawmakers who wanted to protect children from being afflicted with diseases inherited from their parents. Diseases such as HIV-AIDS and cystic fibrosis¹⁰⁶⁶ can be transmitted from parents to their children.

¹⁰⁶² Wardle 2000 *HJLPP* 779.

¹⁰⁶³ Wardle 2000 *HJLPP* 783. See also Gutman and Wilfert “Gonococcal diseases in infants and children” in Holmes *et al* (eds) *Sexually Transmitted Diseases* 806, who report that there is an epidemic of gonococcal diseases in infants and children which inter alia causes blindness, and that parents are responsible for this epidemic. See also Kanigel (“Gonorrhoea, syphilis on rise in NC: Experts concerned that increase passages a surge AIDS cases” *News and Observer* November 1991), who noted that syphilis can cause blindness, hearing problems and death; Sisson “Numbers tell story: AIDS in’t going away” *The Columbian* 13 February 1997 at B1, who report that 15-20% of babies born to HIV-infected mothers are also infected.

¹⁰⁶⁴ Wardle 2000 *HJLPP* 788.

¹⁰⁶⁵ Wardle 2000 *HJLPP* 788

¹⁰⁶⁶ Robertson 2004 *AJLM* 7.

6.3.3 Conclusion

It is important to recall that this study does not focus on whether homosexual unions should or should not be legalised; rather, the study focuses on the welfare of the child that would result from homosexual unions and who would grow up in a homosexual family built up through ARTs. However, reasons for and against the legalisation of homosexual unions shed a light on particular issues that are important for this study. Today, homosexual unions are legally recognised in the USA. For the purpose of this thesis, it is important to discuss the legal status of homosexual unions in the USA.

6.4 FAMILIES CREATED THROUGH ASSISTED REPRODUCTIVE TECHNOLOGIES IN THE USA

6.4.1 Introduction

In the USA, homosexual families are now a legal reality. A legal status has been accorded to homosexual people who live together as couples. While in some states homosexual couples can enter into civil unions and registered domestic partnerships and are granted all or some of the rights granted to those in marriage, in other states homosexuals can legally marry. This situation, coupled with the advances in reproductive technologies, has allowed homosexual couples to have children and create families. Since gay and lesbian persons have children and will continue to procreate, raise children and exercise their parental rights and responsibilities in respect of their children, it seems important to ask how those rights are established in the American legal system. This section is intended to discuss the gay and lesbian right to procreate and the parental rights of gay and lesbian persons in American law.

6.4.2 Homosexuals' right to use assisted reproductive technologies and procreate

The legal battle over same-sex marriage and the technological development in the area of ARTs has placed the question of the right of gays and lesbians to procreate

in the public agenda.¹⁰⁶⁷ Whether or not homosexual persons and couples have the right to use ARTs and reproduce will depend on the interpretation of laws granting this right to heterosexual persons and couples.

The right to decide on whether to have or not to have children is an important personal liberty. Consequently, the state cannot restrict decisions about reproduction except in cases of serious harm.¹⁰⁶⁸ This would suggest that, like other rights, the right to reproduce is granted to every person but is not absolute; it can be limited or restricted for good causes by the state. However, there is a debate about what will count as a sufficient justification for state restriction on reproduction.¹⁰⁶⁹ The right to reproduce has been stressed in a number of cases where the court broadly interpreted the Fourteenth Amendment due process clause to consider the right to reproduce as a fundamental right. The Fourteenth Amendment has often been used as a talisman in the battle over reproduction freedom and choice.¹⁰⁷⁰ The Fourteenth Amendment states that “[n]o state shall deprive any person of life, liberty, or property, without due process of law”.¹⁰⁷¹

It is important to note that the courts have not articulated the positive right to reproduce, but some cases exist in which the courts have protected a certain level of reproductive freedom, particularly freedom from unwanted intervention by the state in the realm of family and child bearing.¹⁰⁷² In *Skinner v Oklahoma* for example the court endorsed the right to reproduce as one of the basic civil rights of a person. The court held that there is a due process right to reproduce which is basic to the perpetuation of race.¹⁰⁷³ In 1972, the court held as follows in another case:

¹⁰⁶⁷ Robertson 2004 *Case WRLR* 324.

¹⁰⁶⁸ *Gerber v Hickman* 291 F.3d 617 (9th Cir. 2002).

¹⁰⁶⁹ *Skinner v Oklahoma* 316 U.S. 541 (1942).

¹⁰⁷⁰ Blake “It’s an ART not science: State mandated insurance coverage of assisted reproductive technology and legal implications for gay and unmarried persons” 2011 *MJLST* 663.

¹⁰⁷¹ United States Constitution Amendment XIV § 1.

¹⁰⁷² *Gerber v Hickman* 291 F.3d 678-9 (9th Cir. 2002).

¹⁰⁷³ *Skinner v Oklahoma* 316 U.S. 535, 536 (1942).

“[I]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹⁰⁷⁴

This would suggest that the right to engage in procreation and sex, regardless of marital status, was protected under the due process clause and that notions of sexual intercourse for reproductive purposes began to move away from notions of sexual intercourse for other reasons.¹⁰⁷⁵ However, it can be argued that the court system has framed the right to procreate as a negative right. This means that it is a right to be free from governmental intervention into the individual procreative activities.¹⁰⁷⁶

This is distinguishable from a positive right to procreate, where the government would be obligated to provide one with the means necessary to do so.¹⁰⁷⁷ Reproductive freedom is viewed more narrowly as a negative right with lesser government protection. This would suggest that the court is reluctant to extend the right to procreate to the realm of positive right. This reluctance was demonstrated in the court’s decision in *Harris v McRae*. In this case the court held that “[w]omen had no positive right to financial assistance from the government in order to procure an abortion despite having a negative right to abortion”.¹⁰⁷⁸

It is therefore clear that all persons, single or married, have the right to procreate. Whether or not they have the right to use ARTs is left to the power of an individual state’s legislation and judicial discretion. In fact, Blake points out that federal laws provide little guidance on the practice or provision of ARTs to the public, including whether or not insurance providers are required to cover these procedures. The duty of regulating who can access ARTs and whether it should be paid for by insurance companies has mainly fallen to individual states and, in some instances, infertility

¹⁰⁷⁴ *Eisenstadt v Baird* 405 U.S. 438, 453 (1972).

¹⁰⁷⁵ Robertson 2004 *WRLR* 679.

¹⁰⁷⁶ *Lawrence v Texas* 539 U.S. 558 (2003).

¹⁰⁷⁷ See Blake 2011 *MJLST* 680.

¹⁰⁷⁸ *Harris v McRae* 448 U.S. 297 (1980).

treatment centres and providers.¹⁰⁷⁹ An analysis of the statutes of states that provide insurance cover for ARTs reveals that in many states infertile persons have the right to access these procedures. However, a close look at these statutes also reveals that the access to ART coverage is unequal because the coverage is based on marital status, sexual orientation and/or medical disability. For example, states such as Arkansas, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Montana, New Jersey, New York, Ohio, Rhode Island and West Virginia provide coverage only for fertility treatment.¹⁰⁸⁰

Some states place limits that depend on the specific treatment in question. For instance, California and New York explicitly exclude IVF from the fertility treatments covered.¹⁰⁸¹

¹⁰⁷⁹

Blake 2011 *MJLST* 663.

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Arkansas' statute provides coverage only for IVF and ignores the coverage for other ART procedures (§23-86-118 of ARK Code Ann (2004)). Connecticut's statute provides coverage only for the medically necessary expenses of ART procedures (§ 38a-536 of Conn Gen. Stat (West 2007)). According to Hawaii, women receiving pregnancy-related benefits will in addition to any other benefits for treating infertility receive a one-time only benefit for all outpatient expenses arising from in vitro fertilisation (§ 431:10A-116.5 of HAW. REV. STAT. (2005)). In the Illinois statute, the insurance policy to be issued must contain coverage for the diagnosis and treatment of infertility (§ 5/356m of 215 Ill. Comp. Stat. Ann. West 2008)). Maryland's statute, like the Hawaii statute, states that women receiving pregnancy-related benefits will in addition to any other benefits for treating infertility receive a one-time only benefit for all outpatient expenses arising from in vitro fertilisation (§ 15 810 of MD. Code Ann, Ins (LexisNexis2006)). Massachusetts' statutes provide coverage for other pregnancy-related procedures, coverage for medically necessary expenses of diagnosis and treatment of infertility (ch. 175, § 47H of Mass. Ann. Laws (LexisNexis 2008)). Montana's coverage is for "basic health services" which are defined as including "infertility services" (§ 33-31-102 of Mont. Code Ann. (2009)). New Jersey's coverage includes, but shall not be limited to, services related to infertility (§ 17:48-6x of N.J. Stat. (West 2008)). New York's statute states that "[e]very policy which provides coverage for hospital care shall not exclude coverage . . . solely because the medical condition results in infertility" (§ 3216 of N.Y. Insurance Law (2010)). Ohio requires health maintenance organisations to cover "basic health services", which include "infertility services" (§ 1751.01 of Ohio Rev. Code Ann. (A)(1)(h) (LexisNexis 2009)). Rhode Island requires any health insurance contract to "provide coverage for medically necessary expenses of diagnosis and treatment of infertility" (§ 27-18-30 R.I. Gen. Laws (2008)). West Virginia requires health maintenance organisations to cover "basic health care services", which includes "infertility services" (§ 33-25A-2(1) of W. Va. Code (LexisNexis 2006)). See generally National Conference of State Legislatures "State laws related to insurance coverage for infertility treatment", available at <http://www.ncsl.org/IssuesResearch/Health/InsuranceCoverageforInfertilityLaws/tabid/14391/Default.aspx> (date of use 23 March 2014).

¹⁰⁸¹

§ 1374.55 of Cal. Health & SAF. Code (West 2008). New York offers coverage for the treatment of infertility, except in vitro fertilization" (§ 3216 (3)(E)(i) of N.Y. Ins. Law (2010)): "[c]overage shall not be required to include . . . in vitro fertilization".

The states' insurance mandates contain one or more of the following preconditions: (1) requirements that a person engage in unprotected sexual intercourse for a particular number of years without pregnancy (California, Illinois, and New Jersey), (2) requirements that the experience of infertility lasts a particular number of years (Connecticut, Massachusetts, and Rhode Island), (3) use of spousal language (Hawaii, Maryland, Rhode Island, and Texas), (4) requirements that the cause of infertility be either medically caused or unexplained (Hawaii, Maryland, and Texas), and (5) requirements that the infertility treatment be medically necessary (Connecticut, Massachusetts, Ohio, and Rhode Island).¹⁰⁸²

This would suggest that there is access to ARTs, but that access to ARTs is limited to heterosexual married people who experience infertility. The remaining question is whether the right to use ARTs can be extended to homosexual married couples and single homosexual people.

It appears that the right to use ARTs extends to persons engaged in homosexual relationships. As stated above, the Fourteenth Amendment protects the right of gay and lesbian persons to procreate. The use of ARTs is the only means of reproducing in the context of their homosexual relationships. According to the Fourteenth Amendment, all persons have the right to liberty, including the liberty of using ART procedures in order to have children.

Some scholars, including Robertson, share this view. Robertson emphasises the interest that homosexual couples and single people have in having and rearing children. He also makes it clear that despite the adverse effects the use of ARTs can have on children,¹⁰⁸³ homosexual people and couples still decide to use these techniques for reproducing purposes. Robertson argues as follows:

“People who reproduce have a strong interest in having healthy children, as do the ART providers who help make such births possible. In some cases, however, it may

¹⁰⁸² Blake 2011 *MJLST* 665-6.

¹⁰⁸³ See para 3.7 above.

not be possible to guarantee a safe outcome. The techniques necessary to reproduce may carry inherent risks of physical defects or the social situation of the users may be less than ideal. In those situations, there may be no practical way to eliminate the risks of an unfavourable outcome and still enable the child to be born. The parents, however, may still wish to reproduce because it is the only way for them to have genetically related offspring whom they will rear or provide for”.¹⁰⁸⁴

In another study Robertson insisted that procreative liberty and the use of ARTs be extended to people engaged in homosexual relationships. In Robertson’s words:

“Our developing conceptions of procreative liberty should extend protection to gay and lesbian individuals and couples. Gays and lesbians have the same interests in having children that heterosexuals do, and can use ARTs to achieve that goal. Most of the societal conflict about recognizing gay and lesbian families has centred on same-sex marriage, not on direct prohibition of gay and lesbian reproduction itself.”¹⁰⁸⁵

The judicial activities also confirmed the right of homosexual people to use ARTs and reproduce. In *Goodridge v Department of Public Health*, the court acknowledged that children will continue to be brought into this world by gay and lesbian persons using ARTs. The court held the following:

“Gay and lesbian reproduction, either coital or assisted, will continue to occur, whatever the status of same-sex marriage and civil unions. As more children are born to gays and lesbians, the need to treat their children equally with other children will fuel equal protection arguments for recognition of same-sex marriage or civil union protections for their children.”¹⁰⁸⁶

Robertson, interpreting the decision reached by the court in *Goodridge v Department of Public Health*, pointed out that the court is expected to extend the right to use non-

¹⁰⁸⁴ Robertson 2004 *AJLM* 39.

¹⁰⁸⁵ Robertson 2004 *Case WRLR* 324.

¹⁰⁸⁶ *Goodridge v Department of Public Health* 789 N.E.2d 941, 943 (Mass. 2003).

coital techniques in order to reproduce to infertile couples because they do have the same desire to have children as heterosexual couples do. In his words:

“Although the Court has talked about the right to reproduce mainly in dicta, there is ample reason to think that that dicta would become holding if states attempted to limit coital reproduction, for example, by mandatory sterilization or contraception, limits on the number of children, or restrictions based on marital status and sexual orientation. If coital reproduction is protected, then we might reasonably expect the courts to protect the right of infertile persons to use non coital means of reproduction to combine their gametes, such as artificial insemination (AI), in vitro fertilization (IVF), and related techniques. Infertile couples who use those techniques are trying to achieve the same goal of having and rearing offspring that fertile couples achieve through coitus. There is no good reason not to grant them the same presumptive freedom to achieve that goal, which fertile persons have, subject to limitation, of course, if use of those techniques impaired important state interests.”¹⁰⁸⁷

He goes to argue that once it is recognised that both married and unmarried persons have a liberty right to reproduce, including the right to use different ARTs combinations when infertile or when necessary to ensure a healthy offspring, there is no compelling reason for denying that right to persons because of their sexual orientation. Gay males and lesbians ordinarily are not sexually attracted to members of the opposite sex, but they may nevertheless have strong desires to have or care for offspring.¹⁰⁸⁸

This would suggest that although there is no law that expressly grants the right to use ARTs to persons engaged in homosexual relationships, the fact is they do have this right and are using this means to reproduce in the USA. With few state laws directly limiting access to ARTs, a more important factor in regulating gay and lesbian reproduction is the willingness of physicians and ART clinics to treat them. Currently, about 80% of ART clinics in the United States provide AI and related services to single women and lesbian couples, while only about 20% provide

¹⁰⁸⁷ Robertson 2004 Case *WRLR* 328.

¹⁰⁸⁸ Robertson 2004 Case *WRLR* 330.

services to male individuals or couples. While most gay males and lesbians who have sought ART services probably have been able to receive them, some have not, and others have had more difficulties in doing so than heterosexual married couples or single women.¹⁰⁸⁹

Now that it has been demonstrated that persons engaged in homosexual relationships have the right to have children and raise them, it is important to analyse how the USA have established the relation between the parents and the child.

6.4.3 Parentage created through assisted reproductive technologies in homosexual families

Parentage created through ARTs in homosexual families is about determining or establishing the parental status of each member of the couple or any other persons having a relationship with a child born to gay men or lesbian mothers. In other words, it is about establishing the relationship existing between children born to homosexual persons and their parents or persons who can be considered their parents. To establish that relationships two approaches are important, namely the theoretical approach and the legal approach. While the former approach focuses on different theories that have been proposed to establish parentage, the latter focuses on the laws that were applied to cases involving the establishment of parentage.

6.4.3.1 The theoretical approach to parentage

A number of theories provide an analytic basis for defining parenthood to accommodate non-biological mothers and fathers. These include the inclusive parenthood, the non-exclusive parenthood, and the intent-based parenthood theories. These theories confer parental rights based on non-biological parents' actions, status or intent.¹⁰⁹⁰

¹⁰⁸⁹ Robertson 2004 *Case WRLR* 353.

¹⁰⁹⁰ Sella "When a mother is a legal stranger to her child: The law's challenge to the lesbian nonbiological mother" 1991 *UCLAWLJ* 142.

6.4.3.1.1 The inclusive parenthood theory

The inclusive parenthood theory was proposed by Polikoff. Under this theory, parental rights are determined by an individual's status as a partner to a lesbian biological parent or husband to a heterosexual mother, and by acts in the form of care given to the child.¹⁰⁹¹ This theory requires that the non-biological mother demonstrates that she has acted as a parent before being recognised as one.¹⁰⁹²

Although this theory has the advantage of establishing parental status for a non-biological mother, it has a problem. The defect of this theory is that it is the biological mother's acts and intent that confer the parental rights to the non-biological mother. The non-biological mother's parental rights are thus vested in the biological mother, rather than conferred to the non-biological mother by virtue of her relationship to the child and to the biological mother. This theory further calls for a proof of parent-child relationship that has developed through the cooperation and consent of someone already possessing the status of legal parent.¹⁰⁹³ The burden of proof denies the lesbian non-biological mother the presumption of parental status. This would suggest that the parental status of the non-biological mother is proven and not presumed as is the case in heterosexual couples or persons.

6.4.3.1.2 Nonexclusive parenthood

Under the nonexclusive parenthood theory of Bartlett, a care-giver gains parental rights by virtue of his or her actions, though not necessary because of his or her status.¹⁰⁹⁴ This theory extends the parental rights to more than one set of parents. Stepparents, foster parents, and related or unrelated care-givers who have formed a parent-child relationship with the child would be considered parents in addition to,

¹⁰⁹¹ Polikoff "This child does have two mothers: Redefining parenthood to meet the needs of children in lesbian-mother and other non-traditional families" 1990 *GLJ* 459.

¹⁰⁹² Polikoff 1990 *GLJ* 542.

¹⁰⁹³ Polikoff 1990 *GLJ* 571.

¹⁰⁹⁴ Bartlett "Rethinking parenthood as an exclusive status: The need for legal alternatives when the premises of the nuclear family has failed" 1984 *VLR* 882-83.

rather than as a substitute for a child's legal parents.¹⁰⁹⁵ The problem with this theory is that Bartlett limits the expansion of parenthood to circumstances in which the child's relationship with his or her legal or natural parent is interrupted.¹⁰⁹⁶ This means that the parental status for any care-giver other than the legal or natural or biological parent is established only when the legal or biological parent has interrupted his or her relationship with the child.

6.4.3.1.3 Intent-based parenthood

The intent-based parenthood approach was developed by Schultz. The theory of intent-based parenthood is premised on recognition that non-traditional methods of reproduction require, and are susceptible to, a new vision of parenthood.¹⁰⁹⁷ According to Schultz, when conception occurs through alternative insemination or contract birthing, "intentions that are voluntarily chosen, deliberate, expressed and bargained for ought presumptively to determine legal parenthood".¹⁰⁹⁸

Parental status in this circumstance is derived from recognising and accommodating the distinct features of non-traditional modes of conception and parenthood. As such, it avoids manipulating presently existing parenthood doctrines, premised as they are on traditional reproductive techniques.¹⁰⁹⁹ Intent-based parenthood gives weight to the deliberateness of the parenthood choice required in conception through alternative insemination and contract birthing.¹¹⁰⁰ Under this theory the status of the non-biological mother would be established by a showing of her intent to serve as her child's parent rather than by proving her status as a biological parent. Intent could be demonstrated by such factors as participating in the birth of the child, providing financial support, and assuming full care-giving responsibilities.¹¹⁰¹ This theory has the advantage of eliminating the power imbalance between the biological and non-biological mother by not basing parental status on a biological relationship

¹⁰⁹⁵ Bartlett 1984 *VLR* 882-883.

¹⁰⁹⁶ Bartlett 1984 *VLR* 946.

¹⁰⁹⁷ Shultz "Reproductive technology and intent-based parenthood: An opportunity for gender neutrality" 1990 *WLR* 307.

¹⁰⁹⁸ Shultz 1990 *WLR* 315.

¹⁰⁹⁹ Sella 1991 *UCLA WLJ* 146.

¹¹⁰⁰ Sella 1991 *UCLA WLJ* 145.

¹¹⁰¹ Sella 1991 *UCLA WLJ* 146.

between a parent and child or on a marital relationship between a non-biological and biological parent. Instead, regardless of biology, the two mothers would be equally recognised as parents based on their intent to share in parenthood.¹¹⁰² It might be for this reason that this theory was used in the legal approach.

6.4.3.2 *The legal approach to parentage*

The legal approach to parentage requires an analysis of parentage under common law, the defect of the common law and the remedy proposed under the Uniform Parentage Act.

6.4.3.2.1 Parentage under common law

Under common law, the child's legal status was defined based on the marital status of the parents. A child born to married parents was recognised as legitimate and the child born to unmarried parents was referred to as illegitimate.¹¹⁰³ The direct implication of this common-law principle was that the illegitimate child had limited rights compared to the legitimate child. For instance, he or she could not inherit from his or her father and could not take his name.¹¹⁰⁴ Moreover, the common law recognised unwed mothers as the legal guardians of their illegitimate children and denied fathers custody, visitation, and adoption rights.¹¹⁰⁵ As a result, the common law treated legitimate and illegitimate children differently because of their parents' marital status. Illegitimate children were less privileged than legitimate children with regard to their inheritance rights and their fathers could not exercise their parental rights. In other words, fathers of illegitimate children could not establish any father-child relationship after breaking up with the mother of the child.

Because of this unequal treatment of children under common law, another legal system that could remedy this situation had to be put in place. In this regard, in the

¹¹⁰² Wardle 2000 *HJLPP* 788.

¹¹⁰³ Nolan "Unwed children' and their parents before the United States Supreme Court from Levy to Michael H. Unlikely participants in constitutional jurisprudence" 1999 *CULR* 6-8.

¹¹⁰⁴ Nolan 1999 *CULR* 7-9.

¹¹⁰⁵ Nolan 1999 *CULR* 9.

late 1960s, the United States Supreme Court began to strike down laws that based a child's legal status on his or her parents' marital relationships.¹¹⁰⁶

In response to the Supreme Court rulings, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") approved the Uniform Parentage Act ("UPA") to eliminate distinction between legitimate and illegitimate children and to promote equal treatment of all children regardless of their parents' marital status.¹¹⁰⁷ From this period a new era of parentage began in the USA.

6.4.3.2.2 Parentage under the Uniform Parentage Act

The purpose of the Uniform Parentage Act was to correct the defect of the common law in the USA. It was codified as family law first in California and thereafter in many other states. The California Family Code sets forth a framework for establishing parentage based on the parent-child relationship rather than the marital status of the parents. The Uniform Parentage Act defines parentage as the legal relationship that exists between a child and the child's natural or adoptive parents in terms of which the law confers or imposes rights, privileges, duties and obligations. The parent-child relationship includes both the mother-child and the father-child relationship.¹¹⁰⁸ Under the UPA a woman can establish a mother-child relationship by showing that she gave birth to the child.¹¹⁰⁹ Section 7611 sets forth the presumption of fatherhood. A man is presumed to be a father of a child if he is married to the mother at the time of the child's birth or if he receives the child into his home and openly holds out the child as his natural child.¹¹¹⁰

It is important to note that the Uniform Parentage Act was applied to many cases involving children born through ARTs. Claims involving heterosexual couples and homosexual couples were brought before the California Supreme Court. The court

¹¹⁰⁶ *Gomez v Perez* 409 U.S. 535 (1973); *Weber v Aetna Cas and Surety Co* 406 U.S. 164 (1972); *Glonn v Am. Guar. Co.* 391 U.S. 73 (1968); *Levy v Louisiana* 391 U.S. 68(1968).

¹¹⁰⁷ Uniform Parentage Act (1973), 9B U.L.A. 377 (2001).

¹¹⁰⁸ Cal. Fam. Code § 7601.

¹¹⁰⁹ Cal. Fam. Code § 7610.

¹¹¹⁰ Cal. Fam. Code § 7611.

used an intent-based analysis and applied a gender neutral interpretation of the UPA in order to determine maternity and paternity. In *Johnson v Calvert*, for example, a married couple entered into a surrogacy contract with Johnson, who agreed to be implanted with the wife's egg, carry the child, and relinquish her parental rights to the couple after the child's birth. The two women, the genetic mother and the gestational mother, both claimed rights as a legal mother because of their biological ties to the child.¹¹¹¹ In this case the California Supreme Court ruled as follows:

“She who intended to procreate the child, that is she who intended to bring about the child that she intended to raise as her own is the natural mother”¹¹¹²

By this ruling, the California Court recognised only one legal mother in cases involving heterosexual couples. In *Buzzanca v Buzzanca*,¹¹¹³ the couple agreed to implant an embryo created by anonymously donated sperm and egg into a gestational surrogate and planned to raise the child.¹¹¹⁴ In order to establish the mother-child relationship, the court relied on the finding in the *Johnson* case that the statutes setting forth presumptions of fatherhood applied equally to claims of maternity. Therefore, the court held that California's artificial insemination statutes used to establish fatherhood also applied to a mother who was neither genetically related to the child nor had given birth to the child. In fact, section 7613 of California's Family Code provides that a man who consents to the artificial insemination of his wife is the child's legal father.¹¹¹⁵ The court thus broadly interpreted the statute in ignoring the gender-specific language of the statute and awarded legal mother status to the woman who just consented to the insemination process but was never biologically related or gave birth to the child.¹¹¹⁶ In this respect the court held as follows:

¹¹¹¹ *Johnson v Calvert* 851 P.2d 776, 779, 779-780 (Cal. 1993).

¹¹¹² *Johnson v Calvert* 851 P.2d 776, 782 (Cal. 1993).

¹¹¹³ 61 Cal. App. 4th 1410 (Ct. App. 1998).

¹¹¹⁴ *Buzzanca v Buzzanca* 61 Cal. App. 4th 1412.

¹¹¹⁵ Cal. Fam. Code § 7613(a) (West 2004).

¹¹¹⁶ *Buzzanca v Buzzanca* 61 Cal. App. 4th 1426.

“There is no reason to distinguish between husbands and wives. Both are equally situated from the point of view of consenting to an act which brings a child into being.”¹¹¹⁷

The court also noted the similarity between artificial insemination and surrogacy procedures:

“The intended mother and father could establish legal parentage under this statute through their consent to Artificial Insemination of another woman in order to produce a child that the couple would raise”.¹¹¹⁸

The court also held:

“The wife, although not biologically related to the child was the child’s legal mother because she initiated the surrogacy arrangement that caused the birth of the child and clearly intended to be the mother of the child.”¹¹¹⁹

With regard to fatherhood, the court held that “[t]he husband was also the child’s legal parent because of his consent to the artificial insemination and surrogacy arrangement”.¹¹²⁰

In short, the reasoning of the California Supreme Court in these cases reveals the intention of the court to recognise parental legal status to the two members of the couple based on their intention to the ART procedures and their intention to raise the child resulting from these procedures as their own. Thus in cases involving heterosexual couples, the husband and the wife are both the legal parents of the resulting child regardless of their biological ties to the child.

¹¹¹⁷ *Buzzanca v Buzzanca* 61 Cal. App. 4th 1420.

¹¹¹⁸ *Buzzanca v Buzzanca* 61 Cal. App. 4th 1421.

¹¹¹⁹ *Buzzanca v Buzzanca* 61 Cal. App. 4th 1420-25.

¹¹²⁰ *Buzzanca v Buzzanca* 61 Cal. App. 4th 1420-25.

It is important to note that, given the purpose of the Uniform Parentage Act, which is the equal treatment of all children regardless of the marital status of their parents, the application of the UPA was extended the homosexual couples.

In 2005, the Registered Domestic Partner Rights and Responsibilities Act of 2003 became effective.¹¹²¹ The Act recognises registered domestic partners as legal parents and provided their children with the same rights as children of married couples.¹¹²²

The California Supreme Court has applied the UPA to many cases involving lesbian and gay couples. For example, in *Elisa B v Superior Court*,¹¹²³ Elisa and Emily, two women in a homosexual relationship, each used the same anonymous sperm donor to give birth to children who were biologically related to one another. Elisa gave birth to a son, and two years later Emily gave birth to twins. The women gave each child a hyphenated surname consisting of both of their surnames and both women breast-fed the three children. The couple raised the children together. Emily stayed home to care for the children, and Elisa worked outside the home in order to provide financial support for the family. After the couple separated and Elisa stopped providing Emily with support, Emily applied for public assistance and the state sought child support from Elisa.

In this case, the court held that a child could have two legal parents of the same sex.¹¹²⁴ The court noted the recent enactment of the Domestic Partner Rights and Responsibilities Act recognising the rights of registered domestic partners and its prior decision upholding a woman's right to adopt her lesbian partner's child, and concluded that there was no reason to preclude a child from having two parents of the same sex.¹¹²⁵ Furthermore, the court ruled that the statutory presumption of paternity permitting a non-biological father to establish fatherhood by presenting

¹¹²¹ Cal. Fam. Code § 297.5 (West 2005).

¹¹²² Cal. Fam. Code § 297.5(d). 5 (West 2005).

¹¹²³ *Elisa B v Superior Ct* 117 P.3d 660 (Cal. 2005).

¹¹²⁴ *Elisa B v. Superior Ct* 117 P.3d 670 (Cal. 2005).

¹¹²⁵ *Elisa B v Superior Ct* 117 P.3d 666 (Cal. 2005).

evidence that he received the child into his home and openly held the child out as his natural child also applied to non-biological mothers.¹¹²⁶

In another case involving a lesbian couple, *KM v EG*,¹¹²⁷ KM donated her ova to her lesbian partner, EG. Although biologically related to the child, KM agreed not to reveal to others that she was the ova donor. KM and EG raised the child together until the couple separated. After their separation, KM sought a determination of her parental rights. In this case, considering the intent of the parties, the court reasoned that KM did not intend simply to be a donor; rather, both KM and EG lived together and intended to produce a child that would be raised in their own home. The court held that section 7613(b), which provides that a man who donates semen to be inseminated in a woman other than his wife is not a father, does not apply when a couple intends to raise the child together in their joint home. Both KM and EG could establish evidence of a mother-and-child-relationship and their claims were not mutually exclusive; therefore, the court found that both KM and EG were legal mothers.¹¹²⁸

The third case in which the court applied UPA to homosexual couples is *Kristine H v Lisa R*.¹¹²⁹ In this case a lesbian couple decided to have a child together and Kristine was artificially inseminated. Before the child's birth, the couple sought and received a judgment declaring both Kristine and Lisa legal parents of the child. Kristine and Lisa raised the child together until they separated two years after the child's birth. Kristine filed an action to set aside the judgment declaring both her and Lisa parents while Lisa filed an action seeking custody of the child.¹¹³⁰ In this case the court ruled that Kristine was estopped from denying that Lisa was the child's parent and noted that public policy favoured a finding that a child has two parents rather than one.¹¹³¹

¹¹²⁶ *Elisa B v Superior Ct* 117 P.3d 667 (Cal. 2005).

¹¹²⁷ *KM v EG* 117 P.3d 673, 675 (Cal. 2005).

¹¹²⁸ *KM v EG* 117 P.3d 673, 678-680 (Cal. 2005).

¹¹²⁹ *Kristine H v Lisa R* 117 P.3d 690, 692 (Cal. 2005).

¹¹³⁰ *Kristine H v Lisa R* 117 P.3d 690, 692 (Cal. 2005).

¹¹³¹ *Kristine H v Lisa R* 117 P.3d 690, 696 (Cal. 2005).

In short, in these cases, the California Supreme Court confirmed that a person's status as a presumed parent may be established regardless of biology, gender, sexual orientation, or marital status.

Although the above cases refer to lesbian couples, the reasoning of the court may also apply to gay couples. The case of gay couples is a bit different in that, in order to have a child, gay couples typically recruit a surrogate who is artificially inseminated with one of the men's sperm. Surrogacy is an expensive process; therefore, the children are planned for and very much wanted. Upon the child's birth, the surrogate relinquishes her parental rights and gives the child to the biological father and his partner.¹¹³²

In the cases involving gay couples, conflicts can occur when the surrogate mother claims motherhood or when the two fathers claim paternity. However, in both cases a gender neutral application of the UPA would be the solution. In this regard, Hawkins points out the following:

"The purpose of the UPA and the courts' application of the UPA in assisted reproduction cases support recognizing the parental rights of gay fathers. The Section 7613 grants parental rights to a husband who consents to the artificial insemination of his wife with the semen donated by another man. Reading this statute in a gender-neutral manner without regard to the marriage-specific language, a gay partner who consents to an artificial insemination and surrogacy arrangement can be recognized as the legal parent of the child."¹¹³³

Hawkins goes on to emphasise the following:

¹¹³² Robertson 2004 *Case WRLR* 323, 359. See also Spitko "From queer to paternity: How primary gay fathers are changing fatherhood and gay identity" 2005 *St Louis U Pub LR* 195, 209-10; Doskow "The second parent trap: Parenting for same-sex couples in a brave new world" 1999 *JJuvL* 1, 3.

¹¹³³ Hawkins "My two dads: Challenging gender stereotypes in applying California's recent Supreme Court cases to gay couples" 2007 *FLQ* 633.

“The purpose of the UPA and existing case law support interpreting section 7613 to apply to gay couples despite the use of the terms ‘husband’ and ‘wife’. By adopting the UPA, the legislature intended to eliminate legal distinctions between children based on the circumstances of their birth.¹¹³⁴ Refusing to apply the UPA to gay couples creates a new class of stigmatized children by distinguishing children solely because their parents are both men. This clearly undermines the intent of the UPA to promote equal treatment of all children regardless of their parents’ marital status.”¹¹³⁵

Hawkins further concludes that it is in the interest of the child and the state that children resulting from ARTs like all other children have two parents. In her words:

“Applying Section 7613 to gay couples also supports the state’s interests in the welfare of children and the integrity of the family. The California courts have expressed a preference for children having two parents rather than one. The state also has an interest in determining parentage in order to hold parents, rather than taxpayers, responsible for the care of children. An early determination of parentage through the UPA prevents the harm a child may experience from losing the bond he has formed with the non-biological parent.”¹¹³⁶

It should be noted that, despite the efforts of the UPA to treat all children in the United States equally, some children in homosexual families still suffer unequal treatment due to the effects of the legalisation of homosexual unions. The next and last section of this chapter is consecrated to the discussion of that inequality.

6.5 IMPLICATIONS OF THE LEGALISATION OF HOMOSEXUAL UNIONS IN THE USA

The legalisation of homosexual unions in the USA has conferred to homosexual unions the legal status of registered domestic partnerships, civil unions or marriages. Many states have enacted laws recognising one of these statuses. In fact, as Graham pointed out, in the USA, most states do not recognise the rights of same-

¹¹³⁴ Hawkins 2007 *FLQ* 633.

¹¹³⁵ Hawkins 2007 *FLQ* 633.

¹¹³⁶ Hawkins 2007 *FLQ* 633.

sex partners as analogous to marriage, but all states have enacted laws providing some protection to same-sex partners. For instance, Vermont's legislature enacted a law that recognises "civil unions" as identical to marriage, although the institution is not described as marriage. Connecticut followed suit; California and New Jersey have also enacted laws that create a legal status for same-sex partners that are virtually identical to marriage, but is not labelled as such.¹¹³⁷

This situation challenges homosexual couples who choose to have children in establishing the legal connection between the child and both parents, especially in the states where their union has not been given a civil union or marriage status. In fact, Graham makes it clear that in the states where homosexual unions have been granted a legal status, be it marriage, civil unions, or registered domestic partnerships, the legal connection between a partner and a child will follow from the rights that arise from creating the legal relationship as it does with heterosexual marriage.¹¹³⁸ In other words, in the states where a homosexual union has a legal status, the parent-child relationship will be established following the procedure of the application of the Uniform Parentage Act to children born as a result of ARTs as discussed above.

In states where second-parent adoption is allowed for a homosexual partner, the parent bond is legally created. But this process is not always available and even where it is available, it can be a cumbersome process. Otherwise a partner (mostly a non-biological parent) can rely on the *loco parentis* doctrine to secure rights to a child.¹¹³⁹ The *loco parentis* doctrine awards parental rights and responsibilities to an individual who voluntarily provides child support or assumes custodial duties of a child. The *loco parentis* status is satisfied when an individual assumes the obligations incident to the parental relationship. This feature is relevant when a non-biological parent wishes to continue her relationship with her child upon the

¹¹³⁷ Graham "Same-sex couples: Their rights as parents, and their children's rights as children" 2008 *SCILR* 1005.

