

WHOSE BABY IS

A woman due to give birth this month to a surrogate baby who is not genetically linked to her is refusing to conclude legal proceedings to hand the infant over to its KZN-based parents. Vivian Attwood reports



A KWAZULU-Natal-based couple battled unsuccessfully for seven years to conceive a longed-for child. Finally, having exhausted all other options, they approached a surrogacy agency to link them with a woman prepared to carry a baby created using anonymous donor eggs and the husband's sperm.

At first all went well, and the appointed surrogate, a 26-year-old free State woman, duly fell pregnant. She was supported throughout the pregnancy by the commissioning parents, who covered all her expenses. Partway through the pregnancy, however, relations became strained when the surrogate demanded money and items on an unspecified "wish list".

At that point the horrified couple discovered that the contract they had signed with the surrogate was not legally binding, and they could lose the child if she decided to renege on her word. South Africa's surrogacy laws were tightened in April last year when certain clauses in the Children's Act came into effect. These require court sanction of all surrogacy agreements before any attempt is made to impregnate a surrogate mother.

On Monday the parents insti-

gated an urgent bid in the Durban High Court to ensure that the surrogate hands over the baby, which is expected to arrive by the end of the month. The matter will be argued in court on Tuesday.

In the affidavit submitted to Durban High Court Judge Achmat Jappie, the couple said they had been married since 2003. The wife has children from a previous marriage, but could no longer conceive owing to an irreversible uterine condition. They claimed that they met the surrogate mother-to-be in 2009 and signed a birth agreement with her in February 2010, unaware that new legislation was to be introduced in April. In May the fertilised embryo was implanted.

Jenny Currie, the founder of the egg donor and surrogacy agency baby2mom, said the beleaguered couple could have saved themselves a lot of agony if they had followed advice. "We started insisting that commissioning parents get court permission as far back as November 2009, because we knew the new laws were imminent.

"The commissioning parents in this instance were reminded repeatedly how important it was for them to get a court order, to ensure there were no glitches further down the

line. We recommended specialist surrogacy attorneys, but they didn't follow our advice. Surrogacy is a conservative, very specialised process. There are no short cuts, because there are too many inherent risks for the parents.

"It is an altruistic act. There is no question in South Africa of 'wombs for rent', which is why we have introduced such stringent legislation. Before the amendments to the law, commissioning parents had to legally adopt the baby, which potentially gave the surrogate time to change her mind. Now she may not. The court order is binding on both the surrogate mother and the commissioning parents."

According to Currie, the surrogate, who does not have children of her own (something mandatory for a potential surrogate under the new laws) underwent extensive medical and psychological evaluation and was declared fit.

Gynaecologist and reproductive specialist Anil Ramdeo, the founder of the Centre for Reproductive Assistance and Endocrinology, based in Westville, said he was "very sceptical" that the clinicians who implanted the fertilised embryo did not know that the law had changed before the procedure.

He said the error in judgement could have far-reaching implications for the couple.

"Under the old legislation, a gestational surrogate baby was considered to be the offspring of the woman who had carried and given birth to it. He or she only became the child of the commissioning parents after they had gone through adoption. It remains to be seen what the court will decide in this unique case."

Ramdeo, who treats patients from around the globe who have compromised fertility, said he had observed a marked increase in the need for donor eggs and surrogate mothers in recent years.

"Many women are leaving late to fall pregnant while they pursue their careers. By their 40s there has been a dramatic reduction in the number and quality of their eggs. This is something we take cognisance of. Women freeze their eggs if they are postponing pregnancy," he added.

IS IT ANYWAY?

Ricky Martin shows off his gorgeous surrogate twin sons Matteo, left, and Valentino in Miami. Picture: AP



Other causes of an inability to conceive include premature ovarian failure, severe endometriosis, cancer, failed recurrent IVF attempts, chronic or hereditary medical conditions, according to the specialists. "Surrogacy must be meticulously executed following all protocols, both legal and medical," adds Ramdeo.

Pieter Kloppers, of Kloppe Incorporated, is acting for the couple. "We are in the process of settling the matter and are confident of a positive outcome," he told the Sunday Tribune.

Kloppers confirmed that the agreement between the parents and the surrogate mother was considered invalid.

"At the end of the day, however, the baby does not possess any of her genetic material, so she can't claim the child, or give it up for adoption without the consent of the biological parents."

Kloppers said the case would never be repeated in this country. "It was a grey area, and the doctor who performed the implantation were evidently not aware that the new legislation was in force. It won't happen to parents again."

Meanwhile, British newspapers revealed that a judge had made a groundbreaking ruling allowing a surrogate mother who had second thoughts about handing over the baby she had borne for an infertile mother to keep the child. The baby girl was conceived using the commissioning father's sperm and an egg from the surrogate mother.

The judge ruled that the welfare of the six-month-old baby, known only as T, "requires her to remain with her mother".

It is expected that the ruling will have far-reaching implications for surrogacy.

* Names have been withheld to protect the identity of the unborn child.

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Dr. Ramdeo, who treats couples from around the world who have come to him for fertility treatment, said he has observed a marked increase in the need for donor eggs and surrogate mothers in recent years.

Many women are leaving it too late to get pregnant while they pursue their careers. By their 30s or 40s, fertility has been dramatically affected. The number and quality of eggs is something to be concerned about. Women should be advised to freeze their eggs if they are going to delay pregnancy," he advised.