

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)



In the matter between:

WESLEY ROBERT HAYES obo

Applicant

JUSTINE AUDREY FILLY HANSEN HAYES

and

THE MINISTER OF HOME AFFAIRS

First respondent

THE DIRECTOR GENERAL OF HOME AFFAIRS

Second Respondent

**THE MANAGER OF THE DEPARTMENT OF
HOME AFFAIRS: QUEENSTOWN**

Third respondent

UNIFORM RULE 16A NOTICE

BE PLEASED TO TAKE NOTICE that **WESLEY ROBERT HAYES** (the "*Applicant*") intends to make application to the abovenamed Court, on a date and time to be arranged with its Registrar, for an order in the following terms:

- a. In terms of section 172 of the Constitution, that it be declared that the Births and Deaths Registration Act, Act 51 of 1992, as amended (the "*BDRA*") is unconstitutional, in so far as it is inconsistent with the

Constitution, in failing to regulate the births of children born by surrogacy to single fathers and declaring the BDRA to be invalid to the extent of its inconsistency.

- b. the legislature is to amend the legislation, or to enact new legislation which regulates the live birth of children born by surrogacy, or to devise other means as a legislative solution to ensure effective redress for children born of surrogacy to single fathers, within a reasonable time-frame.

**BE PLEASED TO TAKE NOTICE FURTHER THAT A SUMMARY OF THE
CONSTITUTIONAL ISSUE IS REPRODUCED FURTHER BELOW**

2. It is the applicant's respectful submission that the BDRA, enacted into law on 26 April 1992, and commenced from 1 October 1992, caters for only two manners of childbirth: either in - or out-of-wedlock.
3. Baby J (in whose interest this application is prosecuted) is not born in terms of either event, but in terms of a surrogacy procedure recognized in the Children's Act.
4. It is clear, from the wording of section 10 of the BDRA, that it does not empower an unmarried father to register the birth of his child in the absence of the child's mother. This Court has already established this interpretation in the *Naki* case.

5. However, the purpose of this application is to establish that there is a further lacuna in the BDRA in that it does not contemplate children born of surrogacy. The applicant respectfully submits that section 10 of the BDRA – in regulating the registration of children ‘*born out of wedlock*’ – fails to capture the true nature of the surrogacy arrangement.
6. In the applicant’s respectful submission, either section 10 must be amended by the legislature to include a birth by surrogacy, or that another section entirely be inserted by the legislature to cater for the registration of birth by means of surrogacy.
7. As a single father who has had a child conceived through surrogacy, the applicant submits that the concept of ‘*out of wedlock*’ in no way relates to the conception and birth of his child, and it would be peculiar to have her registered as a child ‘*born out of wedlock*’, as she was a child born of surrogacy, and not sexual intercourse between an unmarried, heterosexual couple.

TAKE NOTICE FURTHER that any party interested in the relief claimed may, with the written consent of all the parties to the proceedings, given not later than 20-days after the filing of this Notice, be admitted as *amicus curiae*, upon such terms and conditions as may be agreed to between the parties.

TAKE NOTICE FURTHER that the written consent referred to immediately above, shall be lodged with the Registrar: Civil Division, within 5-days of agreement; and

that the *amicus curiae* shall comply with the time-frames agreed for the lodging of written argument.

TAKE NOTICE FURTHER that the agreement entered into may be amended by this Court in the interests of justice.

TAKE NOTICE FURTHER that in the event that the interested party is unable to obtain consent from the parties, it may, within 5-days from expiry of the 20-day period above, apply on notice to the parties, to this Court to be admitted as an *amicus curiae* to these proceedings. To this end, such application shall:

- (a) briefly describe the interest of the *amicus curiae* to these proceedings;
- (b) clearly set-out the submissions to be addressed by it in these proceedings; and their relevance to the constitutional issue;
- (c) the reasons why the submissions will assist the Court, and that they will be different from the submissions advanced by the parties to the proceedings;
- (d) and shall be served on all parties to the proceedings.

TAKE NOTICE FURTHER that any party who opposes the admission of the interested party as an *amicus curiae*, shall file a Notice of Opposition and an Answering Affidavit within 5-days from the date of service of the interested party's application.

KINDLY PLACE A COPY OF THIS NOTICE ONTO THE NOTICEBOARD.

NEVILLE, BORMAN & BOTHA ATTORNEYS

(Attorneys for the Applicant)

Per:

(sgnd)

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TO: The Registrar:
Civil Division, ECPD
High Court
Makhanda

AND TO: Interested Parties
c/o the Noticeboard
High Court
Makhanda