¹¹³⁸ Graham 2008 *SCILR* 1036.

¹¹³⁹ Graham 2008 *SCILR* 1036.

dissolution of a relationship between the two mothers.¹¹⁴⁰ However, this doctrine does not insure a partner's legal connection to a child, and often the rights of the biological partner will trump the rights of the other partner.¹¹⁴¹

It is unfortunate that, in the states that do not afford homosexual relationships the status of marriage or civil union, there is no protection for the parent who does not give birth to or adopt a child resulting from a relation between partners. This situation results in cases where many children born from homosexual couples are without protection – these children are likely to have only one legally recognised parent, which triggers ensuing problems for the child.¹¹⁴²

In other words, in those states, the situation of the child is vulnerable in that, with regard to inheritance, the child will inherit only from one parent and with regard to the child's origin, the child will lose the relationship that he or she has formed with one of his parents, in particular the non-biological parent.

The vulnerability of the child with regard to his or her origins raises concerns for his or her identity. In fact, each child needs to develop a sense of identity in combination with other prerequisites for personal security and stability. The quest for identity is the process by which offspring become aware of who and what they are and where they belong both socially and culturally.¹¹⁴³ The need for identity may become a right that can be claimed against parents, the medical profession and the state, but this is rarely seen in practice as it has not been expressed as an enforceable right in domestic laws.¹¹⁴⁴ The need for identity in many countries depends on who the government recognises as parent. In the USA, most states have statutes or court

¹¹⁴⁰ Mahoney "Support and custody aspects of the stepparent-child relationship" 1984 *CLR* 42.

¹¹⁴¹ Graham 2008 *SCILR* 1036.

¹¹⁴² Graham 2008 *SCILR* 1036

¹¹⁴³ Daniels *et al* "The best interests of the child in assisted human reproduction: The interplay between the state, professionals, and parents" 2000 *PLS* 36.

¹¹⁴⁴ The United Nations Convention on the Rights of the Child (a 7) accords children the right to know their identity by protecting to know their parents as far as is possible (Daniels *et al* 2000 *PLS* 36).

decisions upholding the exclusion of the donor from any rearing rights and duties.¹¹⁴⁵ This causes children to lose one branch of their genealogy. The need for an identity requires that the child know his or her origins from both biological parents. In this regard, Daniels pointed out the following:

“[B]eing the child of a sole parent, or of divorced parents, or to be born ‘out of wedlock,’ was the exception and could make a child feel ‘different’ or ‘second class.’”¹¹⁴⁶

This would suggest that any child who by law loses one of his or her genitors, like the child born as a result of the donation of gametes or eggs, or surrogacy in general, and children of gay and lesbian parents in particular, would feel inferior to other children a second class child. This child will permanently have an identity crisis. Why this should be the case?

The vulnerability of the child with regard to his or her inheritance raises the concern that the child will inherit only from one parent, namely the biological parent, the only legal parent who is recognised as such in states that do not recognise homosexual unions as civil unions or marriage in the USA. Because of this rule, many children inherit only from their legal parents who are their biological parents. When an individual dies without leaving a will in the USA, the state usually requires that the estate be distributed to the decedent’s spouse, and then to other blood relatives. Unless there is a formal adoption, the other partner is a legal stranger to the child and the child has no right to inherit from the non-biological parent.¹¹⁴⁷ In most cases children are entitled to inherit intestate from their natural or biological parents or their adoptive parents. While the general rule is that children can have only two legal

¹¹⁴⁵ § 26-17-21 of Ala. Code (2004); § 7613 of Cal. Fam. Code (West 2004); § 19-4-106 of Colo. Rev Stat. (West 2004); § 8-703 of Del. Code Ann. Tit. 13 (2004); 750 Ill. Comp. Stat. Ann. 40/2 (West 2004); § 38-1114 of Kan. Stat. Ann (2000); § 257.56 of Minn. Stat. Ann. (West 2003); § 210.824 of Mo. Ann Stat. (West 2004); § 40-6-106 of Mont. Code Ann. (2004); § 126.061 of Nev. Rev. Stat. Ann. (Michie 2004); § 9:17-44 of N.J. Stat. Ann. (West 2004); § 40-11-6 of N.M. Stat. Ann (Michie 2004); § 14-18-02.1, 14-17-04 of N.D. Cent Code (2004); § 3111.95 of Ohio Rev Code (Anderson 2004); § 26.26.710 of Wash Admin Code (2004); Wyo. § 14-2-903 Stat Ann (Michie 2004).

¹¹⁴⁶ Daniels *et al* 2000 *Pol Lif Sc* 36.

¹¹⁴⁷ Anderson *Understanding Trusts and Estates* 13.

parents, determining who can recover intestate from a decedent is a power delegated to the states, and the procedure followed differs from state to state.¹¹⁴⁸ However, states are reluctant to grant inheritance rights to a child of someone who is not a legal parent. And, as the law stands, the ability to become a legal parent is limited to biological and adoptive parents.¹¹⁴⁹

Children raised by parents of the same sex are entitled to the same inheritance rights to which children raised by heterosexual parents are entitled. However, because these children lack the two bloodlines from which most children inherit, they cannot prove parental relationships with science and genetics.¹¹⁵⁰

The legalisation of homosexual unions has resulted in homosexual persons and couples being granted the right to procreate. Homosexual couples who choose to procreate in the context of their homosexual relationship will have to use ARTs procedures in order to bring children into this world. However, ARTs raises concerns about the welfare of the resulting children. As John Robertson pointed out:

“Concerns about the welfare of offspring resulting from ARTs cover a wide range of procedures and potential risks. In addition to physical risks from the techniques themselves, they include the risk of providing ART services to persons who could transmit infectious or genetic disease to offspring, such as persons with HIV or carriers of cystic fibrosis. Risks to offspring from inadequate parenting may arise if ARTs are provided to persons with mental illness or serious disability. Questions of offspring welfare also arise from the use of ARTs in novel family settings, such as surrogacy, the posthumous use of gametes and embryos, or with single parents or a same sex couples. Finally, both physical and psychological risks may result from alteration or manipulation of genes, gametes, and embryos.”¹¹⁵¹

¹¹⁴⁸ Anderson *Understanding Trusts and Estates* 13.

¹¹⁴⁹ Trast “You can’t choose your parents: Why children raised by same-sex couples are entitled to inheritance rights from both their parents” 2006 *Hof LR* 859-60.

¹¹⁵⁰ Daniels *et al* 2000 *Pol Lif Sc* 39.

¹¹⁵¹ Robertson 2004 *AJLM* 7.

6.6 THE BEST INTERESTS OF THE ASSISTED REPRODUCTIVE TECHNOLOGIES-BORN CHILD IN THE UNITED STATES OF AMERICA

6.6.1 Introduction

This section discusses the best interests of the child born or to be born using ARTs in the USA. To this end the best interests of the child criterion will be analysed in the cases involving custody and adoption. It is important to note that this analysis will help understand whether the criterion was properly applied to the cases of children born or to be born as a result of ARTs.

6.6.2 The best interests of the child criterion in custody and adoption cases

A survey of Roman and English Law which prevailed in the USA during the eighteenth and nineteenth centuries reveals a strong trend towards paternal presumption in custody disputes.¹¹⁵² The reasons for the preference of the father to the mother in these disputes include the fact that during that time, women under common law were considered not capable of entering into contracts or gaining employment. For this reason, women were lacking the ability in the court's eyes to secure a financial future for themselves and for their children. Women were also presumed to lack the ability to make rational decisions.¹¹⁵³

During the early part of the nineteenth century, the French Napoleonic code brought a shift of the custody standard from the paternal presumption to the dual presumption referred to as the "tender years doctrine", according to which the age of the child determines which parent would have the child custody.¹¹⁵⁴ The doctrine accordingly stipulated that a very young child will be placed in the care of the mother,¹¹⁵⁵ because the mother is presumed as more capable nurturer of a child in

¹¹⁵² Sexton "A custody system free of gender preferences and consistent with the best interests of the child: Suggestions for a more protective and equitable custody system" 1999-2000 *KLJ* 765-766.

¹¹⁵³ Sexton 1999-2000 *KLJ* 765.

¹¹⁵⁴ Sexton 1999-2000 *KLJ* 766.

¹¹⁵⁵ Sexton 1999-2000 *KLJ* 767.

his or her formative years.¹¹⁵⁶ However, the custody of older children will be granted to the father.¹¹⁵⁷

Between 1840 and 1870, there was a tendency to determine the custody of a child in a gender neutral way. This tendency was referred to as the best interests of child.¹¹⁵⁸ According to this tendency, factors that must be taken into account when deciding which parent will have the child's custody include:

- (a) The wishes of the child;
- (b) The determination of the most suitable care-giver;
- (c) The maintaining of a healthy relationship with the non-custodian parent;
- (d) The parents' wishes as to custody;
- (e) The child's adjustment to his or her home, school and community;
- (f) The mental and psychological health of individuals involved.¹¹⁵⁹

In the United States of America, it is admitted that the best interests of the child is the criterion that is widely applied by courts in custody and adoption cases.¹¹⁶⁰ In these cases, the interests of the child have priority over those of the competing adults based on the assumption that when a family breaks up, children are usually the most vulnerable parties and thus most in need of the law's protection.¹¹⁶¹ Many factors have to be taken into account when analysing the best interests of the child. When engaging in a best interests analysis, the Uniform Marriage and Divorce Act ("UMDA") provides that a court shall consider all relevant factors, including the wishes of the child and the child's parents, and the interrelationship between the child, his or her parents, his or her siblings and other individuals who may

¹¹⁵⁶ Mercer "A content analysis of judicial decision-making – How judges use the primary caretaker standard to make a custody determination" 1998 *WMJWL* 17.

¹¹⁵⁷ Ash "Bridge over troubled water: Changing the custody law in Tennessee" 1997 *UMLR* 795.

¹¹⁵⁸ Mecer 1998 *WMJWL* 20-21.

¹¹⁵⁹ Unif. Marriage and Divorce ACT § 402 (1970).

¹¹⁶⁰ McGough "Starting over: The heuristics of family relocation decision making" 2003 *StJLR* 298.

¹¹⁶¹ Principles of the Law of Family Dissolution: Analysis and Recommendations at § 2.02 cmt. b. (ALI 2002);

significantly affect the child's best interests.¹¹⁶² Similarly, the American Law Institute ("ALI") principles governing family dissolution state that a best interests analysis necessitates consideration of a wide range of factors, including emotional attachments between the child and parents, the ability of each parent to care for the child, the mature and reasonable preference of the child, and all other factors relevant to the welfare of the child.¹¹⁶³ All these principles were incorporated in the statutes of many states in the USA.

In California, for example, the Family Code requires courts to consider all relevant factors that impact upon the child, including "health, safety, and welfare" and whether there is a history of domestic violence in determining a best interests analysis in custody matters.¹¹⁶⁴

In New York, courts engaging in a best interests analysis must consider numerous factors related to the circumstances of the particular case, including the quality of the home environment, fitness of the custodial parent, and ability to provide for the child's physical, emotional and intellectual development.¹¹⁶⁵ Similarly, in Pennsylvania, best interests of the child determinations are based on a consideration of all factors that legitimately affect the child's physical, intellectual, moral and spiritual well-being.¹¹⁶⁶ This would suggest that no decision can be taken concerning the child that may ignore the best interests of that child.

Many custody disputes were brought before USA courts, and the courts' decisions in those cases illustrate how courts have protected the best interests of the child within the USA jurisdictions. In *Roche v Roche*,¹¹⁶⁷ for example, the trial court, in the principal case, awarded physical custody of the child to the paternal grand parents. Joint control and privileges of visitation were given to both parents, neither of whom

¹¹⁶² See § 402 of the Uniform Marriage and Divorce Act § 402 (ALI 1982) (hereinafter "UMDA").
¹¹⁶³ Principles of the Law of Family Dissolution: Analysis and Recommendations at § 2.08 cmt. n(2002)
¹¹⁶⁴ § 3011 of the Cal. Fam. Code (West 1994)
¹¹⁶⁵ *Eschbach v Eschbach* 436 N.E.2d 1260, 1263
¹¹⁶⁶ Barbour "Bartering for babies: Are preconception agreements in the best interests of children?" 2004-2005 *WLR* 443.
¹¹⁶⁷ 1944 25 A.C.126, 152 P. (2d) 999.

was found to be unfit or to have forfeited in any manner their claim to custody. In making its award, the court stated that “[t]he best interests of the said minor child will be served”¹¹⁶⁸ The district court of appeal affirmed the judgment of the superior court, but judgment was reversed on appeal. Thus, despite the wording of section 138 of the Civil Code, the court manifestly declares that regardless of the interests and well-being of the minor child, the parent must be found unfit before an award of custody may be made to a third person. Section 138 reads in part as follows:

“In awarding the custody the court is to be guided by the following considerations: (1) By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question; (2) As between parents adversely claiming the custody, neither parent is entitled to it as of right”

In another case, *Cummins v. Bird*,¹¹⁶⁹ an action was brought by the father to obtain the custody of his child, a girl of twelve. His petition was denied due to the fact that the child had been living with her maternal grandparents for almost eleven years, during which time the father was apparently indifferent as to her existence. Even though he was now in a position to care for the child adequately, and his reputation was not impeached in any manner, the court stated that “[i]t is obvious, however, that a man may be of good character and financially secure, and yet not suited to the trust of rearing and educating a 12 year old girl, with whom he has had no previous acquaintance or contact, even though it be his own child.”¹¹⁷⁰ Upon a finding that the father would not be able to offer the child as good a home as the one with her grandparents, and that his occupation would necessitate his being away from home while travelling, and that the future home of the child would be with his parents, the court stated “[h]e is unmarried, and his future domestic relations are unsettled and uncertain. He is not prepared to provide the child with the home, the surroundings, the companionship, or the training she now enjoys. Her welfare would not be

¹¹⁶⁸ 1944 25 A.C. 127, 152 P. (2d) at 999.

¹¹⁶⁹ *Cummins v. Bird* (1929) 230 KY 296, 19 S.W. (2d) 959.

¹¹⁷⁰ *Cummins v. Bird* (1929) 230 KY 299, 19 S.W. (2d) at 961.

enhanced, but well might be endangered, by disturbing her present happy relations with those who have loved and cared for her from infancy, and who possess her confidence and affection.¹¹⁷¹

In *State v. Anderson*,¹¹⁷² the Minnesota court found that the father was financially unable to give the children the physical or medical care they needed and that the grandparents had been supplying their needs and desired to continue doing so. The court held that the right of the parent had to yield to the child's welfare.

In a similar case, *Perry v. Perry*,¹¹⁷³ the Massachusetts court came to the same conclusion, namely that the "parental-right" should give way to the paramount consideration of the child's well-being. The child, also now nine years of age, had practically always lived with its grandparents, and the court stated as follows

"The words of the governing statute¹¹⁷⁴ in the case at bar are broad in scope. They are not bounded by limiting restrictions. There is no express or implied requirement that the parent must be found unequivocally to be unfit before the custody of the child can be awarded to some suitable third personThere well may be cases where the welfare of the child will be promoted by placing it in the custody of another, and yet where the court cannot say that the parents are actually unfit. The present appears to be a case of that nature."¹¹⁷⁵

These cases among many others stress how American courts were seriously engaged to protect the child's best interests in cases involving custody disputes. Where the parents were not found or were declared unfit, courts awarded custody to

¹¹⁷¹ *Cummins v. Bird* (1929) 230 KY 301, 19 S.W. (2d) at 962.

¹¹⁷² *State ex rel. Lund v. Anderson* (1928) 175 Minn. 518, 519, 221 N.W. 868, 869; Minn. STAT. (1941) §§518.17, 518.18.

¹¹⁷³ (1932) 278 Mass. 601, 180 N.E. 512.

¹¹⁷⁴ c. 208, §28 6 MAss. ANN. LAws (1944): "... the court may make such decree as it considers expedient relative to the care, custody and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain, or may award their custody to some third person if it seems expedient or for the benefit of the children." §31: "In making an order or decree relative to the custody of the children ... the happiness and welfare of the children shall determine their custody or possession." Footnote added.

¹¹⁷⁵ (1932) 278 Mass 604-605, 180 N.E. 513.

the third persons against the wording of the civil codes only in order to protect the best interests of the child. It is important now to turn to ARTs and analyse how the best interests of the child were also protected.

It can be argued that the best interests of the child criterion as applied in custody and adoption cases can be extended to a child born as a result of ARTs to heterosexual as well as homosexual couples. In the case of ARTs, the best interests of the child that need to be discussed concern not only a child born as a result of ARTs but also a child expected to be born using these procedures. With regard to the best interests of an unborn child, the question that may arise is: Can the best interests of the child criterion as applied in the cases discussed above be applied to the unborn child who is expected to be born through ARTs? This question raises another important question, which is: Are the rights of an unborn child protected in the USA? It appears that the answer to the first question totally depends on the answer to the second. Therefore, it is important to discuss the protection of an unborn child before attempting to say whether the best interests of the child criterion can apply to it.

6.6.2.1 The protection of an unborn child in the USA

The protection of the unborn child is a controversial subject in the USA. Although for some Americans life in utero is not worthy of protection, there is a tendency to protect life in utero that started with the movement pursuing prenatal personhood. According to the Center for Reproductive Rights, this movement aimed at establishing that fertilised eggs, embryos, and foetuses should be treated as full persons under the law with rights equal to, and in some cases superior to the rights of women.¹¹⁷⁶ Advocates of prenatal personhood proposed measures attempting to protect the legal rights of fertilised eggs, embryos, and foetuses by defining life as beginning at the moment of fertilisation or conception.¹¹⁷⁷

¹¹⁷⁶ Center for Reproductive Rights “Rights at risk: The truth about prenatal personhood” (2012), available at www.reproductiverights.org (date of use: 23 March 2014) 6.

¹¹⁷⁷ Center for Reproductive Rights “Rights at risk: The truth about prenatal personhood” (2012), available at www.reproductiverights.org (date of use: 23 March 2014) 9.

Prenatal personhood measures had been proposed in different states; in the state of Mississippi, for instance, it was proposed as constitutional amendments that would provide that “a person means every human being from the moment of fertilisation, cloning, or the functional equivalent thereof”.¹¹⁷⁸ Other prenatal measures have been proposed as laws that would insert a similar definition of “person” into a state’s criminal code.¹¹⁷⁹ In short, prenatal personhood measures had been proposed in the form of ballot initiatives and legislative bills and as both statutes and state constitutional amendments. It is important to note that the state of Mississippi had enacted a personhood policy statement declaring that the state of Mississippi considers “unborn children” to have the same rights as all other persons in the state.¹¹⁸⁰

Prenatal personhood measures were not the only form of protecting the rights of unborn children in the USA. Almost forty-five states enacted laws protecting the rights of an unborn child. All those laws tend to recognise fetuses as potential victims of violent crimes.¹¹⁸¹ These laws are referred to as Foetal Homicide Laws, and some of them define a person as including the unborn for the purpose of the state’s murder, manslaughter, criminally negligent homicide, and assault statutes.¹¹⁸²

In the USA, 36 states have enacted statutes recognising embryos or fetuses as potential victims of homicide and other violent crimes. Twenty-five of those states prohibit harming fetuses or embryos at any stage of development, some other states only apply their foetal homicide statutes to fetuses that have reached a certain gestational age.¹¹⁸³

The rights of unborn children seem to be also protected through judicial activities in the USA. In many cases, American courts protected the rights of unborn children by

¹¹⁷⁸ Proposed initiative Measure no 26 (Miss 2011)

¹¹⁷⁹ HB 1450, 62nd Leg Assemb Reg.Sess (ND 2011).

¹¹⁸⁰ MO Rev Stat para 1.205.2

¹¹⁸¹ Murphy “A survey of State Foetal Homicide laws and their potential applicability to pregnant women who harm their own fetuses” 2014 *ILJ* 877-882.

¹¹⁸² Murphy 2014 *ILJ* 853.

¹¹⁸³ Murphy 2014 *ILJ* 864

convicting pregnant women for abuse, negligence, assaults and many other charges due to her behaviour during the pregnancy. Although this court's position was subjected to criticism, many pregnant women in the USA were convicted of different crimes that they committed on their own unborn children. The *Whitner v State* case, for instance, involved a woman who pleaded guilty to, and was convicted of criminal child neglect for causing her baby to be born with cocaine metabolites in its system because she took crack cocaine during the last trimester of her pregnancy. In that case the court held as follows:

“If as *Whitner* suggests we should, we read home only as a vindication of the mother's interests in the life of her unborn child, there would be no basis for prosecuting a mother who kills her viable foetus by stabbing it, by shooting it, or by such other means, yet a third party could be prosecuted for the very same act. We decline to read home in a way that insulates the mother from all culpability for harm to her unborn child”.¹¹⁸⁴

In a similar case, the court held the following:

“It is inconceivable that the legislature would intend a foetus to have property rights and causes of action sounding in tort, but not be protected against threats to its safety or life, from its own mother, while in utero... It defies logical reasoning that our law and society would preclude a mother from illegally introducing narcotics and other illegal drugs into her child and yet not protect the unborn child from those same dangers while the child is still in the womb”¹¹⁸⁵

In 2003 the South Carolina Supreme Court affirmed the twenty-years prison sentence imposed on Regina Mcknight after she was convicted of homicide by child abuse in connection with a stillbirth that was attributed to her use of crack cocaine during her pregnancy.¹¹⁸⁶ In 2013, in another case involving the protection of an unborn child's rights, the Alabama Supreme Court affirmed a decision by the

¹¹⁸⁴ *Whitner v State* 492 SE 2nd 777(SC 1977) at 783.

¹¹⁸⁵ *In re Unborn Child* 863 NYS S 2nd 371 (1998) New York Family Court.

¹¹⁸⁶ *State v Mcknight* 576 SE 2nd 168 (SC 2003).

Alabama Criminal Appeals Court, holding that a viable foetus is a child for purposes of the state's criminal statute prohibiting the chemical endangerment of a child.¹¹⁸⁷

Although it is reported that the prenatal personhood measures proposed in many states had so far been rejected by the voters in all the states in which the initiative have appeared on the ballot,¹¹⁸⁸ it is important to note that Foetal Homicide Laws and their application in the abovementioned cases are the evidence of the legislative and judicial protection of unborn children's interests in the USA.

Now that it is established that the unborn child is protected under USA law, the question that was asked above, whether the best interests of the child criterion as applied in custody and adoption cases can also apply to the unborn child, can be answered in the affirmative. In the USA, as demonstrated in the discussion above, an unborn child is a person or a child and therefore protected by the law. This being said, another question can be asked: Are the best interests of the unborn child protected in the USA when such a child is conceived through assisted reproductive procedures?

6.6.2.2 *The application of the best interests of the child criterion to assisted reproductive technologies in the USA*

In the USA, like in other countries, most if not all the cases involving ARTs revolve around the transfer of the child custody or parental rights. The following cases illustrate how courts in the USA have dealt with this issue. In *In re Baby M*,¹¹⁸⁹ Richard and Mary Beth Whitehead and William and Elizabeth Stern developed a strong relationship.¹¹⁹⁰ The two couples agreed that Mary Beth be artificially inseminated with William's sperm provided that if the procedure was successful and she fell pregnant, she would give the baby to the Sterns to raise it as theirs. In

¹¹⁸⁷ *Ex Parte Ankrom*, Nos 110776 and 1100219 2013 WL 135748 at 1.

¹¹⁸⁸ Manian "Lessons from personhood's defeat: Abortion restrictions and side effects on women's health" 2013 *Ohio St LJ* 79-81.

¹¹⁸⁹ *In re Baby M* 537 A.2d 1227, 1250 (N.J. 1988).

¹¹⁹⁰ *In re Baby M* 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988) 36.

counterpart, the Sterns agreed to pay Mary Beth \$10,000. The deal was arranged by the Infertility Center of New York (“ICNY”).¹¹⁹¹

After six months and eleven inseminations, Mary Beth fell pregnant, and on 27 March 1986 she gave birth to a child that was known as Baby M. A few days after the child’s birth, Mary Beth changed her mind and refused to honour the terms of the agreement.¹¹⁹² The Sterns negotiated with Mary and implored her to hand over the child to them as per their agreement.¹¹⁹³ In early May, the Sterns decided to sue Mary in order to have the agreement enforced. The court held that the parties agreed to a permanent change in custody of a child, not only before the child is born but prior to conception of the child.¹¹⁹⁴ On behalf of the court, Judge Harvey Sorkow of the Bergen County Court ordered that the child be handed over to the Sterns.¹¹⁹⁵

It is clear here that what interests the parties in this case is the change of the child’s custody. There is no interest in safety or health of the child whose custody will be changed at birth. In addition, Barbour stated as follows:

“While parties to preconception arrangements may seek legal advice and other counsel to protect their interests, typically, no one represents the interests of the child. Even if a guardian ‘ad litem’ is appointed to protect the interest of the child at the inception of the preconception agreement, it is practically impossible to determine what is in the best interest of a particular child before that child is conceived. While these arrangements may benefit the interests of the parties and brokers involved, preconception arrangements cannot be based upon a true best interest determination.”¹¹⁹⁶

Barbour argues that preconception agreements are merely baby selling devices that serve the interests of the parties, brokers, or other facilitators. There is no

¹¹⁹¹ *In re Baby M* 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988).37.

¹¹⁹² *In re Baby M* 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988).48.

¹¹⁹³ *In re Baby M* 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988) 49.

¹¹⁹⁴ *In re Baby M* 537 A.2d 1227, 1250 (N.J. 1988).

¹¹⁹⁵ *In re Baby M* 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988) 49-50.

¹¹⁹⁶ Barbour 2004-2005 *WLR* 443.

determination of the individual needs of a particular child. Therefore these agreements, even if pre-approved by a court, cannot be based upon a true best interest analysis.¹¹⁹⁷

In another case, *Johnson v. Calvert*,¹¹⁹⁸ Mark and Crispina Calvert agreed with Anna Johnson that she will be a gestational surrogate for their child.¹¹⁹⁹ Gametes from the Calverts were fertilised through IVF and the embryo was implanted in Anna.¹²⁰⁰ In terms of the surrogate motherhood agreement, an amount of \$10,000 in addition to the associated medical expenses would be paid to Anna provided that she gives birth and hand the baby over to the Calverts.¹²⁰¹ The implantation was successful and Anna conceived, but before the child's birth Anna demanded that the balance of fees in respect of the agreement be paid or she would keep the child.¹²⁰² The Calverts sought for an order declaring them the legal parents and Anna also sought an order declaring her the legal mother.¹²⁰³ Upon the child's birth, the blood tests confirmed the Calverts as the genetic parents; however, the court still needed to decide who would be the legal parents of the child.¹²⁰⁴

At issue before the California Supreme Court was the determination of the legal mother of a child who shared both a genetic mother and a birth mother. First, the court concluded that under the Uniform Parentage Act, either circumstance was enough to establish a mother-child relationship;¹²⁰⁵ However, California law only recognises one legal mother per child, "despite advances in reproductive technology rendering a different outcome biologically possible."¹²⁰⁶ To resolve the issue, the court examined the intent of the parties because the California Civil Code did not place a preference on proof of blood testing over proof of having given birth as being

¹¹⁹⁷ Barbour 2004-2005 *WLR* 485.

¹¹⁹⁸ *Johnson v. Calvert* 851 P.2d 776, 778 (Cal. 1993).

¹¹⁹⁹ *Johnson v. Calvert* 851 P.2d 776, 778 (Cal. 1993).

¹²⁰⁰ *Johnson v. Calvert* 851 P.2d at 778 (Cal. 1993).

¹²⁰¹ *Johnson v. Calvert* 851 P.2d at 778.

¹²⁰² *Johnson v. Calvert* 851 P.2d at 778.

¹²⁰³ *Johnson v. Calvert* 851 P.2d at 778.

¹²⁰⁴ *Johnson v. Calvert* 851 P.2d at 778.

¹²⁰⁵ *Johnson v. Calvert* 851 P.2d at 781.

¹²⁰⁶ *Johnson v. Calvert* 851 P.2d at 782.

dispositive of legal motherhood.¹²⁰⁷ The court held that the principle of the bargain is the conception, gestation, birth, and transfer of a child. Preconception arrangements, even if characterised as the mere sale of gestational services, constitute baby selling and should be prohibited. States must not renounce their inherent role as *parens patriae* to protect children's welfare. To the extent that state laws governing preconception arrangements conflict with federal laws prohibiting the sale of humans, state laws must yield to federal law.¹²⁰⁸ The court contended that Crispina was the natural and legal mother of the child because it was the actions of Mark and Crispina which caused the child's existence.¹²⁰⁹ They had intended the birth of the child.¹²¹⁰ They had pursued in vitro fertilisation to ensure the child's existence.¹²¹¹ Further, the aim of the parties to the contract was to bring about the birth of Mark and Crispina's child, not to donate a zygote to Anna.¹²¹² Therefore, the court concluded that because the Uniform Parentage Act recognised both giving birth and genetic consanguinity as means of establishing a mother and child relationship, and when one woman is not both the birth mother and the genetic mother, she will be the natural mother as she intends to bring about the birth of the child and to raise it as her own.¹²¹³ In this regard Barbour summed the following:

“Since preconception agreements invariably affect substantive rights of children produced through such agreements, with no meaningful, or at best, an incomplete best interest determination, preconception agreements should be banned. For numerous legal, religious, ethical, moral, medical, and public policy reasons, we, as a civilized society, should determine that certain things are not for sale including babies and the use of women's reproductive organs. Consequently, all preconception arrangements should be proscribed”.¹²¹⁴

It follows from the above discussion that the best interests of the unborn child do not seem to be a priority when assisted reproductive procedures are concerned. The

¹²⁰⁷ *Johnson v. Calvert* 851 P.2d at 781-82.
¹²⁰⁸ Barbour 2004-2005 *WLR* 485.
¹²⁰⁹ *Johnson v. Calvert* 851 P.2d at 782.
¹²¹⁰ *Johnson v. Calvert* 851 P.2d at 782.
¹²¹¹ *Johnson v. Calvert* 851 P.2d at 782.
¹²¹² *Johnson v. Calvert* 851 P.2d at 782.
¹²¹³ *Johnson v. Calvert* 851 P.2d at 782.
¹²¹⁴ Barbour 2004-2005 *WLR* 485-6.

analysis of those procedures reveals that the state and the ARTs providers solely seek to satisfy the need of the intended parents to have children and build families to the detriment of the resulting children's interests. Courts and ART providers seem to be concerned only with the satisfaction of the need of the intended parents to have children.

In sum, it can be argued that in the USA, preconception agreements and all other means of reproducing using ARTs are centred on the interests of the prospective parents.

From the comparison of the application of the best interests of the child criterion in custody disputes and ARTs procedures, it can be argued that the child's best interests seem to be better protected in custody cases than in ART cases, in particular cases involving the preconception agreements.

In the former cases, statutes and court decisions state that the child's best interests have priority over the competing interests of the adults because children are vulnerable and in need of protection. The Californian Family Code, for instance, requires that when applying the best interests of the child criterion courts must consider factors such as health, safety and welfare because of their impact on the child.¹²¹⁵ The child's physical, emotional and intellectual development is factors that the New York courts must consider when applying the best interests of the child criterion to adoption and custody cases.¹²¹⁶

In short, when the courts determine the best interests of the child, factors such as the child's physical, emotional and spiritual development as well as the child's health, safety and welfare are factors that are vested with the utmost importance and deserve serious consideration.

¹²¹⁵ California Family Code.

¹²¹⁶ *Eschbach v Eschbach* 436 NE 2d 1260, 1263.

However, the analysis of the court's approach to ART cases, in particular preconception agreements, reveals that the courts are not seriously considering factors such as these mentioned above. In *In re Baby M* and *Johnson v Calvert*, respectively in New Jersey and California, the courts were merely interested in the transfer of the custody of the child born as a result of the surrogacy agreement.

To summarise, the courts are interested in the satisfaction of the adults to have children and not in the interests of the resulting child. This approach seems similar to the Australian one, with one exception.

6.7 INTERIM CONCLUSION

There is an on-going debate on the merit of the legalisation of homosexual unions in the world in general and in the USA in particular. Several reasons were asserted for and against this legal procedure that bears many implications on the state as a society, the family and also on children.

The legalisation of homosexual families has resulted in the legal recognition of relationships that already existed. This caused homosexual unions to have a legal status either as registered domestic partnerships, civil unions, or as marriage. The legalisation of homosexual unions also raised some issues. While some scholars view the status of marriage as a final stage in the struggle for the recognition of homosexual rights, other scholars pointed out that registered domestic partnerships and civil unions are necessary steps towards marriage.

Another issue was the interstate recognition of homosexual unions legally recognised in a sister state. All US states have now given legal status to these homosexual unions, some as civil unions, some as domestic partnerships, and others as marriage.¹²¹⁷ The issue of interstate recognition arises when partners to civil marriage for instance move to a state that recognises homosexual unions as

¹²¹⁷ See Para 6.5.2 above.

domestic partnerships. Which rights will be recognised to these partners to civil marriage in the new state where they have relocated?

The legalisation of homosexual unions also raised concerns relating to the establishment of parental rights in homosexual families, and the rights of homosexual persons and couples to use ARTs to procreate and form families.

The legalisation of homosexual unions has some implications on the child resulting from the use of ART technologies. These include the fact that children in the USA receive different treatment according to the states where they live. While in some states children born as a result of ARTs in heterosexual as well as in homosexual families have the right to have the benefit of having two parents respectively of opposite sexes and of the same sex, in other states children are condemned to have only one parent, namely the biological parent. The partner of the biological parent has no parental rights in respect of his or her child. As a result, the child will not only lose financial, psychological and emotional support from the non-biological parent in case of the separation between the two parents, but the child will also be denied the right to inherit from the non-biological parent and will lose his or her blood line if he or she is the result of the use of the genetic materials of a donor. In many states, donors of gametes and eggs and surrogate mothers are required by law to have no contact to or other parental rights in respect of the child resulting from the use of their genetic materials. This will cause the child to lose the root of his or her origins. This situation will cause the child to have an identity crisis. The identity in this context is linked to the child's genetic origins. It will be a challenge for a child born in these states and whose parents are separated to understand that he or she has only one parent.

The legalisation of homosexual unions has resulted in homosexual couples and individuals being allowed to use ARTs in order to reproduce. ARTs are thus their only means to reproduce when they choose to do so in the context of their homosexual relationships.

Having recourse to this way may put children resulting from the procedures at an increasing risk of being born with birth defects and other congenital health problems. This situation raises concerns about the welfare of those children and the question whether it is in the best interests of a child to be forced to be born with health challenges. A further question that can be asked is whether those children have rights that can protect them against the choice of their parents.

The next chapter, which deals with homosexual families in Australia, will give some guidance on how to attempt to respond to these questions.

CHAPTER SEVEN

HOMOSEXUAL FAMILIES IN AUSTRALIA

7.1 INTRODUCTION

It is admitted that in modern times the term family covers a wide range of relationships that are recognised by the law. For instance “spouses” may mean people who are legally married (*de jure* spouses) or not legally married but living together in a committed relationships (*de facto* spouses).¹²¹⁸

Spouses can be parents of children with whom they have biological relationships. In addition to parents and their biological children, there are also many other parent-child relationships that may be legally recognised. These include adopted parents and their children as well as parents and children born as a result of ARTs involving sperm and/or ova donation.¹²¹⁹ In Australia, the term “spouses” covers people engaged in heterosexual relationships as well as people who are in homosexual unions.¹²²⁰

Australia is a federation made up of six states (New South Wales, Queensland, Victoria, Western Australia, South Australia and Tasmania), and two territories (Northern Territory and Australian Capital Territory).¹²²¹

In Australia, on one side, each state and territory has its own governing laws created, defined and enforced by the state and each of these laws is binding within the state, but can be ultimately overridden by federal laws; on the other side the federal laws as stated in the Constitution are those that the parliament of Australia has the power to make.

¹²¹⁸ Milbank “Gay and lesbian families in Australia” 2005 *LIAC* 1.

¹²¹⁹ Milbank 2005 *LIAC* 1.

¹²²⁰ Milbank 2005 *LIAC* 1.

¹²²¹ Elliott “Australia and gay and lesbian rights” 2005 *Peace Review: JSJ* 137.

These laws include trade and commerce, taxation, immigration, marriage, divorce and matrimonial causes, parental rights, the custody and guardianship of infants, and others.¹²²² In other words, Australian federalism involves both independent action by states and territories with oversight by the federal government, and action at the federal level. It is worth noting that Australia is a common-law country, which means that laws and precedents can also be created in a courtroom. There are many laws that are ruled on by a judge in a particular case because of a precedent set down in another decision made in a similar case. The laws are based on judicial decisions rather than legislative action. These rulings are known as common law.¹²²³

In Australia, a wide range of state and federal laws recognise and regulate intimate and familial relationships and superannuation,¹²²⁴ as well as the areas that are traditionally thought of as “family law”: Property division and disputes over children following relationship breakdown.¹²²⁵

Prior to 1998 homosexual couples were excluded from virtually every law in Australia that accorded rights and responsibilities to people based upon their relationship.¹²²⁶ This exclusion was a concern for gay and lesbian families that existed in Australia at that time and according to Milbank, it led to the conclusion that homosexual people as members of families of choice, in which they form partnerships and raise children, were almost universally ignored.¹²²⁷

However, from 1999, Australian relationship laws underwent changes which were aimed at affording legal recognition to homosexual couples. These changes were

¹²²² Graycar “Law reform by frozen chook: Family law reform for the new millennium?” 2000 *MULR* 737

¹²²³ Elliott 2005 *Peace Review: JSJ* 138.

¹²²⁴ Superannuation or private pension was paid to senior male employees by banks, large companies and government for long services before the 1950s. From the 1950s it was extended to permanent staff and was a reward for long and faithful service in most companies. From 1992, it became compulsory for every employer and is paid to every employee in preparation of his or her retirement. For more details on superannuation, see Worthington “Knowledge and perceptions of superannuation in Australia” 2008 *JCP* 351-2.

¹²²⁵ Millbank “Recognition of lesbian and gay families in Australian law – Part one: Couples” 2006 *FLR* 2.

¹²²⁶ Millbank 2006 *FLR* 2.

¹²²⁷ Millbank 2006 *FLR* 2-3.

effected mostly through absorbing homosexual cohabiting couples into the pre-existing category of the *de facto* relationship.¹²²⁸

While little has been done at federal level in terms of relationship law reform, major changes occurred at state and territory level. For instance, New South Wales was the first state to introduce major changes by passing laws including homosexual cohabiting couples in *de facto* relationships across a wide range of state laws.¹²²⁹ New South Wales was followed by other Australian states and territories.

Some states “tested the water” with one or two small changes followed by more comprehensive reform, while others, particularly in more recent years, have passed laws that achieved reform all at once.¹²³⁰

This chapter deals with the recognition of homosexual families in Australian law. The chapter will therefore review the laws recognising homosexual families at commonwealth or federal level as well as state and territory level. This two-level recognition of homosexual families in Australia raises the issue of the constitutional power of the federal parliament to legislate on homosexual relationships. The chapter will address this issue as well as laws introducing homosexual families in Australia. The chapter will then analyse laws regulating ARTs in Australia, parentage in Australian homosexual families and some of the disputes that may arise at the relationship breakdown.

7.2 THE LEGAL RECOGNITION OF HOMOSEXUAL UNIONS IN AUSTRALIA

7.2.1 Introduction

Homosexual relationships have been recognised in Australian Law since 1999. As already stated, the recognition of homosexual relationships occurred at federal level

¹²²⁸ Milbank 2005 *LIAC* 2.

¹²²⁹ Milbank 2005 *LIAC* 2.

¹²³⁰ Milbank 2005 *LIAC* 2.

as well as at state and territory level. It is important to understand how Australia has proceeded to recognise homosexual relationships within its jurisdictions.

7.2.2 The Australian approach to the recognition of homosexual relationships

During the last decade, the law relating to homosexual couples has changed beyond recognition in many parts of the Western world. In Australia, laws relating to homosexual couples have undergone dramatic change. Australian law now provides largely equal protection to all couples, regardless of marriage or gender.¹²³¹ This would suggest that homosexual couples can benefit from legal protection under Australian law regardless of their marital status. In other words, homosexual people are not required to be legally married before receiving legal protection under Australian federal law as well as the laws of states and territories.

Witzleb refers to this approach as the inclusive approach. According to him, this approach has the advantage of diminishing the legal significance of marriage as a vehicle for achieving protection under Australian law.¹²³²

In Australia, it is worth noting that marriage is allowed only between a man and a woman. Marriage as defined in the federal Constitution was the only relationship that received a full range of protection under Australian law. It was then important to decouple protection of other relationships from marriage status for such relationships to benefit from Australian law protection.

In the recognition of homosexual relationships most states proceeded by reforms that were limited in areas they covered. For instance, some legislation inserted a definition of a relationship that would omit all reference to the sex of spouses to

¹²³¹ Witzleb "Marriage as the last frontier? Same-sex relationships recognition in Australia" 2011 *IJLPF* 135.

¹²³² Witzleb 2011 *IJLPF* 138.

define the relationship in a gender-neutral way. In other words, where the relationships referred to “spouses” it was changed to refer to “partners”.¹²³³

By adopting an inclusive approach as defined above, Australia was testing the acceptance of homosexual unions within its jurisdictions with the intention of bringing more comprehensive reforms which would broaden the areas of benefits for homosexual couples at a later stage.¹²³⁴ This process has resulted in the recognition of heterosexual as well as homosexual *de facto* relationships of varying description and definition in Australian states and territories.¹²³⁵

7.2.3 Federal recognition of homosexual relationships

Until 2004 there had been very limited reforms to recognise homosexual partners in federal law. Homosexual partners were not considered as spouses or families in Australia. The federal government opposed any form of recognition of homosexual relationships. In 2004, this view was put into effect by amending the Marriage Act 1961 (Cth) to explicitly include the common-law definition of marriage as a “[u]nion of a man and a woman to the exclusion of all others, voluntarily entered into for life”. This was intended to ensure that Australian courts could not in the future redefine marriage to include homosexual couples.¹²³⁶

However, in late 2004, the federal parliament passed two laws which accorded some limited rights to homosexual couples. The first was the Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004, which amended the superannuation laws to expand the category of dependents entitled to inherit assets if a member of a fund dies. This law does not specifically include homosexual couples; rather they may be able to use the “catch-all” category of dependent.¹²³⁷

¹²³³ Victoria, Australian Capital Territory and South Australia for instance have opted for the term domestic partners or domestic relationships, Tasmania refers to significant relationships, Western Australia and Northern Territory protect homosexual relationships which are marriage-like, regardless of the gender. See Witzleb 2011 *IJLPF* 138.

¹²³⁴ Witzleb 2011 *IJLPF* 138.

¹²³⁵ Witzleb 2011 *IJLPF* 138.

¹²³⁶ Milbank 2005 *LIAC* 9.

¹²³⁷ Milbank 2005 *LIAC* 9.

The second law passed at the federal level was the Anti-Terrorism Act (No 2) 2004. This Act amended the definition of close family member to specifically include homosexual partners. Close family members are protected from the strict liability offence of association with terrorism.¹²³⁸

It is important to note that these reforms did not cover all the rights of homosexual couples. In many areas they were denied equal treatment with heterosexual couples. In 2007, the Human Rights and Equal Opportunities Commission (now the Australian Human Rights Commission) conducted a comprehensive inquiry to identify those federal laws in which homosexual couples and their children suffered discrimination and to devise appropriate mechanisms for reform. In response to this pressure, the government enacted two more laws: The Same-sex Relationships (Equal Treatment in Commonwealth Laws – General Reforms) Act 2008 (Cth) and the Same-sex (Equal Treatment in Commonwealth Laws-Superannuation) Act 2008 (Cth). These reforms removed discrimination against homosexual couples and children from a wide range of commonwealth laws and programs. As a result, federal law caught up with the position that has been achieved at state level for some time. This was generally achieved by expanding the definition of the *de facto* parent, child and relationship so that homosexual couples and their families have equal recognition to, and the same entitlement as heterosexual *de facto* couples.¹²³⁹ These reforms amended all together eighty commonwealth laws, including the following areas:

- (a) social security;
- (b) family assistance and aged care;
- (c) taxation;
- (d) superannuation;
- (e) citizenship;
- (f) veterans affairs;
- (g) workers' compensation; and

¹²³⁸ Milbank 2005 *LIAC* 9.

¹²³⁹ Witzleb 2011 *IJLPF* 145.

(h) immigration.¹²⁴⁰

It is notable that little has been done at federal level in respect of recognising homosexual unions compared to what happened at state and territory level.

7.2.4 State and territory recognition of homosexual relationships

7.2.4.1 Overview of state and territory recognition of homosexual relationships

States and territories have largely completed the move towards equal treatment to *de facto* relationship, regardless of the partners' gender. Notwithstanding many differences in details, the areas in which homosexual couples are enjoying equivalent protection include:

- (a) property division and maintenance where couples split up;
- (b) succession rights;
- (c) recognition as next of kin;
- (d) accident and workers' compensation;
- (e) partner's state superannuation; and
- (f) protection from discrimination on the basis of marital status.¹²⁴¹

Although states in general have offered homosexual couples legal protection in Australia, and despite some similarity in areas where homosexual couples enjoy protection or the same treatment as heterosexuals in some states, each state has its particular degree of protection that is offered to homosexual couples within its jurisdiction. It is important to examine legislations that have included homosexual couples in Australian laws.

¹²⁴⁰ Witzleb 2011 *IJLPF* 145.

¹²⁴¹ Witzleb 2011 *IJLPF* 146-7.

7.2.4.2 State and territory legislations

7.2.4.2.1 New South Wales

In 1996, New South Wales amended two laws that concerned the rights of victims of crimes and their families to include a homosexual partner within the definition of immediate family. These laws were the Victims Support and Rehabilitation Act 1996 (NSW), and the Criminal Procedure Act 1996 (NSW).¹²⁴²

In 1999, New South Wales passed the Property (Relationships) Legislation Amendment Act 1999 (NSW) and became the first state to pass legislation amending a wide range of laws simultaneously to include homosexual couples. The Act inserted a new definition for the term “*de facto* relationship”, turned it into the De Facto Relationship Act 1984 (NSW) and applied the definition to twenty other pieces of legislation concerning matters such as guardianship, inheritance, accident compensation, stamp duty and decision-making in illness and after death.¹²⁴³

The Act defined a *de facto* relationship as two adult persons who live together as a couple and are not married to one another or related by family.¹²⁴⁴ Section 4(2) of the Act lists factors that can be taken into account when deciding whether a couple is in a *de facto* relationship. These include:

- (a) The duration of the relationship;
- (b) The nature and extent of the common residence;
- (c) Whether or not a sexual relationship exists;
- (d) The degree of financial dependence or interdependence;
- (e) Any arrangements for financial support between the parties;
- (f) The ownership, use and acquisition of property;
- (g) The degree of mutual commitment to a shared life;
- (h) The care and support of children;

¹²⁴² Section 9 and Section 23 A respectively. Milbank 2006 *FLR* 9.

¹²⁴³ Milbank 2006 *FLR* 10.

¹²⁴⁴ Section 4(1) of the Property (Relationship) Act 1984 (NSW).

- (i) The performance of household duties; and
- (j) The reputation and public aspects of the relationship.

It is notable that under this Act cohabitation is required, but a specific period of cohabitation is only required for a small number of laws relating to property division and inheritance.¹²⁴⁵

The Act dropped the term “spouse” and replaced it with “partner” or “relationship” to emphasise that there remains a difference between marriage and homosexual partnerships or relationships.¹²⁴⁶ The Act created a new category of “close relationship” intended to cover close cohabitating relationship of interdependence across a small number of laws. According to section 5(1)b of the property (Relationships) Legislation Amendment Act 1999 (NSW), a close personal relationship is defined as a personal relationship (other than marriage or de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.

In 2000, another amendment was passed in New South Wales: The Superannuation Legislation Amendment (Same-sex Partners) Act 2000 (NSW). This Act included homosexual partners of employers in state government superannuation schemes. The Act also amended a number of previous Acts to include some rights for partners living in homosexual unions. These include the Parliamentary Contribution Superannuation Act 1971 (NSW); the Police Association Employees (Superannuation) Act 1996 (NSW), the Police Regulation (Superannuation) Act 1906 (NSW); the State Authorities Non-Contributory Superannuation Act 1987 (NSW), the State Authorities Superannuation Act 1987 (NSW), and the Superannuation Act 1916 (NSW).¹²⁴⁷

¹²⁴⁵ Section 17 of the Property (Relationship) Act 1984 (NSW).

¹²⁴⁶ Section 62 of the Property (Relationship) Act 1984 (NSW).

¹²⁴⁷ Milbank 2005 *LIAC* 13.

Two years later, the Miscellaneous Acts Amending (Relationships) Act 2002 (NSW) was passed and amended a further 27 New South Wales Laws to include homosexual couples as *de facto* partners principally in the areas of surviving partner entitlements to inheritance of interests such as residential leases and employments benefits (eg the rights to a deceased partner's unpaid leave).¹²⁴⁸

7.2.4.2.2 Western Australia

In 2002 and 2003 two laws were passed in Western Australia respectively: The Acts Amendment (Lesbian and Gay Law Reform) Act 2002 and the Acts Amendment (Equality of Status) Act 2003. These two laws together amended over seventy statutes to recognise homosexual relationships as *de facto* relationships.¹²⁴⁹

A *de facto* relationship is defined as a relationship (other than a legal marriage between two persons who live together in a marriage-like relationship).¹²⁵⁰ This definition adds that it does not matter whether the parties are heterosexual or homosexual, or whether they are legally married or in a *de facto* relationship with another person.

Western Australia included adoption law in these reforms, so that homosexual couples who have cohabited for three years or more are eligible to apply to adopt unrelated children.¹²⁵¹ A homosexual partner is also eligible under step-parent provisions to apply to adopt their *de facto* partner's children.¹²⁵²

More sweeping changes to parental rights for homosexual couples occurred with the amendments to the Artificial Conception Act 1985 (WA) that granted presumed

¹²⁴⁸ Milbank 2005 *LIAC* 13.

¹²⁴⁹ Milbank 2005 *LIAC* 23.

¹²⁵⁰ Section 13 A (1) of the Interpretation Act 1984 (WA).

¹²⁵¹ Subsection 38 and 39(1) (e) (i) of the Adoption Act 1994 (WA).

¹²⁵² Section 4(b) of the Adoption Act 1994 (WA).

parental status to a consenting female *de facto* partner of a woman who has a child through ARTs.¹²⁵³

It should be noted that Western Australia was the first state to extend this recognition to a female partner, and to amend laws to allow her to be listed as the second parent on the child's birth certificate. The Births, Deaths and Marriages Registration Act 1998 (WA) was amended by the Acts Amendment (Lesbian and Gay Law Reform) Act 2002 (WA) so that a female partner can be registered alongside the birth mother as parent. This reform makes parental status automatic and applying at birth. There is no need for the step-parent to apply for step-parent adoption. This reform is retrospective in operation, thus applying to children born prior to, as well as following the 2002 reforms.¹²⁵⁴

This reform regulates access to fertility services and allows lesbians to access fertility services to receive donor insemination and access in vitro fertilisation if medically necessary. The reform also introduced laws that removed marital status and sexuality discrimination. The previous requirements applicable to heterosexual *de facto* couples that couples be in a relationship for five out of the past six years in order to be eligible for in vitro fertilisation were removed by this reform. Reforms in Western Australia covered every area of law in the state that concern relationships.¹²⁵⁵

7.2.4.2.3 The Northern Territory

In 2003 the Law Reform (Gender Sexuality and De Facto Relationships) Act 2003 (NT) was passed. The Act amended fifty four pieces of territory legislation to include homosexual couples as *de facto* relationships.¹²⁵⁶ These reforms maintained the New South Wales list of factors for the determination of the existence of a *de facto* relationship. These reforms excluded homosexual couples from eligibility to apply for

¹²⁵³ Section 6A of the Artificial Conception Act 1985.

¹²⁵⁴ Milbank 2005 *LIAC* 23.

¹²⁵⁵ Milbank 2005 *LIAC* 23-4.

¹²⁵⁶ Milbank 2005 *LIAC* 24.

adoption of children. However, individuals are eligible under the relevant statute in exceptional circumstances.¹²⁵⁷

This raft of reforms amended the status of Children Act 1975 (NT) to recognise the non-biological parent in lesbian couples who have children through ARTs, and to allow both mothers to be listed on the child's birth certificate.¹²⁵⁸

A further change was introduced to modify parental rights and redefine the child born to one party in the *de facto* relationships as a step-child in the same way that the child of a party to a legal marriage would be.¹²⁵⁹ These reforms have affected a significant range of Acts, including in the areas of guardianship and inheritance.¹²⁶⁰

7.2.4.2.4 Tasmania

Tasmania simultaneously introduced the *de facto* relationship category and a registration system. Tasmania does not require cohabitation for recognition of a *de facto* relationship. This demarked Tasmania from other states.¹²⁶¹

In 2003, Tasmania passed into law the Relationships Act 2003 (Tas) and the Relationships (Consequential Amendments) Act 2003 (Tas). These laws amended seventy three statutes.¹²⁶²

These reforms introduced the term "personal relationship" of which there are two subcategories: A significant relationship and a caring relationship that replaced the term "*de facto*". Section 4(1) of the Relationships Act 2003 (Tas) defines a significant relationship as a relationship between two adult persons who have a relationship as

¹²⁵⁷ Section 14(1) of the Adoption Act 1994 (NT)

¹²⁵⁸ Section 5B of the Status of Children Act 1975 (NT) and s 4 of the Artificial Conception Act 1985 (WA).

¹²⁵⁹ Section 19A (4) of the Interpretation Act 1978.

¹²⁶⁰ Compensation (Fatal Injuries) Act 1974 (NT); Crimes (Victims Assistance) Act 1982 (NT) and Family Provision Act 1970 (NT).

¹²⁶¹ Milbank 2005 *LIAC* 26.

¹²⁶² Milbank 2005 *LIAC* 26.

a couple and who are not married to one another or related by family. Tasmania does not require the couple to live together. However, to determine whether a significant relationship exists, cohabitation is a relevant consideration. Tasmania also maintained the New South Wales list of factors for determining the existence of the personal relationship.¹²⁶³ If the relationship is registered, the registration is proof of the existence of the relationship.¹²⁶⁴ The registration of a caring relationship is also proof of the existence of the relationship with the difference that the legal status granted to caring relationships is considerable compared to the legal status granted to a significant relationship registration.¹²⁶⁵

7.2.4.2.5 Victoria

In 2002 the Statute Law Amendment (Relationships) Act 2001(Vic) and the Statute Law Further Amendment (Relationships) Act 2001 (Vic) together changed over sixty pieces of law in Victoria to include cohabiting homosexual couples as domestic partners on the same basis as unmarried heterosexual couples. Victoria's reforms dropped the use of *de facto* spouses in order to emphasise that marriage remains unaltered. The Act recognises homosexual relationships in a non-discriminatory way. This means that homosexual relationships are not treated based on the gender or sexual orientation of the people involved. Cohabitation for two years is only required in the case of property division and inheritance legislation. It is possible under these reforms that parties under eighteen years of age may qualify as domestic partners in Victoria.¹²⁶⁶

Victoria did not include adoption laws in the amendments.¹²⁶⁷ Although individuals may apply to adopt in Victoria, the law provides that they will only be considered in exceptional circumstances.¹²⁶⁸

¹²⁶³ Section 4(3) of the Relationship Act 2003 (Tas).
¹²⁶⁴ Section 4(2) of the Relationship Act 2003 (Tas).
¹²⁶⁵ Section 13(1) Relationship Act 2003 (Tas).
¹²⁶⁶ Milbank 2005 *LIAC* 16.
¹²⁶⁷ Section 11(1) of the Adoption Act 1984 (Vic).
¹²⁶⁸ Section 11(3) of the Adoption Act 1984 (Vic).

In Victoria, access to donor insemination and in vitro fertilisation was limited by legislation to married couples and heterosexual *de facto* couples prior to the McBain challenge,¹²⁶⁹ and has been effectively limited to them through a restrictive definition of infertility.¹²⁷⁰

7.2.4.2.6 Queensland

In 1998 and 1999 the property division regimes were enacted in Queensland and were opened to all unmarried couples.¹²⁷¹ In 1999 Queensland introduced a gender neutral definition of the *de facto* relationship in individual law concerning access to parental leave and in legislation concerning domestic violence protection orders.¹²⁷²

Queensland enacted these apparently unrelated pieces of legislation to test public reaction before passing more comprehensive reform some years later. These statutes defined homosexual couples as spouses in various ways.¹²⁷³ “Spouse” was defined to mean either one or two persons, whether of the same or opposite sex, who are living or have lived together as a couple.¹²⁷⁴ Two persons are a couple if they live together on a genuine domestic basis in a relationship based on intimacy, trust and personal commitment to each other.¹²⁷⁵

In the first raft of reforms, Queensland introduced limited parental rights. Three years later, comprehensive reform followed: The Discrimination Law Amendment Act 2002 (Qld), which amended forty five Acts to include homosexual couples as *de facto*

¹²⁶⁹ The McBain challenge was brought in *McBain v Victoria* [2000] FCA 1009, a case in which McBain, a single heterosexual woman, and her doctor challenged the Infertility Act 1995 (Vic). They argued that the federal prohibitions on marital status cover the fact of being single or married; therefore the requirement of the spousal relationship in the Infertility Act 1995 is inconsistent with the federal prohibitions on marital status.

¹²⁷⁰ Section 8 of the Infertility Act 1995 (Vic).

¹²⁷¹ Section 260 of the Property Law Amendment Act 1999 (Qld).

¹²⁷² Industrial Relations Act 1999 (Qld) pt 2 Div 3; S 7 of the Domestic Violence Family Protection Amendment Act 1999 amending s 12 of the Domestic Violence Family Protection Act 1999 (Qld).

¹²⁷³ Milbank 2005 *LIAC*18.

¹²⁷⁴ S 260(1) of the Property Law 1974 (Qld).

¹²⁷⁵ Section 260(2) of the Property Law 1974 (Qld).

partners.¹²⁷⁶ Queensland reform included a genuine domestic basis as an aspect of the definition of the *de facto* relationship. The list of factors for determining the existence of a *de facto* relationship adopted in New South Wales was also adopted in Queensland.¹²⁷⁷ The requirement of a two-year cohabitation period for *de facto* couples in the property division regime was also considered in Queensland and this requirement was extended to several other Acts that confer large financial benefits or obligations.¹²⁷⁸

7.2.4.2.7 The Australian Capital Territory

The Australian Capital Territory introduced the Domestic Relationships Act 1994 (ACT) in 1994. This Act was the first in Australia to formulate a property division regime that was not limited to couples or those who cohabit, but was not open to anyone who had a domestic relationship.¹²⁷⁹

A domestic relationship was defined as a personal relationship other than a legal marriage between two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other, and includes a *de facto* marriage.¹²⁸⁰

In 2003 and 2004, two laws were passed in the Australian Capital Territory respectively: The Amendment Act 2003 (ACT) and the Sexuality Discrimination Legislation Amendment Act 2004 (ACT). Together these laws amended forty one pieces of territory laws to include homosexual partnerships as domestic partnerships. The reforms replaced the term “spouses” and “*de facto*” in Australian Capital Territory law with “domestic partners” for all married and unmarried couples. In the 2003 and 2004 Acts “domestic partnership” is defined as a relationship

¹²⁷⁶ Milbank 2005 *LIAC* 19.

¹²⁷⁷ Section 32 DA (2) of the Acts Interpretation Act 1999 (Qld).

¹²⁷⁸ Milbank 2005 *LIAC* 21.

¹²⁷⁹ Milbank 2005 *LIAC* 29.

¹²⁸⁰ Section 3(1) of the Domestic Relationship Act 1994 (ACT).

between two people, whether homosexual or heterosexual, living together as a couple on a genuine basis.¹²⁸¹

The Australian Capital Territory also introduced adoption law to render homosexual couples eligible to adopt related and unrelated children.¹²⁸² Further changes were introduced to recognise the non-biological parent in lesbian couples who have children through ARTs. This was achieved by replacing the Artificial Conception Act 1985 (ACT) and the Birth (Equality of Status) Act 1998 (ACT) with the Parentage Act 2004 (ACT).¹²⁸³ This Act applies to children born before the amendments as well as afterwards.¹²⁸⁴

7.2.4.2.8 South Australia

In 2003, the Statutes Amendment (Equal Superannuation Entitlement for Same-sex Couples) Act 2003 (SA) amended four statutes to grant homosexual couples access to death benefits under superannuation schemes for state employees (for example those for police and public servants).¹²⁸⁵ The Act introduces the term “putative spouses”, which it defines as including homosexual couples if they are cohabiting with each other in a relationship that has the distinguishing characteristics of the relationship between a married couple (except for the one of the different sex) and legally recognised marriage and other features arising from either of those characteristics.¹²⁸⁶ This change only covers couples who lived together for five years.¹²⁸⁷

In 2004, South Australia passed the Statutes Amendments (Relationships) Bill 2004 (SA) (“the 2004 Bill”). Although the Bill was expected to be replaced by another one in 2006 when the labour party won the elections and gained control of the upper

¹²⁸¹ Section 169(2) of the Legislation Act 2001 (ACT).

¹²⁸² Section 18 of the Adoption Act 1993 (ACT).

¹²⁸³ Section 51 of the Parentage Act 2004 (ACT).

¹²⁸⁴ Section 120 of the Parentage Act 2004 (ACT).

¹²⁸⁵ Milbank 2006 *FLR* 32.

¹²⁸⁶ Statutes Amendment (Superannuation Entitlements for Same-sex Couples) Act 2003 (SA).

¹²⁸⁷ Milbank 2005 *FLR* 32-3.

house, it is interesting to note that it brought significant changes. The Bill proposed to amend eighty two state laws to include homosexual couples. The Bill dropped the terminology of “putative spouse” and replaced it with “*de facto*” partner. A “*de facto* partner” is defined as person who is (irrespective of the sex of the other) cohabiting with that person in a genuine domestic basis (other than married couple).¹²⁸⁸

The *de facto* partnership recognised in South Australia would cover only couples who have lived together for three years (or three of the last four years) unless the couples had a child together, in which case there is no time requirement. These reforms required a three-year cohabitation period for every area of law (rather than just those that concern major property entitlements).¹²⁸⁹

It is important to note that each state has recognised homosexual relationships under a specific name. Though the terminology could change from one state to another, the content seems to be similar. In order to understand the content of these terminologies it is important to analyse the models of recognition of relationships.

7.2.5 Models of recognition of relationships

The survey of the different reforms that affected Australian law as discussed above reveals that in Australia, relationships have received three basic models of recognition in Australia law: The *de facto* relationship, the registered partnership and marriage. Each of these models came with a number of possible variations, such as being open to heterosexual as well as homosexual couples, or being open to non-couples. Furthermore each model can be combined with one or more others. A major difference between them is that the *de facto* recognition is a system that is presumptive. This would suggest it presumes that couples, once they have satisfied certain criteria, will be recognised regardless of whether they have taken any formal steps to certify their relationships. In contrast, registration and marriage are “opt in” systems; they apply to those who have undertaken a formal process. Another factor

¹²⁸⁸ Section 72 of the Statutes Amendments Relationships Bill 2004 (SA).

¹²⁸⁹ Section 66 (2) of the 2004 Bill (SA).

to be considered in the context of Australia is whether recognition is granted at a state or federal level.¹²⁹⁰ The understanding of similarities and differences requires the examination of each model.

7.2.5.1 *The de facto relationship*

A *de facto* relationship is one in which the couple is not married, but the circumstances of their relationship are otherwise identical or at least very similar to marriage.¹²⁹¹

This model covers couples living together in a committed relationship. It does not require any formal registration of the relationship, but may for instance require that the couple has lived together for a set of period. This model of recognition has the advantage of including breadth coverage, accessibility and ease of use.¹²⁹²

In 1999 New South Wales was the first Australian state to include homosexual couples in the definition of *de facto* relationships by passing the Property (Relationships) Legislation Amendment Act 1999. Two further laws allowed homosexual couples to enjoy more rights. The Same-sex Relationships (Equal Treatment Commonwealth Laws – Superannuation) Act 2008 and the Same-sex Relationships (Equal Treatment in Commonwealth Law – General Law Reform) Act 2008, which provided entitlements for homosexual couples in areas such as a joint social security and veteran’s entitlements, employment entitlements, superannuation, workers compensation, joint access to Medicare safety, hospital visitation, immigration, inheritance rights and the ability to file a joint tax return.¹²⁹³ This would suggest that in addition to the Family Law Act 1975 that principally deals with *de facto* relationships at federal level, the two abovementioned laws also grant rights to homosexual couples.

¹²⁹⁰ Milbank 2005 *LIAC* 15.

¹²⁹¹ Tasmania Law Reform Institute “The legal issue relating to same-sex marriage” (2013), available at [www.http://law.utas.edu.au/reform](http://law.utas.edu.au/reform) (date of use 20 January 2015) 8.

¹²⁹² Milbank 2005 *LIAC* 15.

¹²⁹³ Griffith *Same-Sex Marriage Briefing Paper No 3/2011* 2011 *NSWPLRS* 3.

7.2.5.2 Registered partnerships/civil unions

The model of registered partnerships has been in place in Australia since 2004. At that time, it was the city of Sydney Relations Declaration Program which applied to both homosexual and heterosexual couples. It has operated also in New South Wales under the Relationships Register Act 2010 (NSW).¹²⁹⁴

This model allows couples to register their relationships with the government in order to be recognised across most laws. This model grants most, but usually not all of the same rights as marriage.¹²⁹⁵ This model has advantages as well as disadvantages. The main advantage of this model is that it allows couples a choice, as well as the symbolic value of going through a process to have their relationships recognised. It may also provide valuable proof of the relationship if there is a later dispute.¹²⁹⁶

The disadvantage of this model is that it may mean limited coverage as only those who register are granted legal protection, and as with any other “opt in” system, many people may not use it, or it may be disproportionately used by those who are economically and socially advantaged compared to those who are not.¹²⁹⁷ Another disadvantage of this model is that it creates a separated category for homosexual relationships, a kind of relationship that is not yet marriage and is still a lesser status than marriage, and so perpetuates exclusion and inequality at both a legal and symbolic level.¹²⁹⁸

It is important to note that, if not for all purposes, for practical and legal purposes, recognition can be equivalent to a civil union, the main difference being that civil

¹²⁹⁴ Griffith 2011 *NSWPLRS* 3.

¹²⁹⁵ Milbank 2005 *LIAC* 15.

¹²⁹⁶ Entering into a registered relationship provides conclusive proof of the existence of the relationship, thereby gaining all of the rights afforded to the *de facto* couples under state and federal laws without having to prove any further factual evidence of the relationships. See Griffith 2011 *NSWPLRS* 15.

¹²⁹⁷ Milbank 2005 *LIAC* 15.

¹²⁹⁸ Milbank 2005 *LIAC* 16.

unions tend to permit a greater level of formal ceremonial and symbolic recognition.¹²⁹⁹

7.2.5.3 *Marriage*

Marriage is governed by the commonwealth Marriage Act 1961, which defines marriage as the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.¹³⁰⁰

A valid marriage ceremony requires an exchange of words or vows or participation in a recognised religious rite before an authorised celebrant and in the presence of witnesses.¹³⁰¹ The parties to the marriage must also sign a marriage certificate in the approved form.¹³⁰²

Being married also means that in order to be divorced, parties must go through a regulated process which attracts formal rules for the dissolution of the relationship.¹³⁰³

As stated in the introduction, the double level recognition of homosexual relationships in Australia has raised the issue of the constitutionality of the commonwealth government's power to make laws that can allow or forbid the recognition of these relationships within Australia. This issue is discussed in length in the next section.

¹²⁹⁹ Griffith 2011 *NSWPLRS* 4.

¹³⁰⁰ S 5 of the Marriage Act 1961 (Cth).

¹³⁰¹ S 44-45 of the Marriage Act 1961 (Cth).

¹³⁰² S 50 of the Marriage Act 1961 (Cth).

¹³⁰³ Tasmania Law Reform Institute "The legal issue relating to same-sex marriage" (2013), available at [www.http://law.utas.edu.au/reform](http://law.utas.edu.au/reform) (date of use 20 January 2015) 7.

7.3 THE ISSUE OF THE CONSTITUTIONALITY OF HOMOSEXUAL MARRIAGE IN AUSTRALIA

7.3.1 Overview of the issue

The issue involving the constitutionality of homosexual marriage in Australia is about which level of government can legislate on the subject of homosexual marriage under the distribution of power provided in the Constitution: The commonwealth government on one side or states and territories on the other side?¹³⁰⁴

Some scholars argue that homosexual marriage is a matter for the commonwealth government and that, therefore, any attempt to legislate for homosexual marriage should be left to the federal parliament. In opposition to this view, others argue that the commonwealth only has power to legislate in relation to heterosexual marriage.¹³⁰⁵

The marriage power is found in section 51 (XXI) of the Constitution. This section confers on federal parliament or the commonwealth the power to make law for the peace, order and good governance of the commonwealth with respect to marriage.¹³⁰⁶

Relying on this power, the commonwealth parliament amended the Marriage Act 1961 (Cth) in 2004. The Marriage Amendment Act 2004 defines marriage as the union between a man and a woman to the exclusion of all others, voluntarily entered into for life.

¹³⁰⁴ Zimmermann “The constitutionality of same-sex marriage in Australia (and other related issues)” 2002 *BYU JPL* 465.

¹³⁰⁵ Tasmania Law Reform Institute “The legal issue relating to same-sex marriage” (2013), available at [www.http://law.utas.edu.au/reform](http://law.utas.edu.au/reform) (date of use 20 January 2015) 14.

¹³⁰⁶ The county has an express provision in the Constitution granting federal parliament the power to pass laws on the subject of marriage and other correlative issues. See Zimmerman 2013 *BYUJPL*465.

It is notable that the power to legislate for marriage is concurrent between the commonwealth parliament and states and territories.¹³⁰⁷ However, Australia's express constitutional provisions indicate that the Marriage Amendment Act is legally valid, thus precluding any state or territory from introducing other homosexual Marriage Acts.¹³⁰⁸ This raises the issue whether the commonwealth parliament can rely on its power to make laws with respect to marriage to make Australian uniform law which would recognise homosexual marriages as marriages in Australia within the meaning of the terms in section 51 (XXI) of the Constitution.¹³⁰⁹

In order to properly address this issue, one needs to consider constitutional interpretation principles and how courts interpret the meaning of the Constitutional terms.¹³¹⁰

To this end, it should be noted that the constitutional meaning of "marriage" in section 51(XXI) of the Constitution is critical to the analysis of the extent of the constitutional power. Whether the term includes both homosexual and heterosexual marriage determines whether the commonwealth can legislate for homosexual marriage, but importantly it does not necessarily determine whether the commonwealth can prevent homosexual marriage.¹³¹¹

If the constitutional meaning of "marriage" includes homosexual unions, the commonwealth parliament can create legislation which allows as well as forbids homosexual marriage. In contrast, if the constitutional meaning of "marriage" does not include homosexual unions, the commonwealth government cannot create legislation which allows homosexual marriage. However, this may not necessarily

¹³⁰⁷ Tasmania Law Reform Institute "The legal issue relating to same-sex marriage" (2013), available at [www.http://law.utas.edu.au/reform](http://law.utas.edu.au/reform) (date of use 20 January 2015) 14.

¹³⁰⁸ Zimmerman 2013 *BYUJPL* 466.

¹³⁰⁹ Lindel "Constitutional issues regarding same-sex marriage: A comparative survey – North America and Australia" 2008 *SLR* 38.

¹³¹⁰ Lindel 2008 *SLR* 38.

¹³¹¹ Tasmania Law Reform Institute "The legal issue relating to same-sex marriage", available at [www.http://law.utas.edu.au/reform](http://law.utas.edu.au/reform) (date of use 20 January 2015).

prevent the commonwealth government from legislating to forbid homosexual marriage.¹³¹²

7.3.2 Interpretation of the constitutional meaning of marriage

It is important to note that, generally speaking, few words are defined in the Constitution. In most cases, the meaning of words or phrases is authoritatively established only by a determination of a court.¹³¹³ The interpretation of law or terms varies from one judge to another, according to his or her own jurisprudential approach. In other words, how a judge decides a case depends greatly on the way in which he or she interprets the law that must be applied to the case.¹³¹⁴

Though the commonwealth defines marriage as a union between a man and a woman to the exclusion of others, voluntarily entered into for life, this has no bearing upon how the word is to be understood in the Constitution; consequently its meaning remains uncertain.¹³¹⁵

7.3.2.1 *Methods of constitutional interpretation*

The courts have developed a number of competing methods of constitutional interpretation. These include the originalism approach, the connotation/denotation approach, the living-tree method, the term of art approach, and the structure and function approach.¹³¹⁶ Each of these methods deserves a short comment.

¹³¹² Gridley *et al* "Submission to the New Legislative Council Standing Committee on Social Issues Inquiry into Same-Sex Marriage Law in New South Wales" (unpublished paper submitted to the Australian Psychological Society on 1 March 2013) 57.

¹³¹³ Tasmania Law Reform Institute www.http//law.utas.edu.au/reform (date of use 20 January 2015).

¹³¹⁴ Zimmerman 2013 *BYUJPL* 466.

¹³¹⁵ Tasmania Law Reform Institute www.http//law.utas.edu.au/reform (date of use 20 January 2015).

¹³¹⁶ Tasmania Law Reform Institute www.http//law.utas.edu.au/reform (date of use 20 January 2015). See also Zimmerman 2013 *BYU JPL* 467.

7.3.2.1.1 The originalism approach

a Definition

This method of constitutional interpretation aims at the search for legislative purpose. It provides the historical evidence of what was, in actual fact, the real intention of the legislator.¹³¹⁷ In *Re Wakim: Ex parte McNally* (cross-vesting case),¹³¹⁸ Justice McHugh, favouring this method, commented that “[t]he starting point for a principled interpretation of the Constitution is the search for the intention of the legislator”.¹³¹⁹

According to Zimmerman, originalism may be described as a method of constitutional interpretation which aims at discovering the original meaning of the legal text. Originalism thus rests on the general assumption that the intention of the legislator is a fundamental tool to legal interpretation. Such method looks to the historical evidence of what was in actual fact the intention of the legislator and not merely to the letter of the law.¹³²⁰

b Application to the meaning of marriage

According to Lindel, traditional principles of legal interpretation in Australia rest on a literal-originalist approach that concentrates on the essential meaning that the term possessed as at the date the law was enacted.¹³²¹

Garran and Quick approve this view, pointing out that the intention of the framers was to prevent the federal parliament from expanding its limited and specific powers

¹³¹⁷ Zimmerman 2013 *BYUJPL* 466.

¹³¹⁸ (1999) 198 CLR 511. In this case, a core part of the cross-vesting scheme was held invalid and doubt on other aspects of cooperative federalism was made evident. This case undid the cross-vesting legislation in so far as it purported to permit state parliaments to confer state jurisdiction on federal courts.

¹³¹⁹ *Re Wakim, Ex parte McNally* (cross-vesting case) (1999) 198 CLR 511, 551 (Austl).

¹³²⁰ Zimmerman 2013 *BYUJPL* 466.

¹³²¹ Lindel 2008 *SLR* 38.

at its own convenience by simply changing the meaning of the words of the Constitution. In their own words Quick and Garran asserted as follows:

“Every power alleged to be vested in the national government, or any organ thereof, must be affirmatively shown to have been granted. There is no presumption in favour of the existence of a power; on the contrary, the burden of proof lies on those who assert its existence, to point out something in the Constitution which, either expressly or by necessary implication, confers it. Just as an agent claiming to act on behalf of his principal, must make out by positive evidence that his principal gave him the authority he relies on, so congress, or those who rely on one of its statutes, are bound to show that people have authorised the legislature to pass the statute. The search for the power will be conducted in a spirit of strict exactitude, and if there be found in the Constitution nothing which directly or impliedly conveys it, then whatever the executive or legislature of the National government, or both of them together, may have done in persuasion of its existence, must be deemed null and void, like the act of any other unauthorised agent”.¹³²²

The definition of marriage in line with the originalism approach supported by Quick and Garran is given in their definition of the term as understood by the framers of the Constitution:

“Marriage is a relationship originating in contract, but is something more than a contract. It is what is technically called a status, involving a complex bundle of rights, privileges, obligations and responsibilities which are determined and annexed to it by law independent of contract. According to the law of England, a marriage is a union between a man and a woman on the same basis as that on which the institution is recognised through Christendom, and its essence is that it is a voluntary union, for life, of one man and one woman, to the exclusion of all others.”¹³²³

¹³²² Quick and Garran *The Annotated Constitution of the Australian Commonwealth* 795.
¹³²³ Quick and Garran *The Annotated Constitution of the Australian Commonwealth* 608.

This would suggest that for the framers of the Australian Constitution, marriage is a union of one man and one woman for life to the exclusion of all other unions. If the originalism approach is applied to this definition of marriage, it is unlikely that homosexual marriage is included in the term marriage. In other words, when defining the word marriage, the intention of the framers of the Constitution was to confine marriage to unions between persons of different sexes.¹³²⁴ Accordingly, the federal government cannot have a constitutional power to legislate for homosexual marriage as the definition of marriage does not encompass homosexual unions.

However, some scholars contend that supporting this view would amount to a narrow reading of the originalism approach. Goldsworthy, for example, asserts that an originalism approach may embrace a non-literal approach that as such could regard any future developments as being “unanticipated by the founders of the Constitution”.¹³²⁵ In this case the term marriage would be wide enough to encompass homosexual marriage. According to Goldsworthy, some words in the Constitution fail to give effect to their intended purpose so that such words could be expanded or contracted in a simple and obvious way in order to remedy the failure.¹³²⁶ This would result in the court justifying the expansion of the meaning of a legal term so as to encompass unpredictable situations that were not envisaged by the drafters of the legislation.¹³²⁷

This non-literal interpretation of the originalism approach if applied to the definition of marriage will result in the meaning of marriage being expanded to include homosexual marriage. Consequently, this will empower the commonwealth government to make laws allowing homosexual marriage.

It is important to note that the originalism approach as discussed above does not settle the problem at hand. While the literal originalist approach prevents the

¹³²⁴ Lindel 2008 *SLR* 42.

¹³²⁵ Goldsworthy “Constitutional law: Interpreting the Constitution in its second century” 2000 *MULR* 683.

¹³²⁶ Goldsworthy 2000 *MULR* 699.

¹³²⁷ Zimmerman 2013 *BYUJPL* 466 477-8.

commonwealth form legislating for homosexual marriage on one side, the non-literal originalist approach on the other side expands the meaning of marriage to include homosexual marriage and consequently gives power to the commonwealth government to legislate for homosexual marriage.

7.3.2.1.2 The connotation/denotation approach

a Definition

This model of constitutional interpretation is an evolution of the originalism approach. It involves an initial analysis of the meaning of the word at the time the Constitution was written, and then considers the “essential features” a thing must possess in order to fit within the definition. While the original meaning remains constant, the group of things which are found to possess the required features can change and expand according to social, cultural and technical developments.¹³²⁸

The connotation/denotation approach recognises that an understanding of what a word meant at the common-law time of the federation is important, but considers also the fact that it is important to allow for flexibility and adaptability with the Constitution.¹³²⁹

This model recognises that inevitably, social, cultural, and technological changes will require the Constitution to be interpreted to accommodate new things. The attributes which the words signify are referred to as the “essential features”, that is the really essential characteristics, or the fundamental conception of a word.¹³³⁰ Those essential features form the connotation of the word, which has a fixed meaning. The denotation is a set of all the things which possess those essential features, so they fall within the connotation. New things which have all the required essential features

¹³²⁸ Tasmania Law Reform Institute [www.http//law.utas.edu.au/reform](http://law.utas.edu.au/reform) (date of use 20 January 2015).

¹³²⁹ Tasmania Law Reform Institute [www.http//law.utas.edu.au/reform](http://law.utas.edu.au/reform) (date of use 20 January 2015).

¹³³⁰ *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 para [528] (Kirby).

can become part of the denotation. Therefore the group of things which are denoted by the term can change. This may be especially so in relation to new technologies.¹³³¹

b Application to the term marriage

An application of this model to homosexual marriage legislation would require the court to consider whether the word “marriage” in section 51 (XXI) also denotes the union of homosexual couples. The definition of marriage as stated above was the prevailing legal definition at the time the Constitution was written, so it may also have been the definition the drafters of the Constitution intended to capture. Moreover, homosexual practices between men remained criminal offences until much later in the 20th century, and female homosexuality was not overtly acknowledged by either the criminal law or wider society. These considerations support the contention that same-sex marriage would not have been contemplated by the framers of the Constitution.¹³³² As a result the constitutional term marriage does not include homosexual marriage and therefore the commonwealth government cannot legislate for homosexual marriage. This view was challenged by a number of scholars and commentators.

Walker challenges this view and suggests that an application of the connotation/denotation approach would result in a finding that the meaning of marriage does extend to homosexual marriage. She points out that homosexual marriage is not something which framers considered and deliberately rejected, as the concept was not even thought of in 1900. Rather Walker contends that the development of homosexual unions and the desire to have these unions recognised as marriage is similar to technological advances. Walker argues that the Constitution contains a provision relating to “foreign power”. At the time of the federation, the United Kingdom was not considered as foreign power because the colonies still

¹³³¹ Tasmania Law Reform Institute [www.http//law.utas.edu.au/reform](http://law.utas.edu.au/reform) (date of use 20 January 2015).

¹³³² Tasmania Law Reform Institute [www.http//law.utas.edu.au/reform](http://law.utas.edu.au/reform) (date of use 20 January 2015).

relied heavily on the United Kingdom parliament for governance. Furthermore, the framers of the Constitution intended that the British Sovereign would remain the Australian Sovereign after the federation. However, as Australia gradually became more independent, it was appropriate to begin treating the United Kingdom as a foreign power under the relevant provision for constitutional purposes.¹³³³

This would suggest that the flexibility and adaptability within the Constitution would require the court to adopt a broad definition of marriage and include homosexual marriage. As a consequence, the commonwealth government would have power to legislate for homosexual marriage.

It is important to note that the connotation/denotation approach may hold little significance for the issue at hand as many aspects of marriage have changed since the time of the federation. For example, there are a number of situations in which extramarital relationships or polygamous marriages will be recognised despite the stipulation that marriage is between one man and one woman to the exclusion of all others. Consequently, an examination of traditional factors remains relevant, or has become less relevant in contemporary understanding of marriage.¹³³⁴

7.3.2.1.3 The living-tree approach

a Definition

The living-tree approach starts by considering the meaning of words as they were understood at the time of the federation but treats the Constitution as a living, evolving document, thereby recognising that the meaning of words can change over time. For the living-tree method, the words or phrases in the Constitution do not have a meaning which is fixed at the time of the federation. Rather, the Constitution is

¹³³³ Walker "The same-sex marriage debate in Australia" 2007 *IJHR* 114-115.

¹³³⁴ Gridley *et al* "Submission to the New Legislative Council Standing Committee on Social Issues Inquiry into Same-Sex Marriage Law in New South Wales" 57.

viewed as a continuously evolving and living document which should be interpreted in light of modern understanding and meaning.¹³³⁵

b Application to the term marriage

When applying this method, Nicholson CJ, Ellis JJ and Brown JJ in *Attorney General for the Commonwealth v Kevin and Jennifer and Human Rights and Equal Opportunity Commission*¹³³⁶ stated the following:

“It seems to be inconsistent with the approach of the High Court to the interpretation of other heads of Commonwealth power to place marriage in a special category, frozen in the time to 1901”.

This would suggest that just as other powers enumerated in section 51 have been interpreted in accordance with changing needs and understandings, there is no impediment to treating the marriage power in the same way.¹³³⁷ As a result marriage should be defined as including homosexual marriage and consequently the commonwealth government should be given the power to legislate for homosexual marriage.

However, it is worth noting that this method was criticised on the ground that it is somewhat inconsistent and unclear,¹³³⁸ particularly because it does not provide any certainty or a set of principles by which similar issues can be determined in future.¹³³⁹

¹³³⁵ Tasmania Law Reform Institute [www.http://law.utas.edu.au/reform](http://law.utas.edu.au/reform) (date of use 20 January 2015) 18.

¹³³⁶ (2003) Fam CA 94 and 22.

¹³³⁷ Tasmania Law Reform Institute [www.http://law.utas.edu.au/reform](http://law.utas.edu.au/reform) (date of use 20 January 2015) 19.

¹³³⁸ Justice Heydon “Theory of constitutional interpretation: A taxonomy” (speech delivered at the sir Maurice Byers Lecture, New South Wales Bar Association Common Room, 3 May 2007), available at http://www.nsbar.asn.au/docs/resources/lectures/Byers_07.pdf (date of use 20 January 2015).

¹³³⁹ Tasmania Law Reform Institute [www.http://law.utas.edu.au/reform](http://law.utas.edu.au/reform) (date of use 20 January 2015) 18.

7.3.2.1.4 The legal term of art approach

a Definition

This approach suggests that the word marriage is a legal term of art which the drafters of the Constitution would have understood as a constantly evolving concept.¹³⁴⁰ This method of interpretation achieves a similar outcome to the living-tree approach, but hinges on the idea that the meaning of the word marriage was never a fixed concept, rather than claiming, as the living-tree approach does, that a new meaning can be grafted on to old words.¹³⁴¹

b Application to the term marriage

According to Meagher, the word marriage in section 51(XXI) is a legal term of art possessed of a rich pre-federation heritage.¹³⁴² Legal terms of art are words which describe social or cultural constructs and activities, such as corporations, bankruptcy and insolvency, copy rights, patents of inventions and design, and trademarks.¹³⁴³ This would suggest that “marriage” in section 51 (XXI) should be interpreted as though it does not have a fixed meaning and therefore should not be interpreted as restricted to opposite-sex marriage. As a consequence the commonwealth government can legislate for it.

¹³⁴⁰ Tasmania Law Reform Institute www.http//law.utas.edu.au/reform (date of use 20 January 2015) 19.

¹³⁴¹ Tasmania Law Reform Institute www.http//law.utas.edu.au/reform (date of use 20 January 2015) 19.

¹³⁴² Meagher “The times are they a-changin’? - Can the commonwealth parliament legislate for same sex marriages?” 2003 *AJFL*149.

¹³⁴³ S 51(XXI), (XVII) & (XVIII) of the Constitution of Australia Act 1961 (Austl).

7.3.2.1.5 The structure and function method

a Definition

This method suggests that the court in its interpretation has always taken into account the need to maintain the structure of the Constitution (eg a responsible and democratic system of government). Geegeler explains this method as follows:

“The Constitution sets up a system to enlarge the powers of self-government of the people of Australia through institutions of government that are structured to be politically accountable to the people of Australia”.¹³⁴⁴

Cultural, social and technological developments will mean that the demands on and priorities of the system established by the Constitution will change over time. In order for the commonwealth government to function effectively, it must have broad and flexible powers that enable it to adapt to these changes. This means that the court must interpret the text of the Constitution with all the generality which the word admits.¹³⁴⁵

b Application

The consequence of this method is that, taking into account the need to honour the structure and function of the Constitution, the court would give a broad interpretation of the marriage power with the effect that it includes homosexual marriage.¹³⁴⁶

¹³⁴⁴ Geegeler “Beyond the text: A vision of the structure and function of the Constitution”.

¹³⁴⁵ *Ex parte Australian National Airways* (1964) 113 CLR 207, paras [225]-[226].

¹³⁴⁶ Tasmania Law Reform Institute [www.http//law.utas.edu.au/reform](http://law.utas.edu.au/reform) (date of use 20 January 2015) 22.

7.3.2.1.6 Conclusion

In short, it is important to bear in mind that the Australian High Court has yet to decide on this issue. Scholars have tried to anticipate how the court would settle this issue. Some believe that the High Court may be more likely to take an expansive view of the meaning of marriage.¹³⁴⁷ This would result in the court understanding marriage as including homosexual marriage and consequently giving the power to the commonwealth government to pass laws allowing or forbidding homosexual marriage. Others believe that the court will be likely to stick to the intention of the framers of the Constitution and exclude homosexual marriage from the interpretation of marriage. Consequently the commonwealth government would not have the power to legislate on it.

This having been said, the remaining question of the issue of the constitutionality of homosexual marriage is whether states and territories can legislate for same-sex marriage.

7.3.3 The power of states and territories to legislate for homosexual marriage

7.3.3.1 Overview

Although the federal law on marriage, the Marriage Act 1961, clearly defined marriage as the union of a man and a woman to the exclusion of all others, in 2004 the Same-sex Marriage Bill (Tas) was introduced into Tasmanian Parliament. The Bill provided for homosexual marriage in Tasmania. Although this Bill was never passed, it nonetheless revealed the possibility that a state or territory might legislate for state or territory recognition of homosexual marriage. As a result a number of Australian states and the Australian Capital Territory considered Bills to recognise state homosexual marriage.¹³⁴⁸ This gave rise to the issue whether states or territories have the power to make laws allowing homosexual marriage in the way that these laws would not be inconsistent with the federal law on marriage.

¹³⁴⁷ Walker 2007 *IJH R* 113.

¹³⁴⁸ Walker 2007 *IJH R* 118.

While there is no doubt as to the power of state and territory legislatures to enact such laws, there is nonetheless doubt as to its constitutional validity if enacted. As the commonwealth has used its power under section 51(21) to enact the Marriage Act, the question is then whether there is consistency between state and territory law and commonwealth law.¹³⁴⁹

In order to give an acceptable answer to this question, there is a necessity to shortly explain the concept of inconsistency in the context of Australian law.

7.3.3.2 *Inconsistency in Australia*

Inconsistency is a mechanism by which the Constitution ensures the supremacy of the commonwealth law over state and territory law. Because the commonwealth and states share the powers enumerated in section 51 of the Constitution, section 109 provides the means for resolving clashes between state and commonwealth laws. There are two well-established categories of inconsistency under section 109 of the Constitution, namely direct inconsistency and indirect inconsistency.¹³⁵⁰ According to the High Court, an inconsistency can be described as follows:

“When a state law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth parliament, then to that extent it is invalid. Moreover, if it appears from the terms, the nature or the subject matter of a federal enactment that it was intended as a complete statement of law governing a particular matter or set of rights and duties, then for a state law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so is inconsistent”.¹³⁵¹

A state law which alters, impairs or detracts from the operation of a commonwealth law is directly inconsistent. A state law which regulates or applies to a matter over which the commonwealth has shown an intention to give a complete statement of the

¹³⁴⁹ Walker 2007 *IJH R* 118.

¹³⁵⁰ Tasmania Law Reform Institute [www.http//law.utas.edu.au/reform](http://law.utas.edu.au/reform) (date of use 20 January 2015) 32-33.

¹³⁵¹ *Victoria v Commonwealth* (1937) 58 CLR 618 para 630 (Dixon).

law is indirectly inconsistent.¹³⁵² The meaning of direct and indirect inconsistency was further given in Tasmanian law. The Tasmania Law Reform Institute explains the direct and indirect inconsistency as follows: Direct inconsistency arises when a state law alters, impairs or detracts from the operation of a commonwealth law. It may in that case be impossible to obey both laws at the same time. For example, if a commonwealth law provides that all cars should drive on the left side of the road and a state law provides that cars should drive on the right side; these two laws are directly inconsistent. For indirect inconsistency, the commonwealth must have shown an intention in the legislation to cover the field. This means the commonwealth law should be the only law on the topic in question.¹³⁵³

The issue of whether a state or territory can legislate to legalise homosexual marriage has received scholarly attention. In the context of the Tasmanian Same-sex Marriage Bill 2004, for example, many scholars have provided extensive opinions.¹³⁵⁴

Lindel suggests that direct inconsistency is likely to arise between a Tasmanian law and the Marriage Act enacted by the commonwealth. He argues that a Tasmanian same-sex marriage law would be a direct inconsistency and would be in direct contradiction to the Commonwealth Marriage Act because it recognises a relationship which the Commonwealth Act explicitly refuses to recognise.¹³⁵⁵ The Commonwealth Marriage Act can be read as refusing to recognise homosexual marriage in Australia, while Tasmanian law would allow homosexual marriage. This argument suggests that the Marriage Act intended to be not only a statement of the commonwealth attitude towards homosexual marriage, but is also a proclamation of what marriage means for the purpose of all laws in Australia including state laws.¹³⁵⁶

¹³⁵² *Dickson v The Queen* (2010) 241 CLR 491 para [502].

¹³⁵³ Tasmania Law Reform Institute [www.http//law.utas.edu.au/reform](http://law.utas.edu.au/reform) (date of use 20 January 2015) 39.

¹³⁵⁴ Zimmerman 2013 *BYU JPL* 466.

¹³⁵⁵ Lindel "State legislative power to enact same-sex marriage legislation, and the effect of the Marriage Act 1961 (Cth) as Amended by the Marriage Amendment Act 2004 (Cth)" 2006 *CLPR* 25.

¹³⁵⁶ Tasmania Law Reform Institute [www.http//law.utas.edu.au/reform](http://law.utas.edu.au/reform) (date of use 20 January 2015) 41.

For Williams, there would not be inconsistency in the Tasmania case. He suggests that direct inconsistency would not arise as long as Tasmanian law is narrowly drafted and does not attempt to force recognition of homosexual marriage outside Tasmania.¹³⁵⁷

According to Meagher and Brock, a state-based law which provides for homosexual unions (which are the fundamental equivalent of marriage) may be inconsistent with the Marriage Act.¹³⁵⁸ By creating a new type of relationship which adopts the word marriage, state homosexual marriage laws may alter, impair or detract from the operation of the commonwealth laws.¹³⁵⁹

Walker contends that direct inconsistency would only arise if the commonwealth specifically and explicitly legislates to prevent states from recognising homosexual marriage, and states did so.¹³⁶⁰

In short, there is no way to predict which way the High Court would decide the issue of inconsistency in this case. However, it is important to note that the discussion about the constitutionality of homosexual marriage gave light on legal issues that can arise around homosexual unions in Australia. The different views expressed in the above discussion paved a way to the legalisation of homosexual unions in Australia where they have built their families through ARTs.

¹³⁵⁷ Williams "Can Tasmania legislate for same-sex marriage?" 2002 *UTLR* 127.

¹³⁵⁸ Brock and Meagher "The legal recognition of same-sex unions in Australia: A constitutional analysis" 2011 *PLR* 266.

¹³⁵⁹ Brock and Meagher 2011 *PLR* 268.

¹³⁶⁰ Walker 2007 *IJHR* 118

7.4 ARTS AND RELATED ISSUES IN AUSTRALIA

7.4.1 Introduction

The use of ARTs in Australia raises concerns about its regulation and issues related to the practice itself. This section discusses the regulation of ARTs and related issues including the child's identity, the child's interests and welfare.

7.4.2 The regulation of assisted reproductive technologies in Australia

7.4.2.1 *Introduction*

It is not within the legislative power of the Commonwealth of Australia to legislate on the subject of ARTs. Each state and territory is responsible for designing and implementing its own regulatory regime. Some states have done so, whereas other states and territories have adhered to ethical guidelines formulated by bodies such as the National Health and Medical Research Council ("NHMRC") and the Fertility Society of Australia.¹³⁶¹

Australia is formally decentralised with respect to ART policy. All the major levels relevant to reproductive technology policy, such as health regulation, parentage law and criminal prohibition, fall within the jurisdiction of states and territories.¹³⁶²

Although each state and territory in Australia has enacted laws regulating ARTs within their jurisdiction, there is harmonisation of ART policy in Australia. This was possible through a competitive federation process according to which states modelled and copied each other's legislation. This process started with Victoria. In 1984, Victoria passed the Infertility (Medical Procedure) Act 1984 and became the first Australian jurisdiction and one of the first in the world to produce legislation governing ARTs. The Act officially came into force in 1988. It included regulations

¹³⁶¹ Seymour and Magri "A.R.T, surrogacy and legal parentage: A comparative legislative review" 2004 *VLRC* 18.

¹³⁶² Snow and Knopff "Assisted reproduction policy in federal states: What Canada should learn from Australia" 2012 *SPP* 14.

with respect to artificial insemination, in vitro fertilisation, counselling, and reimbursement of expenses. Ten years later, on 4 December 2008, the Victorian parliament passed the Assisted Reproductive Treatment Act 2008 (Vic) (ART Act), based on the recommendations of the Victorian Law Reform Commission in its 2007 Report on ART, adoption and surrogacy.¹³⁶³

The Act, which came into operation on 1 January 2010, gives general guidelines for surrogacy in Victoria. The Act stipulates as follows:

- Commercial surrogacy continues to be banned and altruistic surrogacy is carefully regulated.
- Eligibility requirements for treatment in a clinic apply to the commissioning parents rather than the surrogate mother.
- There will be a presumption against treatment where surrogate mothers or commissioning parents have a record of sexual or violent offences or if they have had child protection orders made against them.
- If a presumption against treatment applies, a newly established Patient Review Panel will determine whether there is a barrier to treatment.
- Parties must undergo extensive counselling before being treated by a registered Victorian ART provider in relation to the risks and issues associated with a surrogacy arrangement.
- Surrogacy agreements will be unenforceable but prescribed payments (eg medical and legal expenses) will be allowed.
- The Patient Review Panel may only approve a surrogacy arrangement where the surrogate mother is at least 25 years old, has given birth to a live child and if her egg is not used to conceive the child.
- All surrogacy arrangements carried out by a registered Victorian ART provider must be approved by the newly established expert Patient Review Panel.

¹³⁶³ Snow and Knopff 2012 *SPPRP* 14.

- The County and Supreme Courts of Victoria will be empowered to make substitute parentage orders in favour of a person or couple who have commissioned a surrogacy arrangement subject to various conditions, including that the Court is satisfied that the order would be in the best interests of the child; the surrogate mother freely consents to the order and the parties have received additional counselling if the surrogacy has been arranged without the assistance of a registered Victorian ART provider.¹³⁶⁴

Other states introduced similar laws. Although they did not always adopt the Victorian provisions and approaches, the content of their laws was modelled on the Victorian ART Act.

At federal level, two more formal devices of intergovernmental negotiation and agreement have supplemented competitive federalism as a route to some level of policy harmonisation. These devices are the Council of Australian Governments (“COAG”) and the Standing Committee of Attorneys General (“SCAG”).¹³⁶⁵

Through these two devices, the commonwealth played a part in governmental agreements on ART policy. This led the commonwealth to pass the Prohibition of the Human Cloning for Reproduction Act and the Research Involving Human Embryos Act in 2002.¹³⁶⁶

SCAG has worked towards achieving consensus and harmony in state-based Australian criminal law. In 1992, SCAG drafted a model criminal code. It has worked towards a consensus on certain aspects of reproductive technology. It has in particular contributed to the trend to liberalise surrogacy law.¹³⁶⁷

The regulation of ARTs is about the regulation of access to ARTs and the legislation activity across the country in respect of the ARTs.

¹³⁶⁴ Joint Working Group “A proposal for a national model to harmonise regulation on surrogacy”, available at <http://www.Scag.org.au/27> (date of use 24 April 2014).

¹³⁶⁵ Snow and Knopff 2012 *SPPRP* 15.

¹³⁶⁶ Snow and Knopff 2012 *SPPRP* 15.

¹³⁶⁷ Snow and Knopff 2012 *SPPRP* 15.

7.4.2.2 *Access to assisted reproductive technologies*

The regulation of access to ARTs in Australia ranges from permissive to restrictive. Some people, such as lesbian and single heterosexual women, experience relative ease of access in some states and territories. These include Western Australia, Tasmania, New South Wales and the Australian Capital Territory.¹³⁶⁸

Lesbians and single women have more limited access in South Australia, Queensland and the Northern Territory. The access is more difficult in Victoria where the Infertility Treatment Act 1995 (Vic) allows a woman to undergo assisted reproductive treatment only if she is married and living with her husband on a genuine basis or is living with a man in a *de facto* relationship.¹³⁶⁹ Similarly, section 3 of the same Act requires a doctor to be satisfied that a woman is otherwise unlikely to become pregnant by her husband or that if she did, a genetic abnormality or disease might be transmitted to the child. A treatment procedure is defined as the artificial insemination of a woman with the sperm of a man who is not the husband of the woman or a fertilisation procedure.¹³⁷⁰ This would suggest that only infertile married women can access the treatment procedure in Victoria. However, in Western Australia access to artificial insemination is open to anyone with the exception that more invasive ARTs are restricted to women who are clinically infertile for reasons other than age.¹³⁷¹

7.4.2.3 *State and territory assisted reproductive technologies laws*

7.4.2.3.1 Western Australia

The Human Reproductive Technology Act 1991 (WA) established the Western Australian Reproductive Technology Council. Normally, no artificial fertilisation

¹³⁶⁸ Dempsey “Active fathers, natural families and children’s origins: Dominant themes in the Australian political debate over eligibility for assisted reproductive technology” 2006 *AJETS* 35.

¹³⁶⁹ Section 8 of the Infertility Treatment Act 1995 (Vic).

¹³⁷⁰ Section 3 of the Infertility Treatment Act 1995 (Vic).

¹³⁷¹ Karina and Drabsch “Legal recognition of same-sex relationships” 2006 *NSW PLS* 38.

procedure may be carried out except pursuant to a license. Under the Act, the Commissioner of Health may issue practice licenses. Before a practice license (or exemption) is granted, the commissioner must refer an application to the Council. The Council also publishes a Code of Practice, which sets out guidelines, and establishes ethical standards required of licensees. No such code has yet been drafted; instead, some guidelines are contained in directions formulated by the commissioner. The use of directions allows greater flexibility than would be possible under a code.¹³⁷²

Access to ARTs is subjected to a number of conditions and the Act includes a number of provisions regarding access to ART. The Act seeks to ensure that:

- artificial fertilisation procedures are carried out only for the benefit of persons eligible under the Act;
- the participants are adequately assessed and counselled;
- the welfare of the participants is properly promoted;
- the prospective welfare of any child to be born as a result of the procedure is properly taken into consideration; and
- equity, welfare and general standards prevailing in the community are taken into account in the practice of reproductive technology.¹³⁷³

Section 23 of the Act, which deals with access to in vitro fertilisation, provides that an in vitro fertilisation procedure may be carried out where it would be likely to benefit:

- persons who, as a couple, are unable to conceive a child due to medical reasons;
- a woman who is unable to conceive a child due to medical reasons; or
- a couple or a woman whose child would otherwise be likely to be affected by a genetic abnormality or disease.

¹³⁷² Seymour & Magri 2004 *VLRC* 18.

¹³⁷³ Section 4 of the Human Reproductive Technology Act 1991 (WA).

In addition:

- effective consent must be given;
- persons seeking to be treated as a couple must be married or in a *de facto* relationship and must be of the opposite sex to each other;
- the reason for infertility must not be age or some other prescribed cause; and
- consideration must be given to the welfare and interests of the participants and of any child likely to be born as a result of the procedure.

It is important to note that the Act gives the power to the medical practitioner to decide on the eligibility of the patient. In fact, the directions issued under the Act state that “the Licensee must ensure that the medical practitioner treating the patient makes the final decision as to the eligibility of any participant on both legal and medical grounds”.¹³⁷⁴

7.4.2.3.2 South Australia

The South Australian Council on Reproductive Technology is established under the Reproductive Technology (Clinical Practices) Act 1988 (SA). The Act empowers the Council to formulate a code of ethical practice to govern the use of artificial fertilisation procedures. This code is set out as a schedule to the Reproductive Technology (Code of Ethical Clinical Practice) Regulations 1995. Generally speaking, a person may not carry out an artificial fertilisation procedure except under a license granted by the Minister. A license is not required in respect of artificial insemination if a registered medical practitioner who has given an undertaking to observe the code of ethical practice carries it out, or if it is carried out gratuitously.¹³⁷⁵

¹³⁷⁴ Section 7 of the Human Reproductive Technology Act Directions (WA).
¹³⁷⁵ Seymour and Magri 2004 *VLRC* 18.

Once more it is the medical practitioner who decides who can undergo the procedures. The legislation indicates that licensees may provide artificial fertilisation procedures only for the benefit of married couples in the following circumstances: The husband or wife (or both) appear to be infertile, or there appears to be a risk that a genetic defect would be transmitted to a child conceived naturally.¹³⁷⁶

This would suggest that in South Australia under this law the patient's eligibility was based on her marital status, and this amounted to discrimination against non-married women and couples. In 1996 the Supreme Court of South Australia found that the restriction of access to treatment on the basis of marital status contravened the Sex Discrimination Act 1984 (Cth).¹³⁷⁷ As a result, single women and couples who do not meet the Act's criterion as to marital status may now access treatment. Such people must meet all other eligibility criteria – they therefore must be infertile, or there must appear to be a risk that a genetic defect would be transmitted to a child conceived naturally.¹³⁷⁸

The need for lesbian women to use ARTs was addressed in South Australia. In this regard the South Australian Council of Reproductive Technology states:

“If a lesbian woman is medically infertile, she would be eligible for treatment the same as any other infertile woman. Lesbian women who are fertile [do not] require invasive treatments like In Vitro Fertilisation. They need only donor conception treatment using donated sperm. They can organise this in their own homes or through a medical practitioner registered to provide such services”.¹³⁷⁹

Further ethical requirements are needed for a patient undergoing ARTs as well as the providers of those procedures in Australia. For example, when an artificial fertilisation procedure is carried out by a licensed medical practitioner, the code of

¹³⁷⁶ Section 13 (1), (2), and (7) of the Reproductive Technology (Clinical Practices) Act 1988 (SA).
¹³⁷⁷ *Pearce v South Australian Health Commission* (1996) 66 SASR 486.
¹³⁷⁸ Section 13 (2) of the Reproductive Technology (Clinical Practices) Act 1988 (SA).
¹³⁷⁹ South Australia Council on Reproductive Technology “Eligibility fact sheet: Reproductive technology legislation and regulation in SA”, available at www.dh.sa.gov.au/reproductivetechnology/fact%20sheets.asp (date of use 11 August 2014).

ethical practice requires the patient to provide the medical practitioner with important information pertaining to her eligibility. The code of ethical practice stipulates that the licensee must be furnished with a statutory declaration from the patient and partner (if any) that neither has been found guilty of a sexual offence involving a child or of a violent offence, and that neither has had a child permanently removed from their guardianship. Information must also be provided by a medical practitioner indicating that neither the patient nor her partner (if any) is suffering from any illness, disease or disability that might interfere with their ability to care for the child. In deciding whether to make infertility treatment available, a licensee must also “treat the welfare of any child that may be born in consequence of the treatment as the paramount consideration”. The code also makes it clear that the licensee is free to refuse to give infertility treatment to a person on “any reasonable ground”.¹³⁸⁰

7.4.2.3.3 The Northern Territory

Although no specific reproductive technology legislation exists in the Northern Territory, reproductive medicine services in the territory are provided by South Australian clinicians operating under guidelines consistent with the South Australian legislation.¹³⁸¹

The Department of Health requires its clinics to adhere to South Australian legislation but with some minor changes. For example, the South Australian legislation complies with the Sex Discrimination Act 1984 (Cth) and allows access to infertility treatments for all infertile women, but the Northern Territory Anti-Discrimination Act 1992 provisions preventing discrimination in relation to services does not apply to the carrying out of an artificial fertilisation procedure.¹³⁸² Thus, only married or heterosexual *de facto* couples can access infertility treatments.¹³⁸³

¹³⁸⁰ Reproductive Technology (Code of Ethical Clinical Practice) Regulations 1995 cl 11 (b), (c), clauses 13 and 14.

¹³⁸¹ Seymour and Magri 2004 VLRC18.

¹³⁸² Section 4(8) of the Anti-Discrimination Act 1992 (NT).

¹³⁸³ Seymour and Magri 2004 VLRC18.

7.4.2.3.4 The Australian Capital Territory

There is no explicit regulation of access to ARTs in the Australian Capital Territory (ACT).

7.4.2.3.5 New South Wales, Tasmania and Queensland

None of these states or territories has legislation on ARTs. Instead, health professionals, clinics, and those generally practicing in the area of reproductive therapy follow the NHMRC Ethical Guidelines on Assisted Reproductive Technology 1996116 and the Fertility Society of Australia's Reproductive Technology Accreditation Committee's Code of Practice.¹³⁸⁴ The guidelines encompass all aspects of the technologies, including accreditation and approval processes, counselling, research requirements, storage of human tissue, record keeping, complaints and appeals processes, and prohibited and unacceptable practices.¹³⁸⁵

Although these states have no specific legislation regulating ARTs within their jurisdiction, there are circumstances in which the courts will scrutinise the way in which eligibility is determined. *Jennifer Morgan v GK*,¹³⁸⁶ is one of the examples that provide an illustration of a medical practitioner denying access on the basis of marital status or sexual orientation. In this case, a medical practitioner had refused to provide ARTs to a lesbian. After proceedings before the Queensland Anti-Discrimination Tribunal, the Queensland Supreme Court, and the Court of Appeal, the matter was remitted to the Anti-Discrimination Tribunal. There it was held that the doctor had acted reasonably in dealing with the woman and did not discriminate against her on the basis of her lesbian relationship.¹³⁸⁷ It was held that in the tribunal's opinion, the doctor was engaged in the treatment of infertility and had denied the woman treatment, not because she was a lesbian, but because she was fertile. Commenting on this outcome, the Queensland Anti-Discrimination

¹³⁸⁴ Code of Practice for Centres Using Assisted Reproductive Technology (April 2002).

¹³⁸⁵ Seymour and Magri 2004 VLRC 18.

¹³⁸⁶ [2001] QADT 10; (2001) EOC 93–154.

¹³⁸⁷ *QFG v JM* (1997) EOC 92–902; BC9705768; *JM v QFG* [1998] QCA 228; [2000] 1 Qd R 373; (2000) EOC 93–047; BC9804065.

Commission stated that the decision was based on a very technical point and left the door open to lesbian women to challenge the various bodies that define and implement policies and guidelines restricting these types of services. Evidence on doctors' practices in other states is anecdotal. The New South Wales Government website notes as follows in this regard:

“While donor insemination is legally available to all women through fertility clinics in NSW, not all fertility services provide access to lesbians or ‘single’ women. Such discrimination may be unlawful under NSW antidiscrimination law”.¹³⁸⁸

Like in the USA, ARTs in Australia raise a number of issues that deserve to be addressed in this study.

7.4.3 Assisted reproductive technologies and related issues

7.4.3.1 *Introduction*

In Australia many issues are related to the use of ARTs. However, the major issues include the identity of the child born through ARTs and the welfare and the interests of the child resulting from the use of ARTs.

7.4.3.2 *The child's identity*

The child's identity issue is discussed with consideration of the child's adoption experience and the child born from gametes donation.

7.4.3.2.1 The adopted child's experience

In Australia the adoption experience reveals that regardless of the strength of the connection with the non-biological parents (adopted parents), many children base their identity formation on knowledge of the identity of their biological parents.¹³⁸⁹

¹³⁸⁸ Section 47 of the Anti-Discrimination Act 1977 (NSW).

¹³⁸⁹ McNair “Outcomes for children born of ART in a diverse range of families” 2004 *VLRC* 28.

Two issues may interfere with the child's identity development. The first is being told of being adopted late in life, and the second is not being able to discover the identity of the biological parents.¹³⁹⁰ In their study conducted in 2003, MacCallum *et al* reported that adoptive children who are not told early in life about being adopted are more likely to develop behavioural and emotional problems.¹³⁹¹ Golombok confirmed this finding in another study. She argued that adoptive children are found to have an interest in their biological origins from around puberty, and this is when they can develop increased emotional and behavioural problems if not told.¹³⁹²

McNair approves this view and asserts that the non-disclosure does not prevent children from noticing a range of clues as to their adoptive status, including lack of physical resemblance to their parents.¹³⁹³ This view is also defended by Grotevant, who emphasises that adoptive children experience significant grief and loss if not being able to discover the identity of their biological parents, resulting in a less complete identity development.¹³⁹⁴

This issue led to calls from adoptive adults for the encouragement of openness from an early age. The open adoption encourages birth mothers to play some role in the selection of adoptive parents and maintain contact with their children.¹³⁹⁵ Advocates of this approach find that it helps children to have more fully formed identities while others suggest that openness can lead to confusion for children if they have conflicting parental values and could create identity conflict.¹³⁹⁶

In short, in respect of the adoption experience, the debate is ongoing as some believe that openness is necessary for forming a full identity and others believe that it will lead to an identity conflict. Does this suggest that in the case of donor-conceived child the result will be the same?

¹³⁹⁰ McNair 2004 *VLRC* 28.

¹³⁹¹ MacCallum *et al* "Surrogacy: The experience of the commissioning couples" 2003 *HR* 1337.

¹³⁹² Golombok *Parenting* 27.

¹³⁹³ McNair 2004 *VLRC* 40.

¹³⁹⁴ Grotevant *et al* "Adoptive identity: How context within and beyond the family shape the developmental pathways" 2000 *FR* 379.

¹³⁹⁵ McNair 2004 *VLRC* 40.

¹³⁹⁶ Grotevant *et al* 2000 *FR* 379.

7.4.3.2.2 The donor-conceived child's experience

Shenfield argues that because donor-conceived children have not been subjected to family breakdown or being given away after birth, they are assumed less likely to require knowledge of the donor of materials that helps for their existence.¹³⁹⁷ Kirkman in contrast argues that donor-conceived children still exist within a culture that valorises genes, and may feel cheated of their heritage and suffer a crisis of identity.¹³⁹⁸

Surrogacy has been advocated within the ARTs field since it began and non-disclosure remains the policy in many states including Norway, Denmark, France and Spain. In most cases, arguments supporting secrecy largely revolve around protection of the privacy of the non-biological parent regarding his or her infertility and others have claimed that disclosure to the child would damage the child's identity and relationship with her or his family.¹³⁹⁹

Some donor-conceived children describe the feeling that their conception was impersonal, and that the donor is a deliberate stranger who has chosen to avoid parenting responsibility. The feeling like a "freak" or the product of an experiment is described. Others have the feeling that they don't belong to their families.¹⁴⁰⁰

In short, it is important to note that genes are significant to many donor-conceived adults and they suffered severe disruption and a fractured sense of identity as a result of not being able to know their biological origins.¹⁴⁰¹

¹³⁹⁷ Shenfield "To know or not to know the identity of one's genetic parent(s): A question of human rights?" in Healy *et al* (eds) *Reproductive Medicine in the Twenty-first Century* 81.
¹³⁹⁸ Kirkman "Parents' contributions to the narrative identity of offspring of donor-assisted conception" 2003 *SSM* 2231.
¹³⁹⁹ McNair 2004 *VLRC* 41.
¹⁴⁰⁰ McNair 2004 *VLRC* 43.
¹⁴⁰¹ Kirkman "Genetic connection and relationships in narratives of donor assisted conception" 2004 *AJETS* 15.

7.5 PARENTAGE RECOGNITION AND RELATION BREAKDOWN IN AUSTRALIAN HOMOSEXUAL FAMILIES

7.5.1 Parentage recognition in homosexual families

Parentage is about determining the person(s) who can be considered the parent(s) of the child in different forms of families. However, for the purpose of this section, the focus will be on person(s) who can be considered the parent(s) of children born through ARTs in homosexual families within Australian jurisdictions.

In Australia there are laws governing parentage in homosexual families at federal as well as state and territory level. Across Australia, the position until 2007 was that if a woman who gave birth had a male partner, he could be recognised on the birth certificate as the child's legal parent, whether or not he was the child's biological parent. In some parts of Australia, the law was amended to allow a birth mother's female partner who is in the same position to be recognised and registered as the child's legal parent, but in other parts, this process has not yet taken place.¹⁴⁰²

Governments in the Australian Capital Territory, the Northern Territory and Western Australia have amended their status of children laws. According to these amendments, children born in these parts of Australia into a family or to a couple, whether the couple is comprised of a woman and a man or a woman and a woman, are able to have both parents recognised, and recognised as such in their birth certificates.¹⁴⁰³

¹⁴⁰² Short "It makes the world difference": Benefits for children of lesbian parents having their parents legally recognised as their parents" 2007 *GLIPR* 5.

¹⁴⁰³ See Artificial Conception Act 1985 (WA) s 6A; Status of Children Act 1998 (NT) s 5DA; and Parentage Act 2004 (ACT) s 8(4). In terms of state and territory laws, all children born to lesbian couples through assisted conception now have a second parent if they are living in Western Australia or the Northern Territory and laws in each state and territory presume that the person listed as parent on the register of another jurisdiction is indeed a parent.

7.5.1.1 Federal laws on parentage

According to Sifiris, the Australian laws that govern the parentage of children born as a result of ARTs and the status of sperm donors is an “unsatisfactory patchwork of legislation”.¹⁴⁰⁴ Sifiris argues that there is a complexity of relationship between federal and state legislation. While states have power in relation to adoption, child protection, ARTs and the parentage of children conceived through ARTs, federal jurisdiction is concerned with parental responsibility, maintenance, child support, residence and contact of children.¹⁴⁰⁵

While this complexity will be made clear with the analysis of state and territory laws on parentage, it is important to note that under the Australian federal law, it is section 60H of the Family Law Act 1975 which is relevant in determining who counts as a parent for the purpose of the Act when the child is born following the use of ARTs.¹⁴⁰⁶

According to the Act, a child born as a result of ARTs is the child of its birth mother and her consenting partner (if any) provided that the latter qualifies as a partner under Part VII of the Act, and hence has parental responsibility.¹⁴⁰⁷

Section 60H (1) of the Family Law Act 1975 (Cth) was amended in 2008 to allocate parental responsibility in cases of homosexual parenting.¹⁴⁰⁸ This relevant provision of this section reads as follows:

- “(1) If:
- (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the other intended parent); and
 - (b) either:

¹⁴⁰⁴ Sifiris “Known sperm donor: To be or not to be a parent” 2005 *JLM* 231.

¹⁴⁰⁵ Sifiris 2005 *JLM* 231.

¹⁴⁰⁶ Zanghellini “Lesbian and gay parents and reproductive technologies: The 2008 Australian and UK Reforms” 2010 *FLS* 235.

¹⁴⁰⁷ Section 60H (1) of the Family Law Act 1975 (Cth).

¹⁴⁰⁸ Zanghellini 2010 *FLS* 236.

- (i) the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or
 - (ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent; then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act:
- (c) the child is the child of the woman and of the other intended parent; and
 - (d) if a person other than the woman and the other intended parent provided genetic material – the child is not the child of that person.
-
- (3) If:
 - (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and
 - (b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man; then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act. The Section 60 H (1) as amended can apply to lesbian as well as gay couples.”

7.5.1.1.1 Lesbian couples

The application of section 60H (1) of the Family Law Act 1975, as amended, to lesbian couples results in parentage being determined as follows:

“In a lesbian Couple, the child born as a result of ARTs is the child of both women, regardless of biological connection, if they both have consented to the carrying out of the procedure; and as parents of the child, both women will also automatically have parental responsibility for it”.¹⁴⁰⁹

¹⁴⁰⁹ Zanghellini 2010 *FLS* 236.

However, it is notable that the sperm donor, although having consented to the use of his genetic materials, will not according to section 60H(1) of the Family Law Act 1975 as amended be regarded as the child's parent.¹⁴¹⁰

In her comment on this section, Milbank contends that lesbian-led families built through assisted conception are families of intention in which biology is not determinative of individual relationships with each other. She goes on confirming that parental status in these families follows the family form rather than the genetic link. Therefore the birth mother and non-birth mothers are equally mothers.¹⁴¹¹

Although in the case of lesbian couples, a sperm donor is not regarded as a parent, the sperm donor will be regarded as a parent and hence has parental responsibility for a child born following the use of his genetic materials, when under a prescribed state and territory law, he qualifies as such, or when the child is born to a single mother.¹⁴¹² This can result in a child born to a lesbian couple following the use of ARTs having two or more parents.

7.5.1.1.2 Gay couples

When gay men wish to build their own families in Australia, they make use of altruistic surrogacy. Altruistic surrogacy is a procedure in which a woman (the surrogate mother) carries a child on behalf of a couple or a single gay person (commissioning parents) without receiving a payment, and relinquishes all parental rights when the child is born.¹⁴¹³

In Australia, only altruistic surrogacy as defined above is legal. It is important to note that surrogacy may or may not require the use of assisted reproductive technologies. Some surrogacy arrangements involve the surrogate mother carrying a child that is

¹⁴¹⁰ S 60H (1) of the Family Law Act 1975 as amended.

¹⁴¹¹ Milbank "The limits of functional family: Lesbian mother litigation in the era of the eternal biology" 2008 *IJLPF* 31.

¹⁴¹² Section 60H (3) of the Family Law Act 19975 as Amended.

¹⁴¹³ Milbank 2008 *IJLPF* 31.

her own genetic offspring. Such a child may be conceived by sexual intercourse, by the woman inseminating herself, or by medically supervised artificial insemination. In either case, the sperm of the commissioning father is usually used. Alternatively, the child may be the genetic offspring of other persons. In this case, assisted reproductive technologies must be employed – an embryo created in vitro, is transferred to the surrogate mother’s uterus. This embryo will be created using eggs and sperm of the commissioning couple, or eggs provided by an egg donor, fertilised by the commissioning father.¹⁴¹⁴

Section 60HB of the Family Law Act 1975 (Cth) provides that a person is a parent of a child born under a surrogacy arrangement and hence has parental responsibility for such child if, under state and territory law, a court has made an order to the effect that he or she is the child’s parent.

This would suggest that in Australia the intended parents are not automatically presumed the parents of the child born following altruistic surrogacy. For the parental status to be transferred to them, they must apply and obtain a surrogacy parental order. Intended parents who want to apply for parental orders must satisfy many requirements of which many are mandatory. The criteria for surrogacy order applications are beyond the scope of this study and will not be discussed. Laws governing parentage in the states and territories of Australia deserve some comments.

7.5.1.2 *State and territory laws on parentage*

7.5.1.2.1 Introduction

The survey of state and territory parentage laws in Australia reveals a lack of uniformity in laws governing parentage in each state and territory. For example, while the Australian Capital Territory does not cater for a single gay man to father a child through surrogacy, it does cover gay couples where one of them is a sperm

¹⁴¹⁴ Seymour and Magri 2004 *VLRC* 18.

donor.¹⁴¹⁵ The Victorian law on the other hand accommodates both single gay men and couples as potential commissioning parents and does not require that one of them be the sperm donor.¹⁴¹⁶ Therefore a good understanding of parentage in Australia also requires an analysis of each state and territory's laws on parentage. State and territory laws relating to parentage vary in terms of lesbian and gay couples.

7.5.1.2.2 Victoria

In Victoria, the Status of Children Act 1974 (Vic) determines who the parents of a child born as a result of a medical procedure are. The Act defines the situations in which parentage can be recognised. Section 10C of the Act states that when a married woman has undergone artificial insemination using donor sperm, the husband of that woman is presumed to be the father of the resulting child and the sperm donor is presumed not to be the father.

Similarly, when the procedure involves an ovum or embryo transfer (whether or not the woman's ovum or husband's sperm is used) the woman's husband is presumed to be the father.¹⁴¹⁷

It is notable that this law does not include the sperm or egg donor in the list of the child's presumed parents and more importantly the law does not cover gay and lesbian's parentage.

7.5.1.2.3 Western Australia

In Western Australia, parentage of children born as a result of ARTs is determined under the Artificial Conception Act 1985 (WA). This Act provides as follows:

¹⁴¹⁵ Rhoades and Burns "The politics of the primary caregiver presumption: A conversation" 1999 *AJFL* 233.

¹⁴¹⁶ Boyd and Rhoades "Reforming custody laws: A comparative study" 2004 *IJLPF* 119.

¹⁴¹⁷ Section 10C of the Status of Children Act 1974 (Vic).

- (a) When a woman uses a donated ovum, she is the mother of any child born as a result of the pregnancy;
- (b) When a married woman undergoes an artificial fertilisation procedure with the consent of her husband, the husband of that woman is presumed the father of the resulting child;
- (c) When a woman who is in a *de facto* relationship with another woman undergoes an artificial fertilisation procedure with the consent of her *de facto* partner, the *de facto* partner of the pregnant woman is conclusively presumed to be a parent of the child born as a result of the pregnancy.¹⁴¹⁸

It should be noted that, like in Victoria, the sperm or ovum donor is not the presumed parent of the child born using his or her genetic materials.

7.5.1.2.4 South Australia

The Family Relationship Act 1975 (SA) regulates parentage of children born following ARTs. This Act provides as follows:

- (a) A woman who gives birth to a child is the mother of the child notwithstanding the fact that the child was conceived by the fertilisation of an ovum taken from some other woman;
- (b) When a married woman undergoes an artificial fertilisation procedure with the consent of her husband, the husband is the father of any child born.¹⁴¹⁹

In South Australia the ovum and sperm donor are not parents of children born using their sperm or ovum. South Australian laws regulating parentage do not have provisions applying to homosexual couples.

¹⁴¹⁸ Section 5, 6(1) (a), (b) & 6 A (1) (a) & (b).

¹⁴¹⁹ Section 10 C, 10 D (a) and (b).

7.5.1.2.5 New South Wales, Tasmania and Queensland

The laws governing parentage in these states are the Status of Children Act 1996 (NSW), the Status of Children Act 1978 (Qld) and the Status of Children Act 1974 (Tas). These three Acts have similar provisions relating to parentage within the jurisdictions of these states. The Acts provide as follows:

- Where a married woman or a woman in a *de facto* relationship becomes pregnant as a result of a fertilisation procedure she is presumed to be the mother and her husband, provided he consented to the procedure, is presumed to be the father;
- Where a woman becomes pregnant by means of a fertilisation procedure using sperm obtained from a man who is not her husband, the donor is presumed not to be the father; or
- Where a woman becomes pregnant by means of a fertilisation procedure using another woman's ovum, the donor is presumed not to be the mother.¹⁴²⁰

7.5.1.2.6 The Northern Territory

The Northern Territory has not enacted clear laws governing parentage of children born following the use of ARTs.

7.5.1.2.7 The Australian Capital Territory

The parentage Act 2004 (ACT) regulates parentage of a child born using ARTs in the Australian Capital Territory. The Act provides as follows:

- If a woman undergoes a procedure as a result of which she becomes pregnant, the woman is conclusively presumed to be the mother of the resulting child.

¹⁴²⁰ Section 14 of the Status of Children Act 1996 (NSW); subsection 15–17 of the Status of Children Act 1978 (Qld); section 10C the Status of Children Act 1974 (Tas).

- If another woman produced the ovum used in the procedure, the other woman is conclusively presumed not to be the child’s mother.
- If the woman undergoes the procedure with the consent of her domestic partner, the partner is conclusively presumed to be a parent of the child.
- If a man other than the woman’s domestic partner produced semen used in the procedure, the man who produced the semen is conclusively presumed not to be the father of the child.

It should be noted that under section 169 of the Legislation Act 2001 (ACT) a reference to a person’s “domestic partner” is a reference to someone who lives with a person in a domestic partnership and includes a reference to a person’s spouse. The significance of this is that, when two women are in a same-sex relationship, and one of them gives birth as a result of ART, her partner is presumed to be a parent of the child.¹⁴²¹

7.5.2 The breakdown of homosexual relationships

Every human relationship has a beginning and an end. By the breakdown of homosexual relationships, reference is made to the end of a homosexual union. A homosexual relationship may end for various reasons which are beyond the scope of this study. Rather, the study is more interested to disputes that may arise when the relationship ends.

7.5.2.1 Disputes arising at the relationships breakdown

Many disputes may arise when a homosexual relationships ends. These include parenting disputes, disputes relating to child support, disputes relating to maintenance, et cetera. For the purpose of this study, attention is given only to parenting disputes and child support which directly affect children born and raised by the two partners who are now separating.

¹⁴²¹ Section 11 of Parentage Act 2004 (ACT).

While the *de facto* and registered relationships receive much the same recognition as marriages in relation to other laws, a significant difference between the two lies in the mechanisms for ending the relationship. To obtain a divorce, married couples must first prove that their marriage has broken down irretrievably. The law deems a marriage to have irretrievably broken down if the parties have been separated for a period of twelve months. Where there are children of the marriage, the court must also be satisfied that proper arrangements have been made for the care, welfare and development of those children before a divorce order will take effect.¹⁴²²

In contrast, legally ending a registered relationship is achieved simply upon the application of one or both parties to the registrar. Alternatively, a registered relationship will automatically end upon either the marriage or death of one or both of the parties. When an application to end a registered relationship is made, there is no requirement for the court to consider the welfare of any children of the relationship. Thus, it is a much simpler process to dissolve a registered relationship than it is to dissolve a marriage. *De facto* relationships that are not registered can come to an end without the need to take any steps to legally dissolve the relationship.¹⁴²³

7.5.2.1.1 Parenting disputes

The Family Court deals with all disputes arising in relation to children following the breakdown of a relationship. This includes where the child will live and who the child will spend time with. The primary consideration in any application before the court is what is in the best interests of the child.

Whilst the court can hear applications from anyone concerned in the care, welfare or development of a child, legal parents are also entitled to certain additional

¹⁴²² Tasmania Law Reform Institute [www.http//law.utas.edu.au/reform](http://law.utas.edu.au/reform) (date of use 20 January 2015) 12.

¹⁴²³ Tasmania Law Reform Institute [www.http//law.utas.edu.au/reform](http://law.utas.edu.au/reform) (date of use 20 January 2015) 12.

considerations (such as whether it is possible to grant each parent equal time, or substantial and significant time with the child).¹⁴²⁴

Legal parents include:

- adoptive parents (or the partner of an adoptive parent who consented to the adoption)
- lesbian mothers with children born through assisted conception
- parents recognised under surrogacy parentage orders.¹⁴²⁵

Legal parents have responsibilities toward their child.

7.5.2.1.2 Child support

Persons who are recognised as the legal parents of a child are liable to pay child support. Following reforms in 2008 to the Child Support (Assessment) Act 1989 (Cth), the Child Support Scheme has been the main avenue for pursuing child support from a same-sex partner after separation since 1 July 2009. Where parents cannot agree on their own, a parent can approach the Child Support Agency for an administrative determination of the liability of each parent for child support in accordance with a set formula.¹⁴²⁶

Because sperm donors are not legal parents, they are not liable for child support under the Child Support (Assessment) Act.¹⁴²⁷ However, the Act lists people who are liable for child support and defines the legal parents in some circumstances. Section 5 of the Child Support (Assessment) Act 1989 (Cth) stipulates as follows:

¹⁴²⁴ Kassasieh “Same-sex couples and their families” in Sheridan (ed) *The Law Handbook: Your Practical Guide to the Law in New South Wales* 1034.

¹⁴²⁵ Kassasieh in Sheridan (ed) 1034.

¹⁴²⁶ Kassasieh in Sheridan (ed) 1034.

¹⁴²⁷ Kassasieh in Sheridan (ed) 1034.

- Persons eligible to receive child support are the carers of a child, who may be a parent.
- Persons liable to pay child support are the parents of the child.
- For the purpose of a child conceived artificially, a parent is a person who is deemed to be a parent for the purposes of section 60H of the Family Law Act, and where the child is conceived in an altruistic surrogacy arrangement and a parentage order has been made and section 60HB of the Family Law Act applies to deem the intended parents to be legal parents (s 5 of the Child Support (Assessment) Act (CSAA))
- Child support liability arises in the following circumstances where child is conceived artificially:
 - In the case of a lesbian couple where one of them conceives artificially, either may be liable to pay, depending who has the primary care.
 - In the case of a gay male couple having a child via an altruistic surrogacy arrangement and who obtained a parentage order under the SCA, both are parents for the purposes of section 60HB of the Family Law Act and come within the definition of “parent” for the purposes of the CSAA, so either can be assessed to pay child support. However, if it was a commercial surrogacy arrangement, then neither is a parent and neither can be assessed to pay child support.
 - In the case of a lesbian couple having a child via an altruistic surrogacy arrangement, both are parents for the purposes of section 60HB of the Family Law Act, and therefore both is a parent within the definition of “parent” for the purposes of the CSAA, and either can be be assessed to pay child support. However, if it was a commercial surrogacy arrangement neither can be a parent for the purposes of section 60HB of the Family Law Act and neither can be assessed to pay child support.
 - A transgender person having a child via an altruistic surrogacy arrangement and who obtains a parentage order is a parent for the purposes of section 60HB of the Family law Act, and therefore is a parent for the purposes of the CSAA, and therefore can be assessed to

pay child support. However, if it was a commercial surrogacy arrangement, the person is not a parent for the purposes of section 60HB of the Family Law Act and cannot be assessed to pay child support.

- In the case of a co-parenting arrangement involving a single gay man or couple and a lesbian couple, neither of the men can be liable to pay child support to the lesbian couple, and if the lesbian couple separate, either of them may be liable to pay the other.

It is clear that the provisions of this section are intended to protect the child when the relationship of its parents comes to an end. This would suggest that irrespective of the form of the family in which the child is born and whether or not the child is born naturally or by means of ARTs; the interests of the child even beyond the relationship of its parents are a concern for the law in Australia.

7.6 THE BEST INTERESTS OF THE CHILD IN AUSTRALIA

7.6.1 Introduction

Australia is one of the countries in the world in which the best interests had been directly applied to children to be born as a result of ART technologies. The discussion of the best interests of the child will therefore begin by analysing how the unborn child is protected in Australia before analysing the application of the best interests of the child's criterion.

7.6.2 The protection of the unborn child in Australia

7.6.2.1 The judicial protection of the unborn child

Like in the USA where children are protected through Foetal Homicide Laws, It is well established law in Australia that a third party, who is not the mother of an unborn child, can be found to have owed a duty of care to that child for injuries caused to the

child while still in the womb of the mother.¹⁴²⁸ Any violent act of a third party on a pregnant woman that causes the unborn child in her womb to suffer injuries will cause that third party to owe a duty of care to the unborn child. In other words, an unborn child is protected from the injuries caused to it by a third party while this unborn child is still in the womb of its mother. The following case shows how the court applied this law. In 2011 through her tutor, Tamara sued the Western Sydney local health Network, claiming that when her mother attended the hospital and told the doctor that her first-born daughter had been diagnosed with chicken pox that very morning, she ought to have been given an injection of Varicella-zoster Immunoglobulin (VZIG). The court held that the defendant owed to the plaintiff a duty to take care and was in breach of that duty.¹⁴²⁹

This case clearly shows the court's concern for the protection the interests of unborn children by protecting them from the injuries that they may suffer from the negligence of a third person. In several other cases, Australian courts were faced with the question whether a duty of care should be extended to the mother of an unborn child for prenatal injuries sustained by the unborn child while in utero.

The courts answered this question in the affirmative, as it is demonstrated in the following cases. In *Lynch v Lynch*, for instance, the Court of Appeal of the New South Wales was required to consider whether a mother could be liable to her child, who was born with disabilities, in respect of injury caused to that child, while a foetus, by the mother's negligent driving of a motor vehicle. The court unanimously answered in the affirmative. Clarke JA held that the question before the court was very narrow and related specifically to a given situation; road accidents. Therefore the circumstances of the case did not require examination of the significant policy consideration.¹⁴³⁰

Eleven years later, in another case involving negligent driving by a pregnant woman that resulted in injuries suffered by her unborn child, the Queensland Court of

¹⁴²⁸ *Watt v Rama* [1972] VR 235.

¹⁴²⁹ *King v Western Sydney local Health Network* [2011] NSWSC 1025.

¹⁴³⁰ *Lynch v Lynch* (by her tutor Lynch) (1991) 25 NSLR 411, 415 (Clarke JA)

Appeals held that the fact that the negligent driver was the mother of the foetus was really incidental. The driver owes a duty of care to others within the vehicle, including any foetus within a passenger seat. The fact that the foetus is within the driver herself is only incidentally relevant.¹⁴³¹

All these cases are evidence of the judicial protection of the unborn child in Australia. However, it is interesting to note that as established in *Watt v Rama*, in Australia, a woman does not owe her unborn child a duty of care other than in the limited circumstance of car accidents.

7.6.2.2 *The legislative protection of the unborn child*

A survey of Australian criminal law reveals that some provisions protect unborn children from injuries they can suffer either from their mothers or third persons. The Crimes Act 1900 in New South Wales for instance contains provisions aimed at the protection of the unborn child.

Section 82 of this Act clearly prohibits a woman to procure her miscarriage by administering to herself any drug or any other noxious thing. The section reads as follows:

“Whosoever, being a woman with child, unlawfully administer to herself any drug or noxious thing, or unlawfully uses any instrument or other means, with intent in any such case to procure her miscarriage, shall be liable to imprisonment for ten years”.

Section 83 deals with a third person administering drugs to a pregnant woman with the intent of procuring her miscarriage. The section stipulates as follows:

“Whosoever, unlawfully administers to, or causes to be taken by, any woman, whether with a child or not, any drug or noxious thing, or unlawfully uses any

¹⁴³¹ *Bowditch v McEwan* [2002] QCA 172 (12) (De Jersey CJ).

instrument or other means, with intent in any such case to procure her miscarriage shall be liable to imprisonment for ten years”.

Lastly the section 84 of the Act concerns the supplying of the means of procuring miscarriage. The section states that:

“Whosoever unlawfully supplies or procure any drugs or noxious things or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used with intent to procure the miscarriage of any woman, whether with a child or not, shall be liable to imprisonment for five years”.

These provisions clearly reveal the intention of the legislature to protect the unborn child’s life. However, this protection does not seem to be unconditional. In other words, a close analysis of these provisions reveals that in some circumstances, a woman or a third party would be by the law authorised to procure a miscarriage and by that means end the life of unborn child in utero. Those circumstances are referred to as a lawful abortion. An abortion is lawful if it is necessary to protect the woman from serious danger to her life or her physical or mental health, provided that it is not out of proportion to the danger to be averted.¹⁴³² This would suggest that in the circumstances that the life of the unborn child will put the life or the health of the mother at risk, the life of the unborn child may be legally ended by legally procuring an abortion. This would also suggest that it is possible that the rights of the unborn child may conflict with the rights of his or her mother.

Throughout the world the use of ARTs to have children and build families sometimes results in conflicts between the rights of the unborn child and the rights of its intended parents. It is in this context that we address the issue of the application of the best interests of the child criterion in Australia.

¹⁴³² *R v Davidson* [1969] VR 667.

7.6.3 Application of the best interests of the child criterion in Australia

The application of the best interests of the child criterion in Australia will be assessed in analysing the regulation of ART technologies in Australia and discussing a few cases in which the child's best interests criterion was applied. Assisted reproductive technologies are regulated in Australia through different combinations of professional and ethical guidelines and specific ART statutes in some states. In view of the fact that this study is a critical legal analysis, a particular focus will be placed only on the specific statutes regulating ARTs in Australia.

The survey of Australian statutes regulating ARTs reveals that the best interests of the child is one of the main principles underpinning the legislative framework. For example, section 5 of the Assisted Reproductive Technologies Act (ARTA 2008) in Victoria, section 4 (ARTA 1998) in South Australia and section 3 (ARTA 2007) in New South Wales embody the principles that the best interests of the unborn child are the primary consideration in ART procedures in Australia. The best interests of the unborn child in Australia are interpreted as to mean among other interests, the well-being of the child. This approach is made clear in Victorian Infertility Treatment Act 1995. In terms of the Infertility Treatment Act 1995, the welfare and interests of any person born or to be born as a result of a treatment procedure are paramount.¹⁴³³ What is interesting in this provision is that the Infertility Act 1995 protects not only the welfare of the ART-born child but also the welfare of the ART child to be born. This would suggest that the life and the welfare of the developing embryo are protected by the Victorian law.

A closer look at the ART statutes reveals that some measures taken in terms of the regulation of ARTs are common to many of the states, although their content might vary from one state to another. These measures include the establishment of donor registers, the restriction of access to ART treatment, and the imposition of eligibility criteria. All these measures are claimed to be taken for the purpose of ensuring the

¹⁴³³ Infertility Treatment Act 1995.

well-being of the child to be born using ART procedures.¹⁴³⁴ It is interesting for the purpose of this thesis to understand how these measures protect the best interests of the child.

7.6.3.1 Donor registers

In Victoria and South Australia, ART legislations were introduced since 1980. Since that time donor anonymity was seen as being in the interest of the infertile couple, the donor and even the child. Considering that infertility is a private matter and a potential source of stigma for the infertile male and the entire family, clinicians used to advise the parents of the donor conceived child not to tell their offspring of their origins.¹⁴³⁵ In short, from 1980 to the end of 2009, anonymity of the donor was a rule in ART procedures. There is now a shift in the public's perception of infertility – this, coupled with the growing importance of genetic information in medical decision-making and individual life choice has resulted in a reconsideration of the ideal of secrecy surrounding the donor identity.¹⁴³⁶ It is reported that donor-conceived children have experienced ongoing negative effects because they were denied this information. According to Mahlstedt *et al* most of them wanted to be told of their conception when they were young and wanted to meet with their donors and half siblings.¹⁴³⁷

In response to this shift, the State of Victoria established donor registers. Victoria is the first Australian state to have established these registers under the Infertility (Medical Procedures) Act 1984 (VIC), and the Infertility Treatment Act 1995 (VIC). These statutes provide that information about the donors can be accessed on request by interested children assisted by their parents or guardians when they turn eighteen. In terms of new legislation¹⁴³⁸ it is now possible for donor conceived

¹⁴³⁴ Thorpe *et al* "In the best interests of the child? Regulating assisted reproductive technologies and the well-being of the offspring in three Australian states" 2012 *IJLPF* 260.

¹⁴³⁵ Thorpe *et al* 2012 *IJLPF* 262-3.

¹⁴³⁶ Thorpe *et al* 2012 *IJLPF* 261.

¹⁴³⁷ Mahlstedt, Labounty and Kennedy "The view of adult offspring of sperm donation: Essential feedback for the development of ethical guidelines within the practice of assisted reproductive technology" 2010 *FS* 2239.

¹⁴³⁸ ARTA 2008 (VIC).

children born in Victoria after 1 January 2010 to find out the method of their conception from their birth certificate.¹⁴³⁹

Similarly, under ARTA 2007 (NSW), a central donor register maintained by the Department of Health has been established. Donor-conceived children born after 1 January 2010 may apply to the Department for identifying information about their genetic genitors when they turn eighteen.¹⁴⁴⁰

7.6.3.2 *Imposition of the eligibility criteria*

Since 1989, only heterosexual married couples in Australia had access to infertility treatment. This position was strongly challenged in two cases, *MW v Royal Women's Hospital*,¹⁴⁴¹ and *McBain v Victoria*.¹⁴⁴² The outcome of these cases was that heterosexual couples in de facto relationships, single and lesbian women were also granted access to fertility treatment provided that they satisfy the requirement of clinical infertility.¹⁴⁴³

In Victoria, the new legislation ARTA 2008 (VIC) introduced a new requirement.¹⁴⁴⁴ This requirement provides as follows: All women or couples seeking treatment must undergo compulsory criminal record and child protection order checks, even if they were using their own sperm and eggs or already had children through ARTs. In other words, there is a presumption against all women and couples seeking infertility treatment who have criminal records for sexual or violent offences, or if a child protection order had been made removing a child from custody or guardianship of the woman or her partner.¹⁴⁴⁵

¹⁴³⁹ Blyth and Frith "Donor-conceived people's access to genetic and biographical history: An analysis of provisions in different jurisdictions permitting disclosure of donor identity" 2009 *IJLPF* 181.

¹⁴⁴⁰ Thorpe *et al* 2012 *IJPF* 262.

¹⁴⁴¹ *MW v Royal Women's Hospital* (1997) EOC 92-886.

¹⁴⁴² *McBain v Victoria* (2000) 99 FCR 116.

¹⁴⁴³ Thorpe *et al* "New assisted reproductive technology laws in Victoria: A genuine overhaul or just a cut and paste?" 2011 *Journal of LM* 845.

¹⁴⁴⁴ Sections 11, 12 and 14.

¹⁴⁴⁵ Thorpe *et al* 2012 *IJPF* 264.

In South Australia, ARTA 1988 introduces a similar requirement referred to as a “medical need condition” for accessing fertility treatment. This requirement was introduced in addition to the criminal record check and the removal from custody requirement. This would suggest that all women and couples seeking infertility treatment must prove that they are in need of the treatment and are not likely to pass serious illnesses to the resulting children. They further have to prove that they have not been convicted for a sexual offence involving a child or a violent offence. They also have to prove that a child have not been removed from their custody or guardianship.¹⁴⁴⁶ If they satisfy these requirements they then qualify for infertility treatment.

It is important to note that all these measures were introduced with the aim of protecting the best interests of the child, in particular the well-being of the child. Researchers, including Tobin, have attempted to assess this claim.

Tobin assessed the test for eligibility for ARTs from the perspective of a child’s rights and best interests.¹⁴⁴⁷ In other words, Tobin wanted to know whether parental eligibility for ART was in the best interests of the child in Australia. Tobin argued as follows in this regard:

“In its current format, the test appears to be inconsistent with the guiding principles of the Infertility Treatment Act 1995 which, as noted above, require that the welfare and interests of any person born or to be born as a result of a treatment procedure are paramount. Despite this overriding requirement, eligibility is determined solely by reference to issues concerning a woman’s fertility. This creates an adult-centric test that involves no assessment of the rights and interests of the child who may be born as a result of such a procedure, let alone making such concerns the paramount consideration. Moreover, the current interpretation of the test effectively makes it discriminatory and adult-centric by introducing factors, namely the sexuality of a woman and/or her marital status, which have no necessary bearing on the ability of a woman to care for a child.... If the test for eligibility for assisted reproductive technologies were truly to be consistent with the rights of children under the

¹⁴⁴⁶ Thorpe *et al* 2012 *IJPF* 264.

¹⁴⁴⁷ Tobin 2004 *VLRC* 19.

Convention (and reflect the principle under the Infertility Treatment Act that the welfare and interests of a child must be paramount), fertility must be an irrelevant consideration as it has no bearing on the ability of a person to care for a child”.¹⁴⁴⁸

This would suggest that in the test for eligibility for ARTs the major concern is the interests of the intended parent(s) to have a child; no reference is made to the interests of the child to be born from ARTs. Does this mean that ARTs are not in the best interests of the child? The answer to this question is provided in the next chapter.

The analysis of the judicial activities in Australia reveals that Australia did not seem concerned with the child’s best interests when deciding cases of children born as a result of ARTs. Australia is recognised as the country with the most complete and child-focused model of the best interests standard.¹⁴⁴⁹ The Australian legal system is known to be too much concerned with the child, almost to the point of being unethically against the weights of parents’ rights.¹⁴⁵⁰ This is accomplished through the concept known as the “paramountcy provision”, which was introduced in 2006, and which states as follows:

“In deciding whether to make a particular order in relation to child, a court must regard the best interests of the child as the paramount consideration.”¹⁴⁵¹

This would suggest that the child’s best interests are absolutely placed above the interests of other parties involved.¹⁴⁵² In practice, this provision aims to reduce the amount of conflict between parents, which alleviates the amount of harm suffered by children as a byproduct of divorce.¹⁴⁵³

¹⁴⁴⁸ Tobin 2004 *VLRC* 19-20.

¹⁴⁴⁹ Elrod and Dale “Paradigm shifts and pendulum swings in child custody: The interests of children in the balance” 2008 *FLQ* 404–405.

¹⁴⁵⁰ Crowe and Toohey “From good intentions to ethical outcomes: The paramountcy of children’s interests in the Family Law Act” 2009 *MULR* 392.

¹⁴⁵¹ Crowe and Toohey 2009 *MULR* 392.

¹⁴⁵² Crowe and Toohey 2009 *MULR* 392

¹⁴⁵³ Crowe and Toohey 2009 *MULR* 392

Although this sounds child protective, in practice there is a case in which the Queensland court has reached a confusing decision. In *Dudley and Anor & Chedi*,¹⁴⁵⁴ an opposite sex couple from Queensland entered into a commercial surrogacy arrangement with a Thai woman. The application for parenting orders related to two children who were artificially conceived using the intended father's sperm donation with donated eggs from a Thai woman other than the surrogate mother. After the children were born they were taken into the care of the intended parents. The application for parenting orders was made with the consent of the surrogate mother. The court raised as a general policy the question whether or not the requested parenting orders should be made, "... which could be perceived in some sense to sanction acts which were illegal in Queensland at the relevant time and which were against public policy..."¹⁴⁵⁵ The court stated that the paramount consideration about the orders sought is the best interests of the children.¹⁴⁵⁶ The court decided that it was in the best interests of the children that the intended parents have equal shared responsibility for the children.¹⁴⁵⁷ However, the court stated that it would direct the Registrar to send a copy of the reasons for the judgement to the office of the Director of Public Prosecutions for consideration of whether a prosecution should be instituted against the applicants.¹⁴⁵⁸

It is difficult to reconcile the court's finding that it is in the best interests of the children in this case to make the orders sought granting equal shared parental responsibility to the intended parents, whilst at the same time referring these people to the Director of Public Prosecutions for consideration of prosecution. How a criminal prosecution of people seeking to become parents is going to promote the best interests of the child is difficult to understand.

Although the application of the best interests of the child criterion in Australia seems to have some similarities with the application in USA, Australian statutes clearly state that factors to be considered when engaging in the analysis of the best interests of

¹⁴⁵⁴ [2011] FamCA 502.

¹⁴⁵⁵ [2011] FamCA 502 para [38].

¹⁴⁵⁶ [2011] FamCA 502 Para [38].

¹⁴⁵⁷ [2011] FamCA 502 Para [38].

¹⁴⁵⁸ [2011] FamCA 502 Para [44].

the child include the welfare and interests of any person born or to be born as a result of ARTs. The Victorian Infertility Act 1995, for instance, emphasises that these factors are paramount in the process.

However, courts have proven to only consider the interests of adults, like in the USA, when confirming the preconception agreements.

7.7 INTERIM CONCLUSION

Homosexual families are recognised in Australia at federal level as well as at state and territory level. Although at federal level little has been done in this regard, state and territory laws underwent major changes to include homosexual unions in many areas covered by those laws.

The debate on the constitutionality of the authority of the commonwealth parliament to legislate on homosexual marriage is an ongoing one. Scholars anticipated the way the High Court of Australia will deal with this issue. Until the court decides on the issue it is difficult to predict which interpretation the court will give to the term marriage in the Constitution.

Homosexual people can have access to ARTs in Australia. Each state and territory has enacted laws enabling or denying access to some procedures.

Parentage in homosexual families within the jurisdiction of Australia has been established based on family law at federal level and various Acts at state and territory level. Efforts had been made through several law amendments to ensure that a child born as a result of ARTs has two parents.

Australian law also protects children in homosexual families when the parents can no longer live together. Mechanisms have been put in place to ensure that disputes that arise at the parents' relationship breakdown are settled in the best interests of the

child and that people liable for child support will not fail to fulfil their obligations in this regard.

The best interests of the child are an important criterion that was used in introducing new legislation regulating ART procedures in Australia. The same criterion was also used in the assessment of the eligibility to access fertility treatment in some Australian states. It can be argued that the measures introduced in Australia in respect of the protection of the best interests of the unborn child are adequate and enough for the purpose of the effective protection of the best interests of children to be born using ARTs.

It is important for that purpose to consider the adverse effects of being born as a result of ARTs in general, and those of growing up in homosexual families in particular as discussed in chapters three and four of this thesis and recommend some measures that would eliminate or alleviate those effects on unborn children expected to be born as a result of ARTs. This aspect will be discussed in more detail in the next chapter.

CHAPTER EIGHT

CONCLUSION

8.1 INTRODUCTION

The starting point of this chapter is a discussion of the South African approach to ARTs and homosexual families created through these new medical reproductive technologies. Such a discussion is of the highest importance for this study in that the appropriate approach to ARTs and families built as a result of ARTs will be determinant of the adequate protection of the best interests of the child. Such approach will be a guideline for legislators, judges and policy makers in their decisions.

The chapter will address the following question: What is the South African approach to ARTs and homosexual families created as a result of the use of ARTs? The importance of the answer to this question can be summarised in the two following points:

- (a) The answer to the above question will first help us determine whether the South African approach to assisted reproductive technologies is parent-focused, child-focused or a nuanced approach. This will in turn require a description and analysis of each of these approaches with reference to the law regulating assisted reproductive technologies in South Africa. The answer to the abovementioned question will also be of assistance in determining whether South Africa uses an equality approach or a more realistic approach to homosexual families built through assisted reproductive technologies.

- (b) The answer to the above question will secondly be of assistance in efforts to determine whether the provisions relating to the regulation of ARTs in South Africa are appropriate and afford the expected protection to the best interests of the child.

The discussion on the South African approach to ARTs and homosexual families created through ARTs is followed by the comparative conclusions. Those conclusions are drawn from the analysis of the best interests of the child criterion in the compared countries. The chapter will then address concluding remarks followed by some proposals of law reform.

8.2 THE SOUTH AFRICAN APPROACH TO ASSISTED REPRODUCTIVE TECHNOLOGIES AND FAMILIES CREATED THROUGH ASSISTED REPRODUCTIVE TECHNOLOGIES

8.2.1 The South African Approach to assisted reproductive technologies

In order to better understand the South African approach to assisted reproductive technologies, I have developed three approaches which in my view are relevant when analysing ARTs. These are the following: the parent-focused approach, the child-focused approach and a nuanced approach. It is important for the purpose of this thesis to briefly discuss each of these approaches and to determine which one South Africa has adopted.

8.2.1.1 Different approaches

(a) The parent-focused approach

The parent-focused approach gives more weight to the right of the prospective parents to reproduce. This would suggest that ART providers and the state are mostly concerned by the desire of the parents to have a child. All the efforts are made to make the parents' desire a reality. The application of this approach imposes on the state the obligation of making available ART institutions within the country for infertile parents to have children. In this context, surrogate motherhood agreements or contracts were conceived and regulated in such a way to ensure that the prospective parents will have the resulting child handed over to the intended parents after birth. Similarly, the regulation of artificial fertilisation focuses on the success of the procedure, which is a live birth. In short, the parents' focused approach to

assisted reproductive technologies requires that all the means be made available for adults who desire to have a child to use them and have the child they have desired.

(b) The child-focused approach

The child-focused approach is the approach that gives more weight to the interests of the ARTs-born child. All the efforts are focused on the well-being of the child born as a result of ARTs. The state's obligation in this context is not merely to make available ART institutions, but also to make sure that appropriate medical and social measures are taken into consideration for the well-being of the child born in those institutions. This approach requires ART providers to make sure that the child resulting from the use of their expertise is healthy and free from any birth defects. This requirement also applies on the state and on the parents.

I am aware of the issues the two first approaches raise. It is clear from the description of the first approach that there is no room for the interests of the child. All arrangements are made solely with the purpose of helping the parents to have a child. Given the harm ARTs may cause to the resulting child it is difficult to apply the second approach. This approach would require zero harm tolerance, which cannot be guaranteed by ART providers as some harm that ARTs cause to the resulting child are even inherent to the procedures. There is therefore a necessity for another approach that would require a proper consideration of the interests of the prospective parents and the interests of the resulting child.

(c) The nuanced approach

The nuanced approach takes into consideration the interests of the parents who desire to have a child and the interests of the child who is born as a result of the use of ARTs. This approach calls for "minimum harm tolerance" when dealing with ART procedures. This would suggest that only a minimum harm to the child resulting from ARTs can be reasonably accepted. In other words, the state, ART providers and the

prospective parents must make sure that the ARTs-born child is either completely healthy or has minor birth defects or other health challenges.

8.2.1.2 *The approach adopted in South Africa*

A closer analysis of the statutes regulating ARTs in South Africa reveals that the parent-focused approach is prevailing in South Africa. Section 1 and 294 of Children's Act, and section 12 of the National Health Act provide some insights of the South African approach to ARTs. While section 1 of the Children's Act defines the surrogate motherhood agreement, section 294 provides the conditions for the validity of the contract. Section 12 of the National Health Act determines the number of zygotes or embryos that may be transferred to the recipient.

Sections 1 and 294 were commented in length in chapter three.¹⁴⁵⁹ It is clear from the discussion of these two sections that the definition of the surrogate motherhood agreement and the conditions for its validity are entirely in the interests of the parents. The prospective parents' desire to have a child was the major concern that motivated the drafters of these sections. They focused on the fact that a child must be born and handed over to those who desired to have it. Although the interests of the child to be born, including the general welfare of the child, a stable environment, and precautions to be taken if one or both commissioning parents die, are mentioned in section 295(d) and (e) of the Children's Act; it is important to note that the parent-focused approach still prevails in South Africa. The critical time for the child to be born as a result of ARTs is when he or she is still in the mother's womb. It is at that moment that she or he is still a foetus that his or her best interests must be protected. If he or she is born with genetic defects, being born in a stable home environment will not help reverse this unfortunate condition which can be prevented rather than cured. The drafters of the Children's Act seem to be concerned about curing the condition of that child rather than preventing it. They viewed ARTs mainly as a means of enabling those couples or individuals who could not naturally reproduce to have children irrespective of the effects on the health conditions of the

¹⁴⁵⁹ See Para 3.4.1 above.

child. This approach was adopted in a relatively recent case heard in the Pretoria High Court. In *Ex parte matter between WH, UVS, LG, BJS*,¹⁴⁶⁰ a case in which two male partners, respectively Dutch and Danish citizens, domiciled in South Africa, who had been in a relationship for eight years and who concluded a marriage in South Africa in 2010, approached the court for the confirmation of a surrogate motherhood agreement. The court confirmed the agreement and held as follows:

“Surrogacy was not recognised in South Africa before the enactment of the Act even though there have been many reported instances of informal surrogacy being practiced. The Act now provides a mechanism for many who desire a child and for whom informal surrogacy is not an option. This has understandably resulted in a growing number of applications in the division seeking the confirmation of the court of surrogacy arrangement.”¹⁴⁶¹

This view of the court is consistent with the parent-focused approach; it confirms that the surrogacy agreement is a mere mechanism for infertile heterosexual individuals and couples as well as homosexual partners, irrespective of their fertility status, to have children if that is their desire.

In addition, the provisions of section 12 of the National Health Act reveal the carelessness of the drafters of the Act with regard to the health of the child resulting from the artificial fertilisation. Section 12 of the National Health Act reads as follows:

“No more than three zygotes or embryos may be transferred to the recipient during an embryo transfer procedure, unless there is a specific medical indication to the contrary”

In other words, in the absence of any medical indication to the contrary, the maximum of three embryos be transferred to the woman who is artificially fertilised during an embryo transfer. This would suggest that the National Health Act allows

¹⁴⁶⁰ 29936/11 Para [15].

¹⁴⁶¹ 29936/11 Para [3].

the transfer of more than one embryo. As already pointed out in chapter four, the transfer of more than one embryo often results in multiple pregnancies.¹⁴⁶² Multiple pregnancies as discussed in length in chapter four is associated with a long list of birth defects and illnesses that usually increase the rate of infant morbidity.¹⁴⁶³

In the efforts of increasing the chances for the prospective parents to have a child, the National Health Act has proven itself to be parent-focused by failing to address the health of the child that will result from ART procedures.

From the above discussion, it is clear that South Africa has adopted a parent-focused approach to ARTs. It is worth remembering that the parent-focused approach to ARTs is essentially characterised by the failure to consider the interests of the resulting child. This approach encourages individuals and couples, in particular those of the same sex, to reproduce even though the child could be born with illnesses or disabilities. This approach is inconsistent with the best interests of the child. It is interesting to ask why South Africa has adopted such an approach to ARTs. The answer to this question is simple; it is probably in an effort to correct the mistakes committed during the apartheid regime that the South African Constitution sought to treat all persons equally and to avoid any unfair discrimination, inter alia based on sexual orientation. This may also explain the South African approach to homosexual families created through ARTs.

8.2.2 The South African approach to homosexual families built through assisted reproductive technologies

There are two possible approaches to homosexual families built as a result of ARTs, namely the equality approach and the realistic approach.

¹⁴⁶² See Para 4.4.3.3 above.

¹⁴⁶³ For more details on the consequences of multiple pregnancies, see para 4.4.3.3.1 above.

8.2.2.1 *Description of the two approaches*

(a) The equality approach

This approach is based on the constitutional equality clause, which reads as follows:

“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”.¹⁴⁶⁴

This approach calls for the equal treatment of all who live in South Africa. As argued in chapter five, the gay and lesbian struggle in South Africa was motivated by the desire of homosexual individuals and couples to have their relationships and families legally recognised and have the same rights that marriage bestows on heterosexual individuals and couples.¹⁴⁶⁵ In other words, advocates of the legalisation of homosexual unions sought equality of treatment between heterosexual and homosexual people. This would suggest that the purpose of the struggle of homosexual advocates was for homosexual individuals and couples to enjoy the same rights that heterosexual individuals and couples enjoy in terms of their relationships.

Motivated *inter alia* by the need to satisfy the demands of homosexual lobby groups, the framers of the Constitution included the equality clause in the final Constitution. The Constitution hence enshrined the right of homosexual people not to be unfairly discriminated against based on their sexual orientation. The equality approach can be summarised as follows: In the name of the equality of all who live in South Africa, homosexual people must also be allowed to marry, reproduce and build families. Scholars and commentators and even the courts have made efforts to view homosexual families as an appropriate environment for the development of children.

¹⁴⁶⁴ Section 9(3) of the Constitution.

¹⁴⁶⁵ See Para 5.3 above.

Some writers even went an extra mile to assume that homosexual parents are better parents than heterosexuals.¹⁴⁶⁶ As one can see, this approach encourages the building of families consisting of two fathers or two mothers, where as pointed out in chapter two, either a mother or a father is absent from the start of these families.¹⁴⁶⁷ As one can understand, this is the approach South Africa has adopted in legalising homosexual relationships.

However, as the discussions in chapter two and chapter five reveal, the characteristics of homosexual families are problematic with regard to the best interests of the child. This is against the background of scholars who claim that there is no difference between children growing up in homosexual families and those growing up in heterosexual families. Regarding the role played by the father or the mother in the children's development, Lubbe argues for instance that children do not need a mother or a father as such for their development; rather they just need parents.¹⁴⁶⁸ It was also reported that the role played by the parents in the sexual orientation of their child is minor.¹⁴⁶⁹

These views support an equality approach to homosexual families and are less realistic. Evidence discussed in chapter two support the view that there is a significant difference in the development of children raised by homosexual individuals or couples and those growing up in heterosexual families. Lamb and Lewis observed emotional problems in children growing up in lesbian families; Knoesen *et al*'s findings support the view that fathers play a very important role in the development of the sexual development of boys' the findings of the studies undertaken by Park *et al* on the one hand and Lamb and Lewis on the other support the views that respectively the father has an important role to play in a girl's psychological development and that mothers and fathers have different roles to play

¹⁴⁶⁶ Golombok *et al* 2002 CD 959, Patterson *et al* 2004 JAD 179

¹⁴⁶⁷ See para 2.4.1 above.

¹⁴⁶⁸ Lubbe 2007 SAJP 276.

¹⁴⁶⁹ Bailey *et al* 1995 DP 69.

in the child's development.¹⁴⁷⁰ In addition to these findings, Golombok is of the view that lesbian behaviours influence the sexual orientation of the children they raise.

I agree with these findings and argue that the equality approach to homosexual families adopted by South Africa is inconsistent with the best interests of the child. Section 18 of the National Health Act emphasises the inconsistency of this approach with the child's best interests. Section 18 of the Act states as follows:

“No person shall 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”.

This would suggest that the section encourages the non-disclosure of the identity of the donor. As I pointed out in chapter three above, the non-disclosure of the identity of the gamete donor causes the child resulting from ARTs to lose his or her genetic link and this is inconsistent with the child's right to preserve his or her identity and to know the identity of his or her genitor enshrined in the Convention on the Rights of the Child that South Africa has ratified and hence has to give effect.

Given that the equality approach is inconsistent with the best interests of the child as discussed above; there is therefore a necessity to adopt an approach to homosexual families that can appropriately balance the interests of the parents and the interests of the child in homosexual families. I refer to this approach as a more realistic approach. This approach is grounded on the realistic analysis of the child growing up in homosexual families built through ARTs. The more realistic approach to homosexual families created through ARTs requires taking into consideration the fact that a child needs a father and a mother for its development. As pointed out above, there is ample evidence to support the view that children do not need just parents to develop to the fullest of their potential, but that they need the presence of a father and a mother. This approach goes beyond the equality approach to include the need of the child born as a result of ARTs to grow up in an environment that will

¹⁴⁷⁰ For more details of these findings; see para 2.5.3 above.

favour his or her adequate development and adequately protect the best interests of the child. The more realist approach requires that provisions of statutes regulating ARTs be amended to include the best interests of the child.

In sum, South Africa has adopted an approach to ARTs and homosexual families built through ARTs that is inconsistent with the best interests of the child. The question that arises now is what should be the appropriate approach to ARTs and to homosexual families created through ARTs? The answer to this question is provided in the comparative conclusions drawn from the analysis of the application of the child's best interests criterion in USA, Australia, and South Africa.

8.3 COMPARATIVE CONCLUSIONS

This section is essentially about the conclusions that can be drawn from the discussion of the legal positions in the USA, Australia and South Africa regarding the application of the best interests of the child criterion, which is the test to be done in order to determine whether these jurisdictions have given any weigh to the best interests of Art-born children. The section considers also the conclusions that can be drawn from the discussion of the child's experience in the USA and Australia in order to better understand the child's experience in South Africa and find a way forward.

8.3.1 The USA

Although in the USA the unborn child is directly protected through Foetal Homicide Laws which consider it as a potential victim of violent crimes,¹⁴⁷¹ like in South Africa, the parent-focused approach to ARTs used in the USA did not allow American courts to protect the best interests of ART-born children. The survey of the cases in which USA courts applied the best interests of the child criterion reveals a difference in the interpretation of the best interests of the child.

¹⁴⁷¹ See para 6.6.2.1 above.

In custody litigation, courts seem to be concerned by the child's best interests, which has determined most if not all the decisions reached. In those litigations, courts have particularly focused on the child's best interests in giving a particular consideration to factors such as the child's physical, emotional, and spiritual development as well as the child's health, safety and welfare.

However, in litigation involving ARTs, although courts seem to be guided by the best interests of the child, they do not appear to give the same consideration to the factors enumerated above. In *In re Baby M* and *Johnson v Calvert*, respectively in New Jersey and California, the courts were merely interested in the transfer of the custody of the child born as a result of the surrogacy agreement.

Art-born children in the USA have experienced hardship in part as a result of the legalisation of homosexual relationships. Although homosexual relationships have been legalised in all the states, not all of them recognise homosexual unions as marriages or civil unions. Consequently, in states where those unions are not recognised as marriages or civil unions, children born to those unions have only one legally recognised parent. The partner of this parent has no parental rights or duties. As a result, in case of separation, the child will inherit only from its legal parent and will lose not only the financial support from the non-legal parent, but also the relationship it created with him or her.¹⁴⁷²

The exclusion of the gamete-donor from any rearing duties in most states results in the child losing one branch of its genealogy and this can ultimately result in an identity crisis.¹⁴⁷³

The experience of ART-born children in this regard is not a good example for South Africa. In fact this situation is similar to the South African one in respect of the exclusion of the gamete-donor in child-rearing. Unlike the USA and South Africa,

¹⁴⁷² See para 6.5 above.

¹⁴⁷³ *Ibid.*

Australia offers a good example that can help find a way of improving the situation of ART-born children in South Africa.

8.3.2 Australia

Like in the USA, Australian state laws directly protect the unborn child, with the difference that in Australia most statutes expressly include the welfare and interests of any person born or to be born as a result of ARTs in the factors that must be considered when engaging in an analysis of the best interests of the child. The Victorian Infertility Act 1995, for instance, emphasises that these factors are paramount in the process.

Australia is characterised by the meaning given to the paramountcy provision in the Constitution. The best interests of the child are interpreted as being above the interests of all other parties involved, including parents. However this approach is not adopted in cases involving ARTs as demonstrated above.¹⁴⁷⁴ In many cases involving ARTs courts have proven to be mostly concerned by the transfer of the custody of the ARTs-born child. This parent-focused approach to ARTs did assist Australian courts in providing adequate protection of ART-born children's best interests, like it did in the USA.

Australian ART-born children born to homosexual people have the same protection as children born to heterosexual families in respect of parentage. Children in homosexual families are regarded as born to both parents and consequently can inherit and enjoy love from both parents, even after parents' separation. Legal mechanisms have been established to ensure that ART-born children in homosexual family continue to receive the necessary support from both parents after their separation.¹⁴⁷⁵

¹⁴⁷⁴ See para 7.6.3 above.

¹⁴⁷⁵ See para 7.5.2.1.1 & 7.5.2.1.2 above.

Unlike in the USA, the legal protection offered to ART-born children in Australia is a good example for South Africa. The experience of ART-born children in Australian homosexual families has inspired the recommendations made below with regard to ART-born children in South African homosexual families.

8.3.3 South Africa

Like in the USA, the analysis of the application of the best interests of the child criterion in custody litigation and litigation involving ARTs seems to support the view that the child's best interests are better protected in custody cases than in cases involving ARTs. Although the best interests of the child are interpreted as being interlinked with the rights and interests of the other parties involved, they are not viewed as trumping the interests of other parties like in Australian statutes. The psychological well-being of the child was the only factor that the court considered in its balancing process in the case discussed above.¹⁴⁷⁶ Therefore there are areas where the interests of the child might suffer. These include the fact that some children are born to grow up in homosexual families; the fact that because of the technologies used to bring them in to the world they may be condemned to have a less than healthy life; and the fact that because of the status of their parental union, they are treated differently from children are born as a result of coital intercourse.

8.3.3.1 The fact of growing up in homosexual families

Children growing up in homosexual families have been reported to experience several problems that affect their best interests. In their family environment for instance, they are often exposed to rejection and unpleasant comments from heterosexual stepparents and siblings.¹⁴⁷⁷ They are often characterised by gender identity disorder, girls growing up with gay parents behave like boys and boys growing up with lesbian parents are effeminate. Those boys like to be involved in sports, games and activities usually chosen by girls, and they also are more

¹⁴⁷⁶ See para 5.8.1.1 above.

¹⁴⁷⁷ Fairtlough "Growing up with a lesbian or gay parent: Young people's perspectives" 2008 *HSCC* 526.

attracted to girl's toys.¹⁴⁷⁸ Children growing up in homosexual families are also reported to end up becoming gay and lesbian.¹⁴⁷⁹

Outside the family environment, children growing up in homosexual families have been reported to be less likely to rely on teachers', nurses' and counselors' support;¹⁴⁸⁰ to be weak in mathematics and social studies; to often find it difficult to socialise;¹⁴⁸¹ to be often timid, not interested to talk about their family life or holidays; and to feel uncomfortable when having to work with children from heterosexual couples. In addition they were characterised as loners and introverts.¹⁴⁸² Some of these children often end up being bullied and teased. They also usually experience peer rejection.¹⁴⁸³

It is clear that children growing up in homosexual families do not have their interests protected because they are exposed to these experiences. It is likely that they will not develop to their full potential. They are permanently condemned to feel different from other children by the very fact of growing up in homosexual families.

8.3.3.2 *The physical and psychological harm of assisted reproductive technologies*

When children are physically and psychologically harmed by the method of their conception or birth, their best interests might suffer. Evidence has shown that multiple pregnancies or multiple gestations has resulted in children being born with a number of physical problems, including low birth weight, birth defects or congenital malformation, and a number of congenital diseases.¹⁴⁸⁴ This evidence raises questions such as whether it is in the best interests of the child to be born with a condemnation to suffer from physical health problems due to the techniques that

¹⁴⁷⁸ Sarantakos 1996 CA 23-25.

¹⁴⁷⁹ Stacey and Biblarz 2001 ASR 173.

¹⁴⁸⁰ Rivers, Poteat and Noret "Victimisation, social support, and psychological functioning among children of same-sex and opposite couples in the United Kingdom" 2008 DP 129.

¹⁴⁸¹ Sarantakos 1996 CA 25.

¹⁴⁸² Sarantakos 1996 CA 25.

¹⁴⁸³ Sarantakos 1996 CA 26.

¹⁴⁸⁴ For the discussion on the physical health problems as a result of ARTs see para 3.4 above.

were used for his or her birth. The harm to children resulting from the use of ARTs was subjected to a contradictory debate. While some critics maintain that there is no harm on a child born of ARTs because the child sought to be protected would not have been born if the techniques that brought him or her to life were not used,¹⁴⁸⁵ other confirm that the harm to a child resulting from the use of ARTs is a reality that cannot be denied.¹⁴⁸⁶

In this regard, the first step in providing an accurate answer to the abovementioned question would be to understand the meaning of the harm to children and the scope of reproductive rights. With regard to the meaning of the harm to children born as a result of ARTs, Robertson is of the view that this situation leads to a paradox.¹⁴⁸⁷ He argues that there are situations in which children are harmed by the method of their conception, gestation, or the social setting of their birth. If in those situations, the welfare of the child must be the primary consideration, there must be a way of preventing the harm that the child will suffer, and the only way of doing so is to give up the use of ARTs that result in that harm.¹⁴⁸⁸ According to David Heyd, if ARTs were not used, children born as a result of the use of these technologies would not have been born, but because their lives will not be so miserable as to be wronged, it would seem that once born they have benefited rather than been harmed by being born.¹⁴⁸⁹ This would suggest that no harm occurred in those or other situations in which the child is knowingly brought into the world in unavoidably less than healthy condition.¹⁴⁹⁰ If so, then using ARTs to enable their birth does not harm them and does not justify restriction on those grounds.¹⁴⁹¹ Robertson also suggests that, considering that the child could not have been born without the condition of being less than healthy, refusing the act or omission that causes the child to be born with that condition cannot harm the child.¹⁴⁹²

1485

Heyd *Genetics* 61.

1486

Green "Parental autonomy and the obligation not to harm one's child genetically" 1997 *JLME* 10-11. See also Coleman "Conceiving harm: Disability discrimination in assisted reproductive technologies" 2002 *UCLALR* 56.

1487

Robertson 2004 *AJLM* 14.

1488

Robertson 2004 *AJLM* 14.

1489

Heyd *Genetics* 61.

1490

Heyd *Genetics* 59-62.

1491

Shiffrin "Wrongful life, procreative responsibility and the significance of harm" 1999 *LT* 117.

1492

Robertson 2004 *AJLM* 14.

It is clear that this reasoning cannot apply to the situation under examination. The harm in our situation is often caused by the greater number of embryos that are transferred, which results in multiple gestations. This is a situation that can be avoided. In this regard, Roberts observed that cases of multiple gestations present situations in which some children who are born as twins or triplets would be born with much fewer health problems if born alone.¹⁴⁹³ In the situation under examination, the harm can be avoided by reducing to one the number of embryos transferred. However, in view of the fact that not all embryos transferred may develop to maturity and live birth, the reduction of the transferred embryos to one may also cause failure to fall pregnant in case that transferred embryos did not develop to a birth child. In this case, the embryo transfer procedure can be restarted until it becomes possible for a pregnancy to develop to a child live birth.

In short, there is no way to deny the harm that may occur if many embryos are transferred and it is reasonable for those who exercise their reproductive rights to repeat one embryo transfer procedure to a successful pregnancy. It is thus clear that in such a case the best interests of those children will not suffer.

8.3.3.3 *The effect of the legal status of the union of the children's parents*

In South Africa, the Civil Union Act has legalised homosexual unions as civil unions and life partnerships. It is clear that the Civil Union Act distinguishes between civil union partners and life partners. This distinction is important in the analysis of the best interests of children born to partners in these unions. In that respect it is important to note that in homosexual families, parental rights and responsibilities are acquired either by means of artificial fertilisation or by means of surrogacy. With regard to artificial fertilisation, The Children's Act makes a clear distinction between children in homosexual civil unions and children in homosexual life partnerships. In homosexual civil unions, children are deemed born to married parents and as a

¹⁴⁹³ Roberts "Cloning and harming: Children, future persons, and the 'best interest' test" 1999 *NDJLEPP* 56-59.

consequence, both parents have parental responsibilities and rights in respect of the child provided that they consented to the artificial fertilisation.

Gay civil union partners become parents by means of surrogacy. The surrogate mother relinquishes the parental rights and responsibilities to both commissioning parents after the child's birth.

However, in homosexual life partnerships¹⁴⁹⁴ the child is deemed born to unmarried parents and as a consequence only the legal parents will have parental rights and responsibilities on the child. In this case, the child will for instance inherit only from the one legal parent that he or she has. The child's interests to inherit from both parents as for children in civil unions will suffer.

8.4 CONCLUDING REMARKS

This study was aimed at emphasising the debate over the suitability or not of homosexual families as an environment for the child's development by advocating a more objective approach to these families. The study also aimed at investigating ways of improving the welfare of children born of ARTs and growing up in homosexual families by ensuring that the children's best interests are considered as paramount in the decision of bringing them into the world through ARTs and raising them in homosexual families.

Hopefully the aims of this study have been achieved. This study departs significantly from other studies in the field and uses a new approach to homosexual families. The study proceeds from the perspective of the best interests of the child in order to analyse homosexual families. The study has critically analysed the process of building families through new medical techniques focusing on challenges that face children born of ARTs and growing up in homosexual families. This issue was chosen because it received less attention by scholars who used to focus on the rights of adults to marry, reproduce and form families even to the detriment of

¹⁴⁹⁴ With the exception of surrogacy, in which case the partner is deemed to be the child's parent.

children they will have to raise. The study ultimately sought to provide an objective or more nuanced approach to homosexual families that is aimed not at accommodating adults who wanted their relationships with persons of the same sex to be legally recognised; but rather an approach that is aimed at examining the facts as they are and objectively drawing consequences from the reality. The study also sought to provide a meaningful engagement in the protection of the child's rights in ensuring that their best interests do not give way to the procreative rights of adults who decide to bring them in the world.

The nucleus of organised human society is the family and it is within the family unit that man has reproduced himself.¹⁴⁹⁵ Family all over the world has undergone many changes. The socio-cultural picture of the family indicates that the nuclear family, which is monogamous and heterosexual, has embarked on a declining process. The genetic link between children and their parents and the presence of a father and a mother are no longer deemed important for the social, physical and psychological development of the child. From the decline of the nuclear family and the development of new techniques in ARTs, homosexual families have emerged.

South Africa was not spared from family changes that occurred around the world. The democratic Constitution with the Bill of Rights and specifically the equality clause not only ended the apartheid regime of discrimination and injustice, but was also a new departure point for the legal recognition of other forms of families, including homosexual families. Following the Constitutional Court decisions on the definition of the family and other related issues, the legislature was given time to come up with a solution to the discrimination against homosexual people in South Africa. The long political and judicial struggle for the recognition of the rights of homosexual people ended up in the promulgation of the Civil Union Act, which legally recognised homosexual relationships as civil unions and life partnerships. On this occasion this law extended some of the rights of heterosexual couples to homosexual couples who could enter into a heterosexual marriage-like relationship.

¹⁴⁹⁵ Lupton 1985 *TSAR* 277.

From that point, homosexual people within South Africa can freely marry and build families.

The South African Constitution on the one hand guarantees the right of every person to reproduce and where necessary to use the new reproductive technologies to achieve this goal.¹⁴⁹⁶ It is a fact that not everyone is fertile and hence can reproduce naturally. The curse of infertility has always posed severe medical and social problems for which the only solution until recently has been acquiescence or adoption. Medical technology has now developed a solution to both male and female sterility in the form of ARTs.¹⁴⁹⁷ As a result, heterosexual infertile and homosexual individuals have extensively used ARTs to reproduce and form their families. On the other hand, the Children's Act requires that the best interests of the child should be considered paramount in every matter concerning him or her. This would suggest that any decision concerning the child should be motivated by the best interests of the child, including even the decision of prospective parents to have children.

It is clear that in the context of families built through ARTs in South Africa, the parents' right to reproduce using ARTs conflict with the right of the child to have his or her best interests considered paramount in every matter concerning him or her. This study was carried out with the view of providing answers to two or even three questions.

The first question is whether ARTs could serve the best interests of the child. With regard to this question, it was indicated in chapter two of this study that reproduction within homosexual families and the best interests of resulting children are one of the issues homosexual families raise. As indicated in chapter three, the legalisation of homosexual unions has resulted in homosexual couples and individuals being allowed to use ARTs in order to reproduce, and that ARTs are their only means of reproduction if they choose to do so in the context of their homosexual relationships, irrespective of whether they are infertile or not. It was further indicated in that chapter

¹⁴⁹⁶ Section 40 of the Children Act.

¹⁴⁹⁷ Lupton 1985 *TSAR* 277.

that having recourse to ART procedures as a means of reproduction might put children resulting from these procedures to an increasing risk of being born with several problems, including physical, mental and psychological problems.

It was concluded in chapter five of this study that for several reasons, including the physical and mental harm that ART procedures cause to children, as well as the adult-centric focus of these procedures, they cannot reasonably be in the best interests of the resulting child. In that chapter, I argued that although the South African approach to ARTs encourages the prospective parents' decision to choose to reproduce using ARTs with the full knowledge of the harm ART procedures can cause to the resulting child, and other related procedures such as genetic selection of offspring which to some extent allow prospective parents to choose the desired physical traits of the resulting child irrespective of the adverse consequences on the child, could not reasonably fall within their procreative liberty.

I further argued that the protection of the child's interests provided in the preconception agreement is important but not enough as it applies after the birth of the child. This protection would be more effective if it is associated with other measures taken while the child is still in the mother's womb. In other words, in order to protect the interests of the ARTs-born child, it is a necessity to apply best interests of the child criterion to the child while the child is still at the stage of foetus in the womb of his or her mother and after birth. Having a child whose interests are protected after birth seems to be the priority rather than a decent and healthy child whose interests are protected before birth by preventing him or her from being born with health problems such as cerebral palsy or mental disability; and after birth by making sure that he or she will grow up in a stable home environment. Taken in this context, ARTs can serve the best interests of the child only to some extent as the major focus is to have a child rather than a healthy child.

The second question is whether being born as a result of ARTs and growing up in a homosexual family could be in the best interests of the child. It was indicated in chapter two regarding this question that several arguments were offered in defense of homosexual families. These arguments indicate that gay and lesbian families are

as good an environment for proper children's development as heterosexual families. The social opposition that these families encounter in many countries is seen as discrimination against gays and lesbians and the denial of their right to marry and form families as is an option for heterosexual people, and their right to equality. The difficult experience of children growing up in these families is viewed as a result of intolerance from a hostile heterosexual environment that is still dominant all over the world. It was also indicated that the justifications offered in opposing these families may indicate that children growing up in these families are at risk of not developing to their full potential, and that their best interests might be not properly protected.

In chapter six, it was indicated that the legalisation of homosexual unions has some implications for the child resulting from the use of ARTs technologies. These include the fact that children in some countries, including the USA, receive different treatment according to the states where they live. While in some states children born as a result of ARTs in heterosexual as well as in homosexual families have the right to have the benefit of having two parents respectively of opposite sexes and of the same sex, in other states children are condemned to have only one parent, namely the biological parent. It is worth remembering that the *Obergefell* decision legalised homosexual unions in all USA states. However, this decision did not impose on states the obligation to register homosexual unions as civil unions or marriages. As a result, in some states, homosexual unions are registered as domestic partnerships in which case children may inherit only from the biological parent. Similarly in South Africa, children born as a result of ARTs to life partners will have only one parent.¹⁴⁹⁸ The partner of the biological parent has no parental right in respect of his or her child. As a result, the child will lose not only financial, psychological and emotional support from the non-biological parent in case of the separation between the two parents, but the child will also be denied the right to inherit from the non-biological parent and will lose his or her blood line if he or she is the result of the use of the genetic materials of a donor.

¹⁴⁹⁸ With the exception of surrogacy, in which case the partner is deemed to be the child's parent.

In many states, donors of gametes and eggs and surrogate mothers are required by law to have no contact to or other parental rights in respect of the child resulting from the use of their genetic materials. This will cause the child to lose the root of his or her genetic origins. This situation will cause the child to have an identity crisis. The identity in this context is linked to the child's genetic origins. It will be a challenge for a child born in these states and whose parents are separated to understand that he or she has only one parent. This may be detrimental to such a child.

It was further indicated in chapter five that the analysis of the process of building families through ARTs in South Africa reveals that although ARTs have been a solution to infertile couples by enabling them to have children, it has also created another problem related to the health of the resulting children. Children born as a result of ARTs are exposed to different harmful treatments while they are still in the womb of their mother. These treatments seem to be in the sole interests of the parents and could result in the child being born with several health challenges that will keep him or her from developing to the fullest of his or her potential like all other children. It was also indicated that not all ART procedures result in a sick or disabled child. However, there seems to be no guarantee that the resulting child will not face such challenges. It was further indicated that the secrecy that surrounds ART procedures and the anonymity of gamete donors are not in the best interests of the child. For all these reasons, it is not reasonable to think that being born of ARTs and growing up in homosexual family can be in the best interests of the child.

It was then concluded in chapter five that because ART procedures as indicated above are neither in the best interests of ARTs-born children nor in the best interests of those growing up in homosexual families, there is thus a conflict between the right of parents to reproduce on the one side and the right of the child to have his or her best interests considered as paramount in every matter concerning him or her. The question that arises is how this conflict will be solved. The answer to this question requires a consideration of the facts surrounding the use of ARTs procedures by homosexual parents.

On the one hand, in view of the fact that ARTs as used and regulated in South Africa may result in children affected by a number of health challenges, including birth defects for twins and triplets as a result of multiple gestations, neurological problems in particular cerebral palsy, sex chromosome and imprinting disorder et cetera,¹⁴⁹⁹ and on the other hand the fact that ARTs are the only option for homosexual couples and individuals to reproduce in the context of their homosexual relationships, I am of the view that a balanced approach is needed. This balanced approach will still allow homosexual parents to have the children they desire but also guarantee that the resulting child will not be exposed to health challenges associated with ARTs. The more nuanced approach to ARTs or the minimum harm approach is to my mind the only adequate way of resolving the conflicts of rights between parents and their children.

8.5 PROPOSALS FOR LAW REFORM

I have analysed the legal recognition process of homosexual families and the current law regulating ARTs in South Africa. The main weaknesses are the fact that the parent-focused approach to ARTs and the equality approach to homosexual families that South Africa has adopted cannot adequately protect the interests of children born as a result of ARTs. Further, there is no provision made for the protection of children born to and growing up in homosexual families. To me, these weaknesses would best be addressed by the measures that follow.

In view of the fact that the transfer of more than one embryo could result in multiple gestations, which in turn result in many health challenges for the child born as a result of ARTs, I am of the view that only one embryo should be transferred to the womb of the recipient during the embryo transfer process.

I propose that a provision limiting the number of embryos to be transferred to the womb of the recipient during the embryo transfer be included in the National Health Act. This provision should explicitly indicate that no more than one embryo can be

¹⁴⁹⁹ Kovalevsky *et al* 2003 *FS* 1272, Cox *et al* 2002 *AJHG* 162 and Strong 2003 *ME* 272.

transferred to a recipient. This provision will have the effect of reducing the chances of having multiple gestations and hence reducing the probability of having a child who is harmed to the minimum. This provision will further by that fact increase the chances of the child to physically develop to his or her fullest potential as required by the Constitution.

In view of the fact that genetic manipulation done to determine the quality of make-up of gametes or embryos, or to modify, transfer, or remove genetic material; such as Preimplantation Genetic Diagnosis (PDG) to screen embryos and Flow Cytometry to select the sperm that bears female or male genetic materials for preconception sex selection, are likely to result in embryo biopsy and many other health challenges that affect the physical well-being of the resulting child; I propose that a provision that explicitly prohibit genetic manipulation for any purpose other than isolating genes that are likely to transfer diseases to the child be included in the National Health Act. This provision should further prohibit any manipulation of the genetic materials for the purpose of creating a tissue that matches with the tissue of the sick sibling or trying to give the child a particular look on the parents' request.

In view of the fact that the secrecy surrounding ARTs have negative psycho social consequences on the child born as a result of ARTs and the fact that the non-disclosure of the identity of the gamete donor results in the gamete donor child being denied the right to preserve his or her identity and to know the identity of his or her genitor as protected in the Convention on the Rights of the Child that South Africa has ratified in 1995; I propose that two provisions be included in the National Health Act. The first provision should impose on the parents of an ARTs-born child the obligation of informing him or her as early as possible in his or her childhood about the means and the circumstances of his or her birth. The second provision would impose on the parents of an ARTs-born child the obligation of assisting him or her in the process of identifying and establishing physical contact with the person who donated his or her genetic materials for the birth of that child. For this purpose, the gamete donation should be accompanied by consent by the donor to be identified and establish physical contact with the child resulting from the use of his or her genetic materials. However, it should be made clear to the donor that he or she will

not have any parental rights. In this case the role of the donor will be to help alleviate the child's psychological problems caused by the loss of origins.

In view of the fact that surrogate motherhood agreements are concluded for the main purpose of allowing perspective parents to have a desired genetically related child without making some efforts to prevent the child from being born with health problems; I propose that a provision that explicitly adds the protection of best interests of the child while still in the mother's womb as one of the validity requirements of the surrogate motherhood agreement be included in the Children's Act. This provision will impose an obligation on the courts to approve only surrogate motherhood agreements where prospective parents and ART providers are committed to the protection of the best interests of the child by making sure that they approach ARTs with a minimum harm perspective which will result in increasing the chances of the child to be born with the maximum chances of developing to the fullest of his or her potential.

In view of the fact that children born as a result of ARTs to life partners are viewed as children born to unmarried parents,¹⁵⁰⁰ and that as a consequence only the birth mother of those children has parental responsibilities and rights in respect of those children,¹⁵⁰¹ children in homosexual life partnerships lose the support of the non-birth mother and are accordingly treated differently from children born to homosexual civil union partners as a result of ARTs. Given that this situation amounts to discrimination against ART children born to homosexual life partners, I propose that a provision that harmonises the situation of all children born as a result of ARTs to homosexual couples and individuals be included in the Children's Act 38 of 2005. This provision will impose an obligation on the state to ensure that children resulting from the use of ARTs have same and equal treatment irrespective of their parents' marital status. The provision will further impose on the non-birth mother the obligation to provide her support to the child to whose birth she consented.

¹⁵⁰⁰ Heaton *South African Law of Persons* (2008) 3rd ed 49.

¹⁵⁰¹ Section 40 (3) (a) of the Children's Act.

The adoption of the proposals set out above should ensure that the best interests of the child born to homosexual partners, married or unmarried, growing up in homosexual family environments are adequately protected and that those interests do not give a way to those of the adults desiring to have genetically related children and build families of their own

BIBLIOGRAPHY

BOOKS

Anderson RW *Understanding Trusts and Estates* 4 ed (LexisNexis Matthew Bender New Jersey 2009)

Bell AP and Weinberg MS *Homosexuality: A Study of Diversity among Men and Women* (Simon and Schuster New York 1978)

Cahill S and Tobia S *Policy Issues affecting Lesbians, Gay, Bisexual and Transgender Families* (Ann Arbor MI: The University of Michigan Press, Michigan 2007).

Currie I and De Waal J *The Bill of Rights Handbook* 5 ed (Juta Landsdowne 2005)

De Vaus D *Diversity Change in Australian Families: Statistical Profiles* (Australian Institute of Family Studies Melbourne 2004)

Dworkin R *Life's Dominion: An Argument about Abortion, Euthanasia and Individual Freedom* (Knopf New York 1993)

Eskridge WN Jr *Equality Practice: Civil Unions and the Future of Gay Rights* (Routledge New York 2002)

Golombok S *Parenting: What Really Counts?* (Routledge London 2000)

Heaton J *The South African Law of Persons* 4 ed (LexisNexis Durban 2012)

Heaton J *South African Family Law* 3 ed (LexisNexis Durban 2010)

Heyd D *Genetics: Moral Issues in the Creation of People* (University of California Press California 1992)

Island D and Letellier P *Men Who Beat the Men Who Love Them: Battered Gay Men and Domestic Violence* (Haworth Press New York 1991)

Jekeliel MS and Emig C *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can Be Done about It?* (Research Brief Child Trends Washington DC 2002)

Johnson SM and O'Connor E *The Gay Baby Boom: The Psychology of Gay Parenthood* (New York University Press New York 1996)

L'Abate L (ed) *Family Psychology: The Relational Roots of Dysfunctional Behaviours* (The Guilford Press New York 1998)

Maccoby E *The Two Sexes: Growing Up Apart, Coming Together* (Belknap Press of Harvard University Press 1998)

McCaffrey E *The Gay Republic: Sexuality, Citizenship and Subversion in France* (Ashgate Aldershot 2005)

Merin Y *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* (University of Chicago Press Chicago 2002)

Quick J and Garran RR *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson Sydney 1901)

Schabas WA *The Abolition of Death Penalty in International Law* 3ed (Cambridge University Press London 2002)

Shankoff J and Phillips D (eds) *From Neurons to Neighbourhood: The Science of Early Childhood Development* (National Academic Press Washington DC 2000)

Silburn S et al *The Western Australian Aboriginal Child Health Survey: Strengthening The Capacity of Aboriginal Children, Families and Communities* (Curtin University of Technology and Telethon Institute of Child Health Research Perth 2006)

Sheikhi M *Women and Family Sociology* 1 ed (Enteshar Co LTD Teheran 2001)

Sorokin P *The American Sex Revolution* (Porter Sargent Publishers Boston 1956)

Stacey J *In the Name of the Family: Rethinking Family Values in the Post-modern Age* (Beacon Press Boston 1996)

Sullivan A *Virtually Normal: An Argument about Homosexuality* (Alfred A Knopf New York 1995)

Waalwijk K *More or Less Together: Levels of Legal Consequences of Marriage, Cohabitation, and Registered Partnership for Different-sex and Same-Sex Partners. A Comparative Study of Nine European Countries* (Institut National d' Etudes Démographiques Paris 2004)

CHAPTERS IN BOOKS

Asch A, Gostin L and Johnson DM “Respecting persons with disabilities and preventing disability: Is there a conflict?” in Herr SS, Gostin LO and Koh HH (eds) *The Human Rights of Persons with Intellectual Disabilities: Different but Equal?* (Oxford University Press New York 2003) 319-346

Buttler AH and Ausbury G “South African LGBT youth” in Sears JT (ed) *Youth, Education, and Sexualities: An International Encyclopaedia* (Greenwood Publishing Group Westport CT 2005) 810-814

Cranston R “The rational study of laws: Social research and access to justice” In Zuckermann AAS and Cranston R (eds) *Reform of Civil Procedure: Essays on “Access to Justice”* (Oxford University Press New York 1995) 31-50

Friedman A and Pantazis A “Children’s rights” in Wolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed (Juta Lansdowne 2004) 1-47

Grotevant HD, Perry YV and McRoy RG “Openness in adoption: Outcomes for adolescents within their adoptive kinship network” in Brodzinsky DM and Palacios J (eds) *Psychological Issues in Adoption: Research and Practice* (Praeger Publisher Westport CT 2005) 167-186

Gutman LT and Wilfert CM “Gonococcal diseases in infants and children” In Holmes KK *et al* (eds) *Sexually Transmitted Diseases* (McGraw-Hill Inc New York 1990) 803-810

Halley JE “Recognition, rights, regulation, normalisation: Rethorics of justification in the same-sex marriage debate” in Wintemute R and Andenaes M (eds) *Legal Recognition of Same-Sex Partnerships: A Study of National, European, and International law* (Hart Publishing Oxford 2001) 97-112

Halmbeck G, Parkoff RL and Brooks-Gun J “Parenting adolescents” In Bornstein MH (ed) *Handbook of Parenting: Children and Parenting* (Lawrence Erlbaum Associates Mahwah New Jersey 1995) 91-118

Kassasieh G “Same-sex couples and their families” in Sheridan H (ed) *The Law Handbook: Your Practical Guide to the Law in New South Wales* (Thomson Reuters Sydney 2012) 1017-1034

Kurdek LA “Lesbian gay couples” In D’Auguelli AR and Patterson CJ (eds) *Lesbian, Gay, and Bisexual Identities over the Lifespan: Psychological Perspectives* (Oxford University Press New York 1995) 243-273

Lamb ME and Lewis C “The development and significance of father-child relationships in two-parent families” in Lamb ME (ed) *The Role of the Father in Child Development* 5 ed imprint (Wiley New York 2010) 94-153

Maccoby EE and Martin JA “Socialisation in the context of the family: Parent-child interaction” in Mussen PH (series ed) and Hetherington EM (ed) *Handbook of Psychology, Socialisation, Personality and Social Development* (Wiley New York 1983) 1-110

McQuoid-Mason D “Privacy” in Woolman S *et al* (eds) *Constitutional Law of South Africa* (revised service ed 3) (Juta Cape Town 2011) 38-1–38-43

Nagy BI, Grunebaum J and Ulrich D “Contextual family therapy” in Gurman AS and Kniskern DP (eds) *Handbook of Family Therapy* (Brunner/Mazel New York 2013) 200-238

O’Sullivan M “Reproductive rights” In Woolman S *et al* (eds) *Constitutional Law of South Africa* (Juta Cape Town revised service ed 3 2011) 37-1–37-28

- Parker RD *et al* "Fathering and children's peer relationships" in Lamb ME (ed) *The Role of the Father in Child Development* 4 ed (Wiley New York 2004) 307-340
- Rollins BC and Thomas DL "Parent support, power and control techniques in the socialisation of children" in Burr WR, Finey RH and Reis IL (eds) *Contemporary Theories about Family* (Free Press London 1929) 317-364
- Santos GG "Decriminalising homosexuality in Africa: Lessons from the South African experience" in Lennox C and Waites M (eds) *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* (University of London London 2013) 313-337
- Shenfield F "To know or not to know the identity of one's genetic parent(s): A question of human rights?" in Healy DL *et al* (eds) *Reproductive Medicine in the Twenty-first Century* (Parthenon Publishing Group LTD Melbourne 2002) 78-85
- Smith B "The dissolution of a life or domestic partnership" in Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (LexisNexis Durban 2014) 389-478
- Sparrow R "The real force of 'procreative beneficence'" in Akayabashi A (ed) *The Future of Bioethics: International Dialogues* (Oxford University Press Oxford 2014) 183-192
- Steinbock B "Wrongful life and procreative decisions" in Roberts MA and Wasserman DT (eds) *Harming Future Persons: Ethics, Genetics and the Nonidentity Problem* (Springer Netherlands London 2009) 155-178

Van der Vyver JD “Constitutional protection of children and young persons” in Robinson JA *The Law of Children and Young Persons in South Africa* (Butterworths Durban 1997) 265-320

Van Zyl M “Cape Town activists remember sexuality struggle” in Hoad N, Martin K and Reid G (eds) *Sex and Politics in South Africa* (Double Storey Books Cape Town 2005) 98-116

Wardle LD “Same-sex marriage and the limits of legal pluralism” in Eekelaar S and Nhlapo T (eds) *The Changing Family: International Perspective on the Family and Family Law* (Hart Publishing Oxford 1998) 381-396

Woolman S “Dignity” in Woolman S *et al* (eds) *Constitutional Law of South Africa* (revised service ed 3) (Juta Cape Town 2011) 31-1–36-75

JOURNAL ARTICLES

- Adashi E *et al* "Infertility therapy-associated multiple pregnancies (births): An ongoing epidemic" 2003 (7) *Reproductive Biomedicine Online* 521
- Allen DG, Alperstein A and Tsalacopoulos G "Artificial insemination by donor at Groote Schuur Hospital" 1985 (23) *South African Medical Journal* 284-287
- Allen KR and Demo DH "Family of lesbians and gay men: A new frontier in family research" 1995 (57) *Journal of Marriage and the Family* 111-127
- Aloni E "Incrementalism, civil unions, and the possibility of predicting legal recognition of same-sex marriage" 2010 (18) *Duke Journal of Gender Law and Policy* 105-161
- American Academy of Pediatrics "Families and adoption: The pediatrician's role in supporting communication" 2003 (112) *Pediatrics* 1437-1441
- Anderson G *et al* "The demographics of same-sex marriages in Norway and Sweden" 2006 (43) *Demography* 1-98
- Andrews LB "Prenatal screening and the culture of motherhood" 1996 (47) *Hastings Law Journal* 967-1006
- Ard KL and Makadon HJ "Addressing intimate partner violence in lesbian, gay, bisexual and transgender patients" 2011 (26) *Journal of General Internal Medicine* 930-933
- Ash DR "Bridge over troubled water: Changing the custody law in Tennessee" 1997 (27) *University of Memphis Law Review* 769-842

Badgett L "Predicting partnership rights: Applying the European experience in the United States" 2005 (17) *Yale Journal of Law and Feminism* 71-88

Baetens and Brewaeys "Lesbian couples requesting donor insemination: An update of the knowledge with regard to lesbian mother families" 2001(7) *Human Reproduction Update* 512-519

Bailey JM *et al* "Heritable factors that influence sexual orientation in women" 1993 (50) *Archives of General Psychiatry* 217-223

Bailey JM *et al* "Sexual orientation of adult sons of gay fathers" 1995 (31) *Developmental Psychology* 124-129

Baker KK "Taking care of our daughters, a book review of Martha Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies*" 1995 (18) *Cardozo Law Review* 1495-1525

Barbour VSB "Bartering for babies: Are preconception agreements in the best interests of children?" 2004-2005 (26) *Whittier Law Review* 429-486

Bartlett KT "Rethinking parenthood as an exclusive status: The need for legal alternatives when the premises of the nuclear family has failed" 1984 (70) *Virginia Law Review* 879-963

Baurmind D "Commentary on sexual orientation: Research and social policy implications" 1995 (31) *Developmental Psychology* 130-136

Baurmind D "The Discipline Controversy Revised" 1996 (45) *Family Relation* 405-414.

Bengtson VL "Beyond the nuclear family: The increasing importance of Multigenerational Bonds" 2001 (63) *Journal of Marriage and Family* 1-16.

Biermat M "Gender stereotypes and the relationships between masculinity and Femininity" 1991 (61) *Journal of Personality and Social Psychology* 351-365.

Bigner JJ "Raising our sons" 2000 (10) *Journal of Gay and Lesbian Social Service* 61-77

Bigner JJ and Jacobsen RB "Parenting behaviors of homosexual and heterosexual fathers" 1989 (18) *Journal of Homosexuality* 173-186

Birembaum J "Contextualising choice: Abortion, equality and the right to make decisions" 1996 (12) *South Africa Journal on Human Rights* 485-503

Blake V "It's an ART not a science: State mandated insurance coverage of assisted reproductive technology and legal implications for gay and unmarried persons" 2011 (12) *Minnesota Journal of Law, Science and Technology* 651-713

Blyth E "To be or not to be? A critical appraisal of the welfare of children conceived through new reproductive technologies" 2008 (16) *International Journal of Children's Rights* 505-522

Blyth E and Frith L "Donor-conceived people's access to genetic and biographical history: An analysis of provisions in different jurisdictions permitting disclosure of donor identity" 2009 (23) *International Journal of Law, Policy and the Family* 1-181

- Bodley W and Cameron M "Establishing the existence of a same-sex life partnership for the purposes of intestate succession" 2008 (125) *South African Law Journal* 259-273
- Bonthuys E "Possibility foreclosed: The Civil Union Act and lesbian and gay identity in Southern Africa" 2008 (11) *Sexualities* 726-739
- Bonthuys E "Race and gender in the Civil Union Act" 2007 (23) *South Africa Journal on Human Rights* 526-542
- Bonthuys E "The best interests of the child in the South African Constitution" 2006 (20) *International Journal of Law, Policy and the Family* 23-4
- Bos HMW, Van Balen F and Van den Boom DC "Lesbian families and family functioning: an overview" 2005 (59) *Patient Education and Counseling* 263-275
- Bos HMW *et al* "Minority stress, experience of parenthood and child adjustment in lesbian families" 2004 (22) *Journal of Reproductive and Infant Psychology* 1-14
- Bossin PG "Same-sex unions: The new civil rights struggle or an assault on traditional marriage" 2004 (40) *Tulsa Law Review* 381-420
- Boyce CC and Sireci L S "Who is Mummy tonight? Lesbian parenting issues" 2002 (43) *Journal of Homosexuality* 1-13
- Boyd SB and Rhoades H "Reforming custody laws: A comparative study" 2004 (18) *International Journal of Law, Policy and Family* 119-146

- Bozett FW "Gay fathers: A review of the literature" 1989 (18) *Journal of Homosexuality* 137-162
- Bradford J, Ryan C and Rothblum ED "National Lesbian Health Care Survey: Implications for mental health care" 1994 (62) *Journal of Consulting and Clinical Psychology* 228-241.
- Brewaeys A *et al* "Donor insemination: Child development and family functioning in lesbian mother families" 1997 (12) *Human Reproduction* 1349-1359
- Brock M and Meagher D "The legal recognition of same-sex unions in Australia: A constitutional analysis" 2011 (22) *Public Law Review* 266-278
- Burda JM "Obergefell v Hodges: The effects of the decision and estate planning for LGBT couples" September 2015 *NYSBA Journal* 10-17
- Burgess EW "The Family as a unity of interacting personalities" 1926 (2) *The Family* 3-9
- Burnett MC and Lawrence H "A descriptive empirical study of gay male step families" 1993 (42) *Family Relations* 256-262
- Byrd DA "Gender complementarity and child rearing: where tradition and science agree" 2005 (6) *Journal of Law & Family Studies* 213-228
- Cameron E "Sexual orientation and the Constitution: A test case for human rights" 1993 (110) *South African Law Journal* 450-472
- Carara BGS and Filippi V "Sex and reproduction: an evolving relationship" 2010 (16) *Human Reproduction Update* 96-107.

- Carnelly M "Ex Parte WH 2011 6 SA (GNP). Discussion of genetic links and monetary payments in South Africa and foreign surrogate motherhood agreements with particular reference to the English experience" 2012 (45) *De Jure* 179-188
- Carpenter D "A traditionalist case for gay marriage" 2009 (50) *South Texas Law Review* 93-104
- Case MA "What feminists have to lose in same-sex marriage litigation" 2010 (57) *UCLA Law Review* 1199-1233
- Clark B "A balancing Act? The rights of donor-conceived children to know their biological origins" 2011-2012 (40) *Georgia Journal of International and Comparative Law* 619-661
- Clark B "Custody: The best interests of the child" 1992 (109) *South African Law Journal* 391-396
- Clarke V "Stereotypes, attack and stigmatise those who disagree: Employing scientific rhetoric in debates about in lesbian and gay parenting" 2000 (10) *Feminism and Psychology* 152-159
- Coleman CH "Conceiving harm: Disability discrimination in assisted reproductive technologies" 2002 (50) *UCLA Law Review* 101-156
- Cook RC "International protection of women's reproductive rights" 1992 (24) *New York University Journal of International Law and Politics* 645-722
- Cox GF *et al* "Intracytoplasmic sperm injection may increase the risk of imprinting defects" 2002 (71) *American Journal of Human Genetics* 162-164

- Croucher S "South Africa's democratisation and the politics of gay liberation" 2003 (28) *Journal of South African Studies* 315-330
- Crowe J and Toohey LC "From good intentions to ethical outcomes: the paramountcy of children's interests in the Family Law Act" 2009 (33) *Melbourne University Law Review* 391-414
- Daniels KR "Artificial insemination using donor semen and the issue of secrecy: The views of donors and recipient couples" 1988 (27) *Social Science & Medicine* 377-383
- Daniels KR "The best interests of the child in assisted human reproduction: The interplay between the state, professionals, and parents" 2000 (19) *Politics and the Life Sciences* 33-44
- Daniels KR and Burn I "Access to assisted human reproduction services by minority groups" 1997 (37) *Australian New Zealand Journal of Obstetric Gynaecology* 79-85
- Davel T "In the best interests of the child: Conceptualisation and guidelines in the context of education" 2007 (4) *Commonwealth Education Partnership* 222-226
- Davis DS "The parental investment factor and the child's right to an open future" 2009 (39) *Hastings Center Report* 24-27
- De Jong-Pleij EAP *et al* "Three-dimensional ultrasound and maternal bonding, a third trimester study and review" 2013 (3) *Prenatal Diagnosis* 81-88
- Demo DH and Allen K "Family structure, family process, and adolescent well-being" 1996 (6) *Journal of Research on Adolescence* 457-488

- Dempsey D "Active fathers, natural families and children's origins: Dominant themes in the Australian political debate over eligibility for assisted reproductive technology" 2006 (4) *Australian Journal of Emerging Technology and Society* 28-44
- De Ru H "Historical perspective on the recognition of same-sex unions in South Africa" 2013 (19) *Fundamina* 221-250
- De Vos P "A judicial revolution? The court-led achievement of same-sex marriage in South Africa" 2008 (4) *Utrecht Law Review* 162-174
- De Vos P "Same-sex sexual desire and the re-imaging of the South African family" 2004 (20) *South African Journal on Human Rights* 179-206
- De Vos P "The 'Inevitability' of same-sex marriage in South Africa's post-apartheid state" 2007 (23) *South African Journal on Human Rights* 432-465
- De Vos P and Barnard J "Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflection on an ongoing saga" 2007 (124) *South African Law Journal* 795-826
- Dillard CJ "Rethinking the procreative right" 2007 (10) *Yale Human Rights Development Journal* 1-63
- Dolev YH and Shkedi S "On new reproductive technologies and family ethics: Pre-implantation genetic diagnosis for sibling donor in Israel and Germany" 2007 (65) *Social Science & Medicine* 2081-2092
- Doskow E "The second parent trap: Parenting for same-sex couples in a brave new world" 1999 (20) *Journal of Juvenile Law* 1-22

- Dryer ST and Kruger TF "Assisted reproductive technology in South Africa: First results generated from the South African register of assisted technologies" 2012 (103) *South Africa Medical Journal* 167-170
- Dune G "Opting into motherhood: Lesbians blurring boundaries and transforming the meaning of parenthood and kinship" 2000 (14) *Gender & Society* 11-35.
- East L, Jackson D and O'Brien L "Father absence and adolescent development: A review of the literature" 2006 (10) *Journal of Child Health Care* 283-295
- Eaton L *et al* "Examining Factors co-existing with interpersonal violence in Lesbian relationships" 2008 *Journal of Family Violence* 697-705
- Eekelaar J "The best interest of the child and the child's wishes: The role of dynamic self-determinism" 1994 (8) *International Journal of Law and the Family* 42-61.
- Elliott D "Australia and gay and lesbian rights" 2005 (17) *Peace Review: Journal of Social Justice* 137-142.
- Elrod LD and Dale M "Paradigm shifts and pendulum swings in child custody: The interests of children in the balance" 2008 (42) *Family Law Quarterly* 381-418
- Elsas LJ "Medical genetics: present and future benefits" 2000 (49) *Emory Law Journal* 801-822
- Ethics Committee of the American Society of Reproductive Medicine "Preconception gender selection for nonmedical reasons" 2002 FS 861-862
- European Humanist Federation "What are sexual and reproductive health and rights" January 2015 *European Humanists* 1-5

Fairtlough A “Growing up with a lesbian or gay parent: Young people’s perspectives”
2008 (16) *Health and Social Care in the Community* 521-528

Fethers K *et al* “Sexually transmitted infections and risk behavior in women who
have sex with women” 2000 (76) *Sexually Transmitted Infections* 345-358

Field MA “Killing the ‘handicapped’ – Before and after birth” 1993 (16) *Harvard
Women’s Law Journal* 79-138

Fineman MA “The neutered mother” 1992 (46) *University of Miami Law Review* 663-
669

Flood PJ “Does international law protect the unborn child?” 2006 (9) *Life and
Learning* 3-42

Galpern E “Assisted reproductive technologies: overview and perspective using a
reproductive justice framework” December 2007 *Center for Genetics and
Society* 1-20

Gartel N *et al* “The National Lesbian Family Study 1: Interviews with prospective
mothers” 1996 (66) *American Journal of Orthopsychiatry* 272-281

Gilman S *et al* “Risks of Psychiatric disorders among individuals reporting same-sex
sexual partners in the National Comorbidity Survey” 2001 (91) *American
Journal of Psychiatry* 933-939

Goldberg AE and Jenkins MP “The division of labor and perceptions across the
transition to parenthood” 2007 (24) *Journal of Social Personal Relationships*
297-318

- Goldblatt B “Case note: Same-sex marriage in South Africa – The Constitutional court’s judgement” 2006 (14) *Feminist Legal Studies* 261-270
- Goldblatt B “Regulating domestic partnerships – a necessary step in the development of South African family law” 2003 (120) *South African Law Journal* 610-629
- Goldsworthy J “Constitutional law: Interpreting the Constitution in its second century” 2000 (24) *Melbourne University Law Review* 677-710
- Golombok S and Tasker F “Adults raised as children in lesbian families” 1995 (65) *American Journal of Orthopsychiatry* 203-215
- Golombok S and Tasker F “Do parents influence the sexual orientation of their children? Findings from longitudinal study of lesbian families” 1996 (32) *Developmental Psychology* 3-11
- Golombok S *et al* “Families created through surrogacy arrangements: Parent-child relationships in the first year of life” 2004 (40) *Developmental Psychology* 400-411
- Golombok S, MacCallum and Rutter “Family with children conceived by donor insemination: A follow-up at age twelve” 2002 (73) 3 *Child Development* 952-968.
- Golombok S *et al* “The European study of assisted reproduction families: The transition to adolescence” 2002 (17) *Human Reproduction* 830-840
- Gonzalez M *et al* “Psychological adjustment and social integration of children from gay-lesbian families” 2004 (27) *Infancia Aprendizaje* 327-343

- Grace VM, Daniels KR & Gillett W “The donor, the father, and the imaginary constitution of the family: Parents’ constructions in the case of donor insemination” 2008 (66) *Social Sciences and Medicine* 301-314
- Graham KT “Same-sex couples: Their rights as parents, and their children’s rights as children” 2008 (48) *Santa Clara Law Review* 999-1037
- Graycar R “Law reform by frozen chook: Family law reform for the new millennium?” 2000 (24) *Melbourne University Law Review* 737-755
- Green RM “Parental autonomy and the obligation not to harm one’s child genetically” 1997 (25) *Journal of Law Medicine and Ethics* 5-15
- Greenan DE and Tunnel G “Sex, drugs, rock ‘n’ roll ... and children: Redefining male couples in the 21th century” 2005 (1) *Journal of Gay Lesbian Bisexual and Transgender Family Studies* 33-52
- Griffith G “Same-sex marriage” July 2011 *NSW Parliament Library Research Service* 1-36
- Grotevant HD “Adoptive identity: How context within and beyond the family shape the developmental pathways” 2000 (49) *Family Relations* 379-387
- Hawkins J “My two dads: Challenging gender stereotypes in applying California’s recent Supreme Court Cases to gay couples” 2007 (41) *Family Law Quarterly* 623-638
- Hay P “Recognition of same-sex legal relationships in the United States” 2006 *American Journal of Comparative Law* 257-279

- Heaton J "An overview of the current legal position regarding heterosexual life partnerships" 2005 (68) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 662-670
- Heaton J "An individualized, contextualized and child-centred determination of the child's best interests, and the implications of such an approach in the South African context" 2009 (34) 2 *Journal for Juridical Science* 1-18
- Heaton J "Some general remarks on the concept 'best interests of the child' 1990 (5) *Journal for Contemporary Roman Dutch Law* 95-99
- Herek GM "Legal recognition of same-sex relationships in the United States: A social science perspective" 2006 (61) *American Psychology* 607-621
- Herell R *et al* "Sexual orientation and suicidality: A co-twin control study in adult men" 1999 (56) *Archives of General Psychology* 867-874
- Hsu KK "Why the politics of marriage matter: Evaluating legal and strategic approaches on both sides of the debates on same-sex marriage" 2005 (20) *Brigham Young University Journal of Public Law* 275-312
- Hull KE "The political limits of the rights frame: The case of same-sex marriage in Hawaii" 2001 (44) *Sociological Perspectives* 207-232
- Huyser C and Boyd L "ART in South Africa: The Price to Pay" 2013 (5) *Facts, Views, Vision in Obstetric Gynaecology* 91-99
- Huyser C and Boyd L "Assisted reproduction laboratory cost-drivers in South Africa: value, virtue and validity" 2012 (22) *Obstetrics & Gynaecology Forum* 15-21

- Isaac M “What’s in a name?’ Civil unions and the constitutional significance of marriage” 2008 (10) *Journal of Constitutional Law* 607-642
- Jain T *et al* “Trends in embryo-transfer practice and in outcomes of the use of assisted reproductive technology in the United States” 2004 (350) *New English Journal of Medicine* 1639-1645
- Jivan U “From individual protection to recognition of relationships: Same-sex couples and the South African experience of sexual orientation reform” 2007 (11) *Law, Democracy & Development* 19-46
- Johnson K “Maternal-infant bonding: A review of literature” 2013 (8) *International Journal of Childbirth Education* 17-22
- Karina A and Drabsch T “Legal recognition of same-sex relationships” June 2006 *New South Wales Parliamentary Library Research Service* 1-62
- Kerry W “‘Dip me in chocolate and throw me to the lesbians’: Homophobic hate crimes, the state and civil society” 2012 *South Africa Crime Quarterly* 39-46
- Kirkman M “Genetic connection and relationships in narratives of donor assisted conception” 2004 (2) *Australian Journal of Emerging Technologies and Society* 1-20
- Kirkman M “Parents’ contribution to the narrative identity of offspring of donor-assisted conception” 2003 (57) *Social Sciences and Medicine* 2229-2242
- Koivurova S *et al* “Growth, psychomotor development and morbidity up to 3 years of age in children born after IVF” 2003 (18) *Human Reproduction* 2328-2336

Koppelman A “Why discrimination against lesbians and gay men is sex discrimination” 1994 (69) *New York University Law Review* 197-287

Kovalevsky G “Do assisted reproductive technologies cause adverse fetal outcomes?” 2003 (79) *Fertility & Sterility* 1270- 272

Kukura E “Finding family: Considering the recognition of same-sex families in international human rights law and the European Court of Human Rights” 2006 (13) *Human Rights Brief* 17-20

Kurinczuk JJ, Hansen M & Bower C “The risk of birth defects in children born after assisted reproductive technologies” 2004 (16) *Current Opinion in Obstetrics and Gynecology* 201-209

Laing JA and Oderberg D “Artificial Reproduction, the ‘welfare principle’ and the common good” 2005 (13) *Medical Law Review* 328-356

Le Vay S “A difference in hypothalamic structure between heterosexual and homosexual men” 1991 (253) *Science* 1034-1037

Lev AI “Gender dysphoria: Two steps forwards, one step back” 2013 *Clinical Social Work Journal* 1-9

Lie G and Gentlewarrier S “Intimate violence in lesbian relationships: Discussion of survey findings and practice implications” 1991 (15) *Journal of Social Service Research* 41-59

Lindel G “Constitutional issues regarding same-sex marriage: A comparative survey – North America and Australia” 2008 (38) *Sydney Law Review* 27-60

Lindel G “State legislative power to enact same-sex marriage legislation, and the effect of the Marriage Act 1961 (Cth) as Amended by the Marriage

Amendment Act 2004 (Cth)" 2006 (9) 2 *Constitutional Law and Policy Review* 25-36

Lindsay J *et al* "Stigma or respect: Lesbian parented families negotiating school settings" 2006 (40) *Sociology* 1059-1077

Lockhart LL *et al* "Letting out the secret: Violence in lesbian relationships" 1994 (9) 4 *Journal of Interpersonal Violence* 469-492

Louw A "Surrogacy in South Africa: Should we reconsider the current approach" 2013 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 564-588

Lubbe C "Mothers, fathers or parents: Same gendered families in South Africa" 2007 (37) *South African Journal of Psychology* 260-283

Lucassen N *et al* "Expressed emotion during pregnancy predicts observed sensitivity of mothers and fathers in early childhood" 2015 *Parenting: Science and Practice* 158-165

Lupton ML "The status of children born by artificial insemination in South African law" 1985 *Tydskrif vir die Suid-Afrikaanse Reg* 277-295

Lupton ML "The legal status of the embryo" 1988 *Law and Medicine* 197-215

MacCallum F *et al* "Surrogacy: The experience of commissioning couples" 2003 (18) *Human Reproduction* 1334-1342

Maccoby EE "The role of parents in the socialisation of children: An historical overview" 1992 (28) *Developmental Psychology* 1006-1017

- Macklin E "Nontraditional family forms: A decade of research" 1980 (42) *Journal of Marriage and the Family* 905-922
- Mahlobogwane FM "Surrogate motherhood arrangements in South Africa: Changing societal norms?" 2013 (27) *Speculum Juris* 45-58
- Mahlstedt PP, Labounty K and Kennedy WT "The view of adult offspring of sperm donation: Essential feedback for the development of ethical guidelines within the practice of assisted reproductive technology" 2010 (93) *Fertility and Sterility* 2236-2246
- Mahoney MM "Support and custody aspects of the stepparent-child relationship" 1984 (70) *Cornell Law Review* 38-79
- Manian M "Lessons from personhood's defeat: Abortion restrictions and side effects on women's health" 2013 (74) *Ohio State Law Journal* 75-120.
- Martín IM "Sex selection and the procreative liberty framework" 2013 (23) *Kennedy Institute of Ethics Journal* 1-18
- Massoud M "The evolution of gay rights in South Africa" 2003 (15) *Peace Review: A Journal of Social Justice* 301-307
- Mattalucci C "Between the law and bioethics: Placing the unborn in contemporary Italy" 2013 (2) *Academic Journal of Interdisciplinary Studies* 283-290
- McGough LS "Starting over: The heuristics of family relocation decision making" 2003 (77) *Saint John Law Review* 291-343

- McKirnan D and Peterson PL “Alcohol and drug use among men and women: Epidemiology and population characteristics” 1989 (14) *Addictive Behaviours* 545-556
- McNair R “Outcomes for children born of ART in a diverse range of families” 2004 *Victoria Law Reform Commission* 1-88
- McReynolds AW “Comment, what international experience can tell US Courts about same-sex marriage” 2006 (53) *University of California Law Review* 1073-1105
- Meagher D “The times are they a-changin’? –Can the commonwealth parliament legislate for same-sex marriages?” 2003 (17) *Australian Journal of Family Law* 134-154
- Meazan W and Rouch J “Gay marriage, same-sex parenting, and America’s children” 2005 (2) *The Future of Children* 97-117
- Mercer KL “A content analysis of judicial decision-making – How judges uses the primary caretaker standard to make a custody determination” 1998 (5) *William and Mary Journal of Women and Law* 1-149
- Meyersen D “Abortion: The constitutional issues” 1999 (116) *South Africa Law Journal* 50-59
- Milbank J “From here to maternity: A review of the research on lesbian and gay families” 2003 (38) *Australian Journal of Social Issues* 541-600
- Milbank J “Gay and lesbian families in Australia” 2005 *Legal Information Access Centre* 1-23

- Milbank J "Recognition of lesbian and gay families in Australian Law – Part one: Couples" 2006 (34) *Federal Law Review* 1-44
- Milbank J "The limits of functional family: Lesbian mother litigation in the era of the eternal biology" 2008 (22) *International Journal of Law, Policy and Family* 1-35
- Mills C "Reproductive autonomy as self-making: Procreative liberty and the practice of ethical subjectivity" 2013 (38) *Journal of Medicine and Philosophy* 639-656
- Moosavi SF "The comparison of family functioning, marital adjustment and intimacy in middle aged and young spouses" 2012 (6) *International Research Journal of Applied and Basic Sciences* 2015-2021
- Müller A "Strategies to include sexual orientation and gender identity in health profession education" 2015 (7) 1 *African Journal of Health Professions Education* 4-7
- Murphy AS "A Survey of State Foetal Homicide laws and their potential applicability to pregnant women who harm their own fetuses" 2014 (89) *Indiana Law Journal* 847-883
- Murray C and Golombok S "Oocyte and semen donation: a survey of UK licensed centres" 2000 (15) *Human Reproduction* 2133-2139
- Murray CE and Mobley K "Empirical research about same-sex partners' violence: A methodological review" 2009 (56) *Journal of Homosexuality* 361-386
- Naidoo K and Kerels M "Hate crimes against black lesbian South Africans: Where race, sexual orientation and gender collide (Part I)" 2012 (33) *Obiter* 236-259

- Ness RB *et al* "Infertility, fertility drugs, and ovarian cancer: A pooled analysis of case-control studies" 2002 (155) *American Journal of Epidemiology* 217-224
- Ngwenya C "An appraisal of abortion laws in Southern Africa from a reproductive health rights perspective" 2004 (32) *Journal of Law, Medicine and Ethics* 708-717
- Nielsen JS and Van Heerden B "The constitutional family: Developments in South African family law jurisprudence under the 1996 Constitution" 2003 (17) *International Journal of Law Policy and the Family* 121-146
- Nolan LC "'Unwed children' and their parents before the United States Supreme Court from Levy to Michael H. Unlikely participants in constitutional jurisprudence" 1999 (28) *Capital University Law Review* 1-72
- Pacey B "The emergence and recognition of moffees as popular entertainers in the Cape Minstrel carnival" 2014 (27) *South African Theatre Journal* 111-124
- Parisi I "Surrogacy world's perspective – A review" 2015 (2) *Acta Media International* 137-143
- Paterson CJ "Family relationships of lesbians and gay men" 2000 (62) *Journal of Marriage and Family* 1052-1069
- Patterson CJ "Families of the lesbian baby boom: Parents' division of labor and children's adjustment" 1995 (31) *Developmental Psychology* 115-123
- Patterson CJ and Tornello S "Gay fathers' pathways to parenthood: International perspectives" 2010 (22) *Journal of Family Research* 103-115

- Patterson CJ, Suftin EL & Fulcher M "Division of labour among lesbian and heterosexual parenting couples: Correlates of specialised versus shared patterns" 2004 (11) *Journal of Adult Development* 179-189
- Pickles C "Termination-of-pregnancy rights and foetal interests in continued existence in South Africa: The Choice on Termination of Pregnancy Act 92 of 1996" 2012 (15) *Potchefstroom Electronic Law Journal* 403-434
- Pillay R and Zaal FN "Surrogate motherhood confirmation hearings: The advent of a fundamentally flawed process" 2013 *South African Law Journal* 476-485
- Polikoff N "This child does have two mothers: Redefining parenthood to meet the needs of children in lesbian-mother and other non-traditional families" 1990 (78) *Georgia Law Journal* 459-575
- Polk LM "Montana's marriage amendment: Unconstitutionally denying a fundamental right" 2005 (66) *Montana Law Review* 405-443
- Popenoe D "American family decline 1961-1990: A review and appraisal" 1993 (55) *Journal of Marriage and the Family* 527-555
- Potashnik G *et al* "Fertility drugs and the risk of breast and ovarian cancers: Results of a long-term follow-up study" 1999 (71) *Fertility & Sterility* 853-859
- Pound R "Individual interests in domestic relations" 1916 (14) *Michigan Law Review* 177-196
- Ray V and Gregory R "School experiences of the children of lesbian and gay parents" 2001 (59) *Family Matters* 28-35

Rhoades H "Reforming custody laws: A comparative study" 2004 (18) *International Journal of Law, Policy and the Family* 119-146

Rhoades H and Burns K "The politics of the primary caregiver presumption: A conversation" 1999 (13) *Australian Journal of Family Law* 233-263

Rivers I, Poteat VP and Noret N "Victimisation, social support, and psychological functioning among children of same-sex and opposite couples in the United Kingdom" 2008 (44) *Developmental Psychology* 127-134

Roberts MA "Cloning and harming: Children, future persons, and the 'best interest' test" 1999 (13) *Notre Dame Journal of Law, Ethics and Public Policy* 37-61

Robertson JA "Liberty, Identity, and human cloning" 1998 (76) 6 *Texas Law Review* 1371-1456

Robertson JA "Gay and lesbian access to assisted reproductive technology" 2005 (55) *Case Western Law Review* 332-372

Robertson JA "Procreative liberty and harm to offspring in assisted reproduction" 2004 (30) *American Journal of Law & Medicine* 7-40

Robertson JA "Procreative liberty in the era of genomics" 2003 (29) *American Journal of Law and Medicine* 439-487

Rogers G "'Suffer the Children': What's wrong with gay adoption" 2005 (28) *Christian Research Journal* 1-8

Rothman J "South African gay fathers' parenting practices: From pathology to normalisation" 2011 (43) *Acta Academia* 39-79

Sabatello M “Are the kids all right? A child-centred approach to assisted reproductive technology” 2013 (31) *Netherlands Quarterly of Human Rights* 74-98

Sadler BJ “Re-thinking civil unions and same-sex unions” 2008 (91) *The Monist* 578-605

Salam D and Lawery K “Taxation of same-gender spousal benefits in the wake of US Supreme Court ruling” August 2015 *Ernest Young* 1-5

Sandfort GMT *et al* “Sexual orientation and mental health status: Findings from Dutch population survey” 2006 (96) *American Journal of Public Health* 1119-1129

Sarantakos S “Children in three contexts: Family, education, and school development” 1996 (21) *Children Australia* 23-31

Shai NJ and Sikweyiya Y “Addressing sexual and intimate partner violence in South Africa” 2015 (51) *South Africa Crime Quarterly* 31-41

Scheib JE, Riordan M & Rubin S “Choosing identity-release sperm donors: The parents’ perspective 13-18 years later” 2003 (18) *Human Reproduction* 1115-1127

Schultz RM and Williams CJ “The science of ART” 2002 (296) *Science* 2188-2190

Sella CB “When a mother is a legal stranger to her child: The law’s challenge to the lesbian nonbiological mother” 1991 (1) *UCLA Women’s Law Journal* 135-164

Seopela SS “Congenital and neonatal infections” 2015 *Obstetrics & Gynaecology Forum* 27-32

Sexton SD "A custody system free of gender preferences and consistent with the best interests of the child: suggestions for a more protective and equitable custody system" 1999-2000 (88) *Kentucky Law Journal* 761-802

Seymour J and Magri S "A.R.T, surrogacy and legal parentage: A comparative legislative review" 2004 *Victoria Law Reform Commission* 1-74

Shiffrin SV "Wrongful life, procreative responsibility and the significance of harm" 1999 (5) *Legal Theory* 117-148

Short E *et al* "Lesbian, gay, bisexual and transgender (LGBT) parented families" 2007 *Australian Psychological Society* 1-29

Short L "'It makes the world of difference': Benefits for children of lesbian parents having their parents legally recognised as their parents" 2007 (3) *Gay and Lesbian Issues and Psychology Review* 5-15

Shultz MM "Reproductive technology and intent-based parenthood: An opportunity for gender neutrality" 1990 (297) *Wisconsin Law Review* 297-398

Sifris A "Known semen donors: To be or not to be a parent" 2005 (13) *Journal of Law and Medicine* 230-244

Singh D "Intimate abuse - A study of repeat and multiple victimisation" 2003 (16) *Acta Criminologica* 34-51

Smart C "Law and the regulation of family secrets" 2010 (24) *International Journal of Law Policy and the Family* 397-413

- Snow D and Knopff R "Assisted reproduction policy in federal states: What Canada should learn from Australia" 2012 (5) *School of Public Policy* 1-28
- Solomon SE, Rothblum ED and Balsan KF "Money, housework, sex, and conflicts: Same-sex couples in civil unions, those not in civil unions, and heterosexual married siblings" 2005 (52) *Sex Roles* 561-575
- Soule SA "Going to the chapel? Same-sex marriage bans in the United States, 1973-2000" 2004 (51) *Society for the Study of Social Problems* 453-477
- Spitko EG "From queer to paternity: How primary gay fathers are changing fatherhood and gay identity" 2005 (24) *Saint Louis University Public Law Review* 195-220
- Stacey J and Biblarz T "How does the sexual orientation of parents matter?" 2001 (66) *American Sociological Review* 159-176
- Steinberg L "We know something: Parent-adolescent relation in retrospect and prospect" 2001 (11) *Journal of Research on Adolescence* 1-19
- Stephenson R, Khosropour C and Sullivan P "Reporting of intimate partner violence among men who have sex with men in an online survey" 2010 (9) *Western Journal of Emergency Medicine* 242-246
- Strömberg B *et al* "Neurological sequelae in children born after in-vitro fertilisation: A population-based study" 2002 (359) *The Lancet* 461-465
- Strong C "Too many twins, triplets, quadruplets, and so on: A call for new priorities" 2003 (31) *Journal of Law Medicine and Ethics* 272-282

- Stychin CF "Constituting sexuality: The struggle for sexual orientation in the South African Bill of Rights" 1996 (23) *Journal of Law and Society* 455-483
- Tasker F "Lesbian mothers, gay fathers and their children: A review" 2005 (26) *Journal of Developmental and Behavioral Pediatrics* 224-238
- Thomas C *et al* "Distress and depression in men who have sex with men: The Urban Men's Health Study" 2004 (161) *American Journal of Psychiatry* 278-285
- Thoreson RR "Somewhere over the rainbow nation: Gay, lesbian and bisexual activism in South Africa" 2008 (34) *Journal of South African Studies* 679-697
- Thorpe R *et al* "In the best interests of the child? Regulating assisted reproductive technologies and the well-being of the offspring in three Australian states" 2012 (26) *International Journal of Law, Policy and the Family* 259-277
- Thorpe R *et al* "New assisted reproductive technology laws in Victoria: A genuine overhaul or just a cut and paste?" 2011 (18) *Journal of Law and Medicine* 835-850
- Titshaw S "Sorry ma'am, your baby is an alien: Outdated immigration rules and assisted reproductive technology" 2010 (12) *Florida Coastal Law Review* 47-133
- Tobin J "The Convention on the Rights of the Child: The rights and best interests of children conceived through assisted reproduction" 2004 *Victoria Law Review Commission* 1-68
- Trast CR "You can't choose your parents: Why children raised by same-sex couples are entitled to inheritance rights from both their parents" 2006 (35) *Hofstra Law Review* 857-899

- Turkmendag I, Dingwall R & Murphy T “The removal of donor anonymity in the UK: The silencing of claims by would-be parents” 2008 (22) *International Journal of Law, Policy and the Family* 283-310
- Turner AJ and Coyle A “What does it mean to be a donor offspring? The identity experiences of adults conceived by donor insemination and the Implications for counselling and therapy” 2000 (15) *Human Reproduction* 2041-2051
- Van As NM and Janssen JMAM “Relationships between child behavior problems and family functioning: A literature review” 2002 (5) *International Journal of Child and Family Welfare* 40-51
- Van der Vyver JD “Children’s rights, family values, and federal constraints” 2012 (15) *Journal of Markets & Morality* 117-142
- Vanfraussen K, Kristofferssen PI & Brewaeys A “An attempt to reconstruct children’s donor concept: A comparison between children’s and lesbian parents’ attitude towards donor anonymity” 2001 (21) *Human Reproduction* 2019-2025
- Vanfraussen K, Kristofferssen PI and Brewaeys A “What does it mean for youngsters to grow up in a lesbian family created by means of donor insemination?” 2002 (20) *Journal of Reproduction and Infant Psychology* 237-252
- Venn A *et al* “Risk of cancer after use of fertility drugs with in-vitro fertilisation” 1999 (354) *Lancet* 1586-1590
- Vernado S “Who’s your daddy? A legitimate question given Louisiana’s lack of legislation governing assisted reproductive technology” 2006 (66) *Louisiana Law Review* 609-660

- Waaldijk K “Overview of forms of joint legal parenting available to same-sex couples in European countries” 2009 (2) *Droit et Société* 383-385
- Walker K “The same-sex marriage debate in Australia” 2007 (11) *International Journal of Human Rights* 109-130
- Walmsey LJ “Obstetric outcome after assisted conception” 2014 (24) *Obstetrics and Gynaecology Forum* 29-35
- Wardle LD “A critical analysis of constitutional claims for same-sex marriages” 1996 (1) *Brigham Young University Law Review* 1-101
- Wardle LD “A response to the ‘conservative case’ for same-sex marriage and the tragedy of the commons’ 2007 (22) *Brigham Young University Journal of Public Law* 441-474
- Wardle LD “Multiply and replenish: Considering same-sex marriage in light of state interests in marital procreation” 2000 (24) *Harvard Journal of Law and Public Policy* 772-814
- Wardle LD “The Potential Impact of Homosexual Parenting on Children” 1997 (3) *University Illinois Law Review* 833-919
- Wardle LD “Who decides? The federal Architecture of DOMA and comparative marriage recognition” 2010 (41) *California Western International Law Journal* 143-187
- Wertz DC “International perspectives on ethics and human genetics” 1993 (27) *Suffolk University Law Review* 1411-1456

- Williams G "Can Tasmania legislate for same-sex marriage?" 2002 (31) *University of Tasmania Law Review* 117-133
- Witzleb N "Marriage as the last frontier? Same-sex relationships recognition in Australia" 2011 (25) *International Journal of Law, Policy and Family* 135-164
- Wolff J "Return of the sperm bank babies" 2004 (19) *Men's Health* 122-162
- Wood-Bodley MC "Establishing the existence of a same-sex life partnership for the purposes of intestate succession" 2008 (15) *South African Law Journal* 259-273
- Worthington AC "Knowledge and perceptions of superannuation in Australia" 2008 (31) *Journal of Consumer Policy* 349-368
- Wynchank D "Psychiatry and same-sex marriage: Are we involved" 2006 (9) *South African Psychiatry Review* 69-71
- Xiridou M *et al* "The contribution of steady and casual partnerships to incidence of HIV infection among homosexual men in Amsterdam" 2003 (17) *Lippincott Williams and Wilkins Journals* 1029-1038
- Zanghellini A "Lesbian and gay parents and reproductive technologies: The 2008 Australian and UK Reforms" 2010 (18) *Feminist Law Studies* 227-251.
- Zawawi M "Donated materials in assisted reproductive technologies: An ethico-legal analysis of art legislations worldwide" 2010 (3) *Journal Medical Ethics and History of Medicine* 1-9
- Zimmermann A "The constitutionality of same-sex marriage in Australia (and other related issues)" 2013 (27) *Brigham Young University Journal of Public Law* 465-488

Zubrick SR *et al* "Prevention of child behavior problems through universal implementation of a group behavioral family intervention" 2005 (6) *Prevention Science* 287-304

Zyberaj J and Ikonomi E "The complications of donor assisted reproduction anonymity" 2013 (2) *Academic Journal of Interdisciplinary Studies* 578-578

NEWSPAPERS

Kanigel "Gonorrhoea, syphilis on rise in NC: Experts concerned that increase passages a surge AIDS cases" (7 November 1991) *News and Observer* 3

Knoesen "Queering the vote" (3 March 2004) *Mail and Guardian* 15

Noome P "The gay left" March/April 1990 *EXIT* 3

Oliver L "Tears as pair is given custody" (5 December 1998) *Saturday Argus* 3

Powers C "Lesbian mother wins custody of her child" (3 April 1998) *The Star* 3

Sisson B "Numbers tell story: AIDS in't going away" (13 February 1997) *The Columbian* at B1

Villarosa L "Once invisible sperm donors get to meet the family" (21 May 2002) *New York Times* at F5.

OTHER SOURCES

Gay and Lesbian Archives of South Africa (GALA), University of the Witwatersrand, GASA Collection, File 6, Address by Kevan Botha, National Secretary of GASA, 8th Annual Conference of the International Lesbian and Gay Alliance (ILGA), Copenhagen, 12 July 1986

Memorandum from the Lambda Legal Defense and Education Fund Inc (22 May 1995)

UNPUBLISHED SOURCES

Biblarz TJ and Stacy J “How does the gender of parents matter?” (Paper delivered at the Evolving Families Conference, 7-8 April 2006, Institute for Social Sciences, Cornell University)

Geegeler S “Beyond the text: A vision of the structure and function of the Constitution” (lecture delivered at the New South Wales Bar Association Sir Maurice Byers Memorial, 7 April 2009)

Gridley H *et al* “Submission to the New Legislative Council Standing Committee on Social Issues Inquiry into Same-sex Marriage Law in New South Wales” (unpublished paper submitted to the Australian Psychological Society on 1 March 2013)

Robinson JA “The evolution of the concept of marriage in South Africa: The influence of the Bill of Rights in 1994” (unpublished paper presented at the 12th World Conference of the International Society of Family Law, July 2005, Salt Lake City)

INTERNET SOURCES

American Bar Association Section of Family Law Working Group on Same-Sex Marriages and Non-Marital Unions *An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships* (a White Paper) (2004), available at

<http://www.americanbar.org/content/dam/aba/migrated/family/reports/WhitePaper.authcheckdam.pdf> (date of use 26 March 2015)

Bureau of International Programs, United States Department of State “Outline of the US legal system” (2014), available at <http://usinfo.state.gov> (date of use 24 August 2016)

Center for Reproductive Rights “Rights at risk: The truth about prenatal personhood” (2012), available at www.reproductiverights.org (date of use 26 March 2015)

Centers for Disease Control “Contribution of assisted reproductive technology and ovulation-inducing drugs to triplet and higher-order multiple births – United States, 1980-997” *Morbidity and Mortality Weekly Report* (23.06.2000), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4924a4.htm> (date of use 26 March 2015)

Centers for Disease Control and Prevention, US Department of Health and Human Services “A glance at the HIV/AIDS epidemic 2” (2007), available at <http://www.cdc.gov/hiv/resources/factsheets/At-A-Glance.htm> (date of use 26 March 2015)

Chambers C “Feminism, liberalism and marriage” (2010) (unpublished manuscript), available at

<http://www.brown.edu/Research/ppw/files/Feminism,%20Liberalism%20and%20Marriage.doc> (date of use 26 March 2015)

CNN “Map: Same-sex marriage in the United States” (26 June 2015), available at <http://edition.cnn.com/interactive/us/map-same-sex-marriage> (date of use 21 July 2015)

Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997), available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=164&CL=ENG> (date of use 20 March 2014)

Diggs JR “The health risks of gay sex” (2002), available at http://www.corporateresourcecouncil.org/white_papers/Health_Risks.pdf (date of use 26 March 2015)

Federal Judicial Center “The U.S. legal system: A short description” available at www.fjc.gov/public/pdf.nsf/...legal system.../us-legal-system-English07pdf (date of use 24 August 2016)

Green Paper on *Families Promoting Family Life and Strengthening Families in South Africa* (2011), available at <http://www.thepresidency.gov.za/.../Green%20Paper%20on%20Families.pdf> (date of use 3 July 2015)

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=164&CL=ENG> (date of use 20 March 2014)

http://www.americanbar.org/content/dam/aba/migrated/family/reports/WhitePaper.aut_hcheckdam.pdf (date of use 26 March 2015)

Human Fertilisation and Embryology Authority “Sex selection: Options for regulation” (2003), available at <http://www.hfea.gov.uk/AboutHFEA/Consultations> (date of use 26 March 2015)

Joint Working Group “A proposal for a national model to harmonise regulation on surrogacy” (2009), available at <http://www.Scag.org.au/27> (date of use 24 April 2014)

Justice Heydon “Theory of constitutional interpretation: A taxonomy” (speech delivered at the sir Maurice Byers Lecture, New South Wales Bar Association Common Room, 3 May 2007), available at http://www.nsbar.asn.au/docs/resources/lectures/Byers_07.pdf (date of use 20 January 2015)

Lambda Legal “Marriage, relationships, and family law”, available at <http://www.lambdalegal.org/ourwork/issues/marriage-relationships-family> (date of use 23 March 2015)

Lubbe C “To tell or not to tell: How children of same-gender parents negotiate their lives at school. (2007), available at http://www.glhv.org.au/files/tell_or_not_tell_edu_change_OPdf. (date of use 10 August 2016)

“LSVD”, available at <https://www.lsvd.de/ziele/buergerrechte/lsvd-the-lesbian-and-gay-federation-in-germany.html> (date of use 7 July 2015)

Marquardt E “The revolution in parenthood, institute for American values” (2006) 6, 10 available at <http://familyscholars.org/2006/01/01/the-revolution-in-parenthood> (date of use 27 August 2014) (hereinafter “Marquardt”)

McCormick TL “Queering discourses of coming out in South Africa” (2013), available at <http://spiplus.journals.ac.za> (date of use 10 August 2016)

National Conference of State Legislatures “State laws related to insurance coverage for infertility treatment”, available at <http://www.ncsl.org/IssuesResearch/Health/InsuranceCoverageforInfertilityLaws/tabid/14391/Default.aspx> (date of use 23 March 2014)

New Jersey Civil Union Review Common “The legal, medical, economic and social consequences of New Jersey’s Civil Union Law” (2008), available at <http://www.nj.gov/lps/dcr/downloads/CURCFinal-Report.pdf> (date of use 23 March 2015)

Nkabinde N & Morgan R “This happened since ancient times...it’s something that you are born with: Ancestral wives among same-sex sangomas in South Africa” (2011) available at <http://www.tandfonline.com/loi/ragn20> (date of use 21 May 2015)

President’s Council on Bioethics, Reproduction and Responsibility “The regulation of new biotechnologies” (ch 2), available at <http://www.bioethics.gov/reports/reproductionandresponsibility/chapter2.html1> (date of use 23 June 2015)

Robinson J “Homosexual parenting evenly divides Americans” (2003), available at <http://www.gallup.com/poll/8740/homosexual-parenting-evenly-divides-americans.aspx> (date of use: 2 February 2016)

Shipman B and Smart CC “‘It’s made a huge difference’: Recognition, rights and the personal significance of civil partnership (2007), available at <http://www.socresonline.org.uk/12/1/shipman.html> (date of use 23 March 2015)

South Australia Council on Reproductive Technology “Eligibility fact sheet: Reproductive technology legislation and regulation in SA”, available at www.dh.sa.gov.au/reproductivetechnology/fact%20sheets.asp (date of use 11 August 2014)

Storey GP “Ethical problems surrounding surrogate motherhood”, available at <http://www.yale.edu/ynhti/curriculum/units/2000/7/00.07.05.x.html> (date of use 29 June 2015)

Tasmania Law Reform Institute “The legal issue relating to same-sex marriage” (2013), available at www.http//law.utas.edu.au/reform (date of use 20 January 2015)

Thomas V “Stop the baby trade” (2006) available at <http://childrenhaverights-saynotoreprotech.blogspot.com/2007/02/new-eugenics-california-cryobank.html> (date of use 27 August 2014)

United Nations Refugee Agency “UNHCR guidelines for determining the best interests of the child” (2008), available at www.unhcr.org/4566b16b2.pdf (date of use 24 August 2016)

TABLE OF LEGISLATION

Australia

Adoption Act 1984 (Vic)
Adoption Act 1993 (ACT)
Adoption Act 1994 (WA)
Anti-Discrimination Act 1977 (NSW)
Artificial Conception Act 1985 (WA)
Compensation (Fatal Injuries) Act 1974 (NT)
Constitution of Australia Act 1961 (Austl)
Crimes (Victims Assistance) Act 1982 (NT)
Domestic Relationship Act 1994 (ACT)
Family Law Act 1975 (Cth)
Family Protection Act 1999 (Qld)
Family Provision Act 1970 (NT)
Human Reproductive Technology Act 1991 (WA)
Industrial Relations Act 1999 (Qld)
Infertility Act 1995 (Vic)
Infertility Treatment Act 1995 (Vic)
Interpretation Act 1984 (WA)
Interpretation Act 1999 (Qld)
Legislation Act 2001 (ACT)
Marriage Act 1961 (Cth)
Parentage Act 2004 (ACT)
Property (Relationship) Act 1984 (NSW)
Property Law 1974 (Qld)
Property Law Amendment Act 1999 (Qld)
Relationship Act 2003 (Tas)
Reproductive Technology (Clinical Practices) Act 1988 (SA)

Reproductive Technology (Code of Ethical Clinical Practice) Regulations 1995
Status of Children Act 1974 (Tas)
Status of Children Act 1974 (Vic)
Status of Children Act 1975 (NT)
Status of Children Act 1978 (Qld)
Status of Children Act 1996 (NSW)
Status of Children Act 1998 (NT)
Statutes Amendment (Superannuation Entitlements for Same-sex Couples) Act 2003 (SA)
Statutes Amendments Relationships Bill 2004 (SA)

SOUTH AFRICA

Aliens Control Act 96 of 1991
Basic Conditions of Employment Act 75 of 1997
Births, Marriages and Death Registration Act 81 of 1963
Children's Act 38 of 2005
Choice on Termination of Pregnancy Act 92 of 1996
Civil Union Act 17 of 2006
Constitution of the Republic of South Africa, 1996
Domestic Violence Act 116 of 1998
Employment Equity Act 55 of 1998
Immorality Act 5 of 1927
Maintenance Act 99 of 1998
Marriage Act 25 of 1961
Medical Schemes Act 131 of 1998
National Health Act 61 of 2003
Prison Act 2 of 1975
Rental Act 50 of 1999
Sexual Offences Act 23 of 1957

USA

Defense of Marriage Act (DOMA)

Uniform Parentage Act (1973),

Uniform Marriage and Divorce Act

California Fam. Code (West 1994)

United States Constitution Amendment XIV

Civil Unions Act (2002)

TABLES OF CASES

Australia

Attorney General for the Commonwealth v Kevin and Jennifer and Human Rights and Equal Opportunity Commission (2003) Fam CA
Bowditch v McEwan [2002] QCA 172 (12) (De Jersey CJ)
Cummins v. Bird (1929) 230 KY 296, 19 S.W. (2d) 959
Dickson v The Queen (2010) 241 CLR 491
Ex parte Australian National Airways (1964) 113 CLR 207
In Re Wakim: Exparte McNally (cross-vesting case) (1999) 198 CLR 511, 551 (Austl)
Jennifer Morgan v GK [2001] QADT 10; (2001) EOC 93–154
JM v QFG [1998] QCA 228; [2000] 1 Qd R 373; (2000) EOC 93–047; BC9804065
King v Western Sydney local Health Network [2011] NSWSC 1025.
Lynch v Lynch (by her tutor Lynch) (1991) 25 NSLR 411, 415 (Clarke JA)
McBain v Victoria [2000] FCA 1009
MW v Royal women’s Hospital (1997) EOC 92-886
Pearce v South Australian Health Commission (1996) 66 SASR 486
Perry v. Perry (1932) 278 Mass. 601, 180 N.E. 512
QFG v JM (1997) EOC 92–902
R v Davidson [1969] VR 667
Roche v. Roche 1944 25 A.C.126, 152 P. (2d) 999
Victoria v Commonwealth (1937) 58 CLR 618
Watt v Rama [1972] VR 235

England

Hyde v Hyde and Woodmansee (1866) LR 1 P&D

South Africa

- AB Surrogacy Advisory Group v Minister of Social Development (Centre for Child Law as amicus curiae)* [2015] 4 All SA 24 (GP)
- Bernstein v Bester* 1996 (2) SA 751 (CC)
- Chisholm v East Rand Property Mines Ltd* 1909 TH 297
- Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC)
- Christian Lawyers Association of SA v Minister of Health* 1998 4 SA 1113 (T)
- Christian Lawyers Association v Minister of Health* 2005 1 SA 509 (T)
- Dawood v Minister of Home Affairs* 2000 (1) SA 997 (C)
- Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA); 2003 11 BCLR 1220 (SCA)
- Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC); 2002 10 BCLR 1006 (CC)
- Ex parte matter between WH, UVS, LG, BJS* 29936/11
- Ex parte WH* 2011 (6) SA 514 (GNP)
- Gory v Kolver NO (Starke intervening)* 2007 (4) SA 97 (CC)
- In re Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC)
- Joshua v Joshua* 1961 (1) SA 455 (GW)
- Jooste v Botha* 2000 (2) SA 199 (T); 2000 (2) BCLR 187 (T)
- Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T); 1998 (2) All SA 259 (T)
- Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC); 2006 (3) BCLR 255 (CC)
- Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC)
- Minister of Home Affairs* 2000 (3) SA 936 (CC)
- Minister of Welfare and Population Development v Fitzpatrick* 2000 (7) BCLR 713 (CC)

Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae; Lesbian and Gay Equality Project v Minister of Home Affairs 2006 (1) SA 524 (CC); 2006 (3) BCLR 255 (CC) *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC)

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC); 2000 1 BCLR 39 (CC)

Peter v Minister of Law and Order 1990 (4) SA 6 (E)

Phillips v Director of Public Prosecutions 2003 (3) SA 345 (CC)

Pinchin v Santam Insurance Co Ltd 1963 (2) SA 254 (W)

Road Accident Fund v Mtati 2005 (6) 215 (SCA)

S v Callop (1981) SA 150 (A)

S v Kruger (1976) 3 SA 52 (A)

S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC)

S v Makwanyane 1995 (3) SA 391 (CC)

S v Meaker 1998 (8) BCLR 1038 (W)

S v Solberg 1997 (4) SA 1176 (CC)

S v V 1967 (2) SA 17 (E)

Satchwell v President of the Republic of South Africa 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC)

Satchwell v President of the Republic of South Africa 2003 (4) SA 266 (CC); 2004 (1) BCLR 1 (CC)

Simms v Simms 1981 (4) SA 186(D).

Soobramoney v Minister of Health 1998 (1) SA 765 (CC)

Van Rooyen v Van Rooyen 1994 (2) SA 325 (W)

V v V 1998 (4) SA 169 (C) 189 (B)

V v De Wet 1953 (1) SA 613 (O).

Volks v Robinson 2005 (5) BCLR 446 (CC)

W v W 1976 (2) SA 308 (W).

USA

Adams v Howerton 468 F supp 1119, 1122, 1124 (CD Cal 1980)

Astrue v Capito 556 US-(2012)

Baehr v Miike 910 P.2d 112 (Haw1996)

Baker v State 744 A.2d at 867 (Vt 1999)

Bowers v Hardwicks 478 US 189 (1986)

Brasch v Stahl Assocs. Co 543 NE 2d 49 (New York 1989)

Brause v Bureau of Vital Statistics 1998 WL 88743 (Alaska Super Feb 27, 1998)

Buzzanca v Buzzanca 61 Cal. App. 4th 1410 (Ct. App. 1998)

Caban v Mohammed 441 US 380 (1979)

Dean v DC 653 A 2d 307, 313-17 (DC 1995)

Eisenstadt v Baird 405 U.S. 438, 453 (1972)

Elisa B v Superior Court Elisa B v Superior Ct 117 P.3d 660 (Cal. 2005)

Eschbach v Eschbach 436 N.E.2d 1260, 1263

Ex Parte Ankrom Nos 110776 and 1100219 2013 WL 135748

Gerber v Hickman 291 F.3d 617 (9th Cir. 2002)

Glonn v Am.Guar. Co. 391 U.S. 73 (1968)

Gomez v Perez 409 U.S. 535 (1973)

Goodridge v Dep't of Pub Health, 798 N.E.2d 941, 969 (2003)

Harris v McRae 448 U.S. 297 (1980)

In re Baby M 537 A.2d 1227, 1250 (N.J. 1988)

In re Guardianship of Kowalski 478 NW 2d 790 (Min CT 1991)

In re unborn child 863 NYS S 2nd 371 (1998) New York Family Court)

Johnson v Calvert 851 P.2d 776, 779, 779-780 (Cal. 1993)

KM v EG 117 P.3d 673, 678-680 (Cal 2005)

Kristine H v Lisa R 117 P.3d 690, 692 (Cal. 2005)

Lawrence v Texas 539 U.S. 558 (2003)

Levy v Louisiana 391 U.S. 68(1968)

Loving v Virginia 388 US 1 (1967)
Moore v City of East Cleveland 431 US 494 (1977)
Obergefell v Hodges 1355 CT. 2584 (2015)
Pierce v Society of Sisters 268 US 510 (1925)
Poe v William 367 367 US 479, 546 (1961)
Romer v Evans 517 US 620 (1996)
Shahar v Bowers 70 F 3d 1218 (11th Cir 1995)
Skinner v Oklahoma 316 U.S. 541 (1942)
State ex rel. Lund v. Anderson (1928) 175 Minn. 518, 519, 221 N.W
State v Mcknight 576 SE 2nd 168 (SC 2003)
Thornburgh v American College of Obstetrics & Genecology 476 US 747, 772 (1986)
Turner v Safely 482 US 78 (1987)
US v Windsor [2013] 570 US
Washington v Glucksberg 521 U.S. 702
Weber v Aetna Cas and Surety Co 406 U.S. 164 (1972)
Whitner v State 492 SE 2nd 777(SC 1977)
Zablock v Redhail 434 US 374 (1987)

INTERNATIONAL AND REGIONAL INSTRUMENTS

African Charter on the Rights and Welfare of the Child (1990)

Convention on Human Rights and Biomedicine (1997)

Convention on the Rights of the Child (1989)

UN Human Rights Committee *CCPR General Comment No 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses* (1966)

Geneva Convention (Protection of Civilian Persons in the Time of War) of 1949

International Covenant on Economic, Social and Cultural rights (1966)

International Covenant on Civil and Political rights (1996)

United Declaration of Human Rights (1948